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Or land or life, if freedom fail?*  
EMERSON



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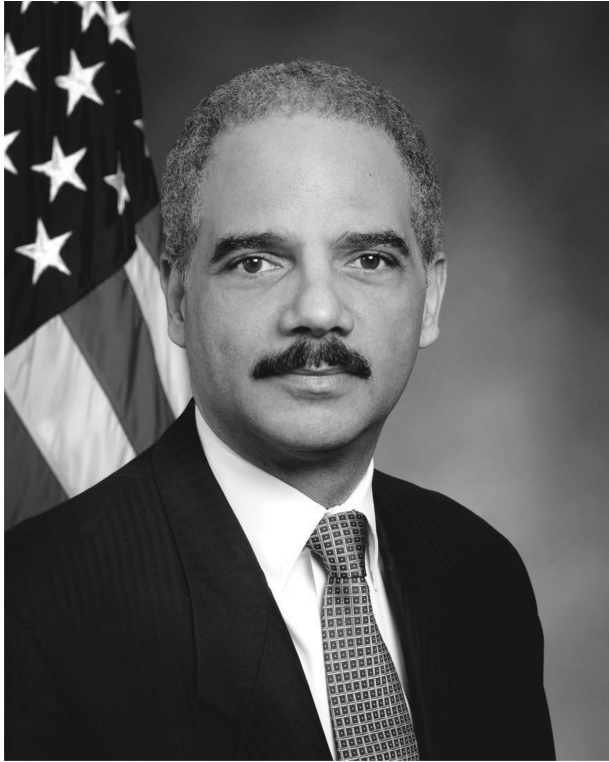
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This Volume of  
New York University Annual Survey of American Law  
is respectfully dedicated to  
**ERIC HOLDER**



**ERIC HOLDER**

## **ERIC HOLDER**

Eric Holder was the 82nd Attorney General of the United States and the third-longest-serving Attorney General in the nation's history. Born and raised in New York City, he graduated from Stuyvesant High School before earning his B.A. from Columbia University and his J.D. from Columbia Law School.

Following law school, Attorney General Holder joined the United States Department of Justice through the Attorney General's Honors Program, serving in the Public Integrity Section. In 1988, President Ronald Reagan appointed him as an Associate Judge of the Superior Court of the District of Columbia. In 1993, President Bill Clinton nominated him to serve as United States Attorney for the District of Columbia. He was the first African American person to hold that position. In 1997, Clinton nominated him as Deputy Attorney General of the United States, and he was confirmed by the Senate unanimously. After a period in private practice at Covington & Burling LLP, President Barack Obama nominated him to serve as the United States Attorney General. Confirmed by the Senate, he became the first African American person to serve in the role, which he did until 2015.

During his tenure, Attorney General Holder oversaw major counterterrorism prosecutions and advanced reforms aimed at strengthening fairness in the criminal justice system, including support for the Fair Sentencing Act and the Department's Smart on Crime Initiative. He prioritized the enforcement of civil rights laws, pursued voting rights litigation, and oversaw investigations into unconstitutional policing practices that resulted in consent decrees across the country. Since leaving office, he has returned to private practice at Covington & Burling LLP. He also serves as Chairman of the National Democratic Redistricting Committee.

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\* In memoriam

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# TRIBUTE TO ERIC HOLDER

MAX S. MILLER

Good evening, everyone, and thank you for joining us. My name is Max Miller, and I am the Editor-in-Chief of the *New York University Annual Survey of American Law*. On behalf of our journal, I would like to welcome you all to our Dedication ceremony, where we are honored to celebrate Attorney General Eric Holder.

But first, some background on *Annual Survey*. Originally compiled by NYU Law faculty members to serve as a practical, comprehensive guide to developments in American law, *Annual Survey* has always strived to be a practitioner-focused publication. We focus on practitioners in the materials we publish, the symposia we host, and through our annual Dedication. This ceremony, a continuous tradition since our founding, honors a distinguished member of the legal community. Among the ranks of our past dedicatees are Supreme Court Justices, preeminent judges, awe-inspiring practitioners, and significant professors. This year, in recognition of his extraordinary contribution to the legal profession—and to the lives of millions of Americans—the *Annual Survey of American Law* is honored to dedicate its 82nd Volume to the 82nd Attorney General of the United States, Eric Holder.

Honoring Attorney General Holder today is timely, as his career is defined by his commitment to preserving and improving American democratic institutions. And this space is apt for a ceremony honoring him as well, as Attorney General Holder is a native New Yorker. He earned his B.A. and J.D. from Columbia University. After graduating, he served in the Department of Justice's Public Integrity Section for just over a decade. He was then appointed as a judge on the Superior Court of the District of Columbia, a position he held for five years.

Thereafter, Attorney General Holder achieved a series of firsts. President Clinton appointed him as the U.S. Attorney for the District of Columbia, the first African American to serve in this post. Four years later, he became the first African American Deputy Attorney General. After eight years in private practice at Covington & Burling,

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This speech was delivered on April 9, 2025, at New York University School of Law at the *New York University Annual Survey of American Law's* dedication event in honor of former Attorney General Eric Holder. This transcript has been lightly edited for readability and clarity.

President Obama nominated Attorney General Holder for his titular position. He was confirmed by a wide margin in the Senate, becoming the first African American Attorney General.

Attorney General Holder's career at the Department of Justice was defined by making American institutions stronger and more equitable. I will provide a brief sketch of his accomplishments during his tenure as Attorney General. He successfully led the Department of Justice in obtaining convictions against numerous alleged terrorists in the federal courts. Attorney General Holder fought to reduce inequities in the criminal justice system through the Smart on Crime Program, the Access to Justice Initiative, support for the Fair Sentencing Act, and investigations into police misconduct that resulted in numerous consent decrees. He was committed to protecting voting rights, winning numerous Voting Rights Act Section 2 and Uniformed and Overseas Citizens Absentee Voting Act cases. Further, he supported the legalization of same-sex marriage by refusing to defend the constitutionality of the Defense of Marriage Act. After that Act was held invalid, he ensured that the Department of Justice and other federal agencies provided equal treatment to same sex couples. That this list is not comprehensive is a testament to the breadth and depth of Attorney General Holder's positive impact on the lives of Americans and our institutions throughout his service at the Department of Justice.

After leaving the Department in 2014, Attorney General Holder rejoined Covington & Burling. He has continued to bolster the quality of our democracy. In 2016, he joined the National Democratic Redistricting Committee as Chair, where he fights for fairer electoral maps. In more recent news, Attorney General Holder represented Tennessee politicians Justin Jones and Justin Pearson over their expulsion from the State House floor. He was also involved in the 2024 Presidential campaign, in which he was responsible for vetting Democratic vice-presidential nominees.

Our next speakers will speak in greater depth about Attorney General Holder's career and accomplishments. And we will have the opportunity later in the ceremony to hear Attorney General Holder's reply. I will conclude simply by thanking Attorney General Holder for his service to our country and stating that following his example continues to be of the utmost importance for future attorneys like myself, my colleagues at *Annual Survey*, and all other NYU Law students. Please give a warm welcome to our first speaker, Professor Vanita Gupta.

# TRIBUTE TO ERIC HOLDER

VANITA GUPTA

Good evening, everyone. Thank you, Dean McKenzie, and thank you, Max. I am deeply honored to be able to participate in this tribute to an extraordinary leader and a dear friend, former Attorney General Eric Holder.

A little over eleven years ago, I was in the audience at a conference at Georgetown Law when I saw something I had never seen before.

I saw the nation's chief law enforcement officer—Attorney General Eric Holder—stand up and give voice to the national crisis of mass incarceration that few leaders wanted to acknowledge, much less try to address.

At the time, I was Deputy Legal Director at the ACLU, working on criminal justice issues. I cannot overstate how transformative it was for me to listen to AG Holder speak with such moral clarity and urgency about the need to advance a smarter and fairer system of criminal justice in this country.

That day, I heard a leader give voice to people and communities across the country who had been ignored for too long. I heard a leader speak urgently and forcefully about a problem that was not just about the dehumanization of thousands of people and their families involved in the criminal justice system, but a problem that called into question our country's very commitment to the promise of equal justice under the law.

It was on that day that I had the chance to see firsthand—for the first time, but not the last—the quality I have always admired most about AG Holder, and especially so right now: his courage.

It is AG Holder's courage—and his courageous commitment to making real the promise of our nations' civil rights laws—that defined his tenure as one of the longest-serving Attorneys General in American history.

It was with courage that he led pioneering efforts to advance a smarter and fairer federal criminal justice system.

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It was with this same courage that he made clear the Justice Department's priority is to protect civil rights, and that it has an unwavering responsibility to protect the rights of all people to live free from exploitation, discrimination, and violence.

It was with courage—at a time not so long ago, when same-sex couples were looking to the federal government for recognition and protection—that AG Holder directed the Justice Department to recognize same-sex married couples equally under the law.

At a time when efforts to disenfranchise voters were mounting, and in the wake of the Supreme Court's devastating decision in *Shelby County*, it was AG Holder who ensured that the Justice Department used every available tool to protect the right to vote.

At a time of enormous pain and tension in the wake of Ferguson, when the way forward felt uncertain, it was AG Holder who was steadfast in his insistence that our criminal justice system could, and must, protect everyone equally and treat everyone equally under the law.

Time and time again, AG Holder reminded all of us at DOJ that the values of fundamental fairness and equal justice do not protect themselves.

They demand our vigilance and work.

And they demand our courage.

The late Congressman John Lewis once said that AG Holder became “the symbol of fairness, an embodiment of the best in the federal government.” For AG Holder, he said, “the struggle for civil and human rights” is a “legacy . . . in his bones. It is written on his heart.”

That is why AG Holder has continued to be a beacon of moral leadership in the legal community at Covington & Burling. He knows that vigilance in the fight for voting rights and civil rights is essential to the functioning of our democracy.

Just a few months after seeing AG Holder speak for the first time, I was given the opportunity to interview with him to serve as head of the Civil Rights Division at DOJ.

I had always revered the Justice Department, but at that time, I had spent most of my career suing the United States government. So, when I walked into DOJ for my interview, I remember feeling very out of place, and extremely nervous.

Almost right away, AG Holder made me feel like I belonged. I don't know if he could sense I was nervous, but he started by telling me a story about how his brother used to send him articles about a case in Tulia, Texas, where dozens of people had been wrongfully convicted, and how, as a result of cases brought by the NAACP Legal Defense Fund, the Texas Governor had granted 35 pardons.

He said his brother would use these articles to poke at him, by pointing out that the lawyer in those cases—which it turned out, he said, was me—was fresh out of law school. He said his brother would then go on to tease him about what *he* had done that day.

During my interview, AG Holder had a way of identifying what I believed was a weakness—that I was an outsider—and then convinced me it was a strength.

In that moment, and in so many more, I have had the chance to see how AG Holder’s courage has the power to inspire courage in other people.

Throughout his career, AG Holder has modeled for all of us what it means to speak up and speak out, even when it is most uncomfortable, and in the face of resounding silence. And he has reminded all of us that it is in moments of peril when our courage is needed the most.

AG Holder and I have been in touch a lot recently about the attacks on our legal system by an Executive Branch seeking to punish litigants who aim to hold our government accountable to the law and the Constitution. We have also talked about how this is a moment that calls for courage and collective action, not capitulation, from our colleagues at law firms and across the legal profession. Silence and worse, appeasement to the forces in our country attempting to dismantle the rule of law is not how we protect it. It is certainly not how we fulfill our obligations as lawyers and as Americans.

AG Holder, thank you for continuing to push all of us to do better. Thank you for demonstrating by example what it means to be a lawyer working for justice.

We recognize you today because you have led, and continue to lead, with a deep belief in this country, with an unwavering conviction that we can—and we must—fulfill its promise of equal justice, and with an enormous amount of courage.

May we all have a fraction of the courage you have demonstrated throughout your career—that you continue to demonstrate—to do what is right, especially when it is hard and so much is at stake.

Thank you.

# TRIBUTE TO ERIC HOLDER

SALLY YATES

It is such a privilege to be here today to be able to talk a bit about my friend and personal hero, Eric Holder. You know, with Vanita and Eric and Jim here, this sort of feels like the good old days back at the DOJ. Let's get around a table and decide some stuff, okay?

I had the privilege of serving in the Justice Department for many years, as you heard, and for over ten of them, either when he was Deputy Attorney General or Attorney General, Eric Holder was my boss. And so, for me, the Justice Department that I knew, the Justice Department that I loved, was defined, in large part by the leadership of Eric Holder. AG Holder fully embraced both the responsibility, but also the opportunity, to be able to do good when having the privilege of serving as Attorney General of the United States. He didn't just manage the Department, he *led* the Department of Justice. And he led it by being bold and relentless and courageous, as Vanita said, and above all else, acting with integrity and a commitment to seeking justice.

When Eric led the department, all of us there—whether you were out as an AUSA across the country or whether you were there at Main Justice—we knew what he stood for, we knew what he expected of us, and we were inspired by the opportunity to be able to represent the people of the United States in a manner that engenders the trust of the people whom we served. You know, at a time of cynicism and distrust, if not outright disdain, for the government, I wish the American people could see and know the Justice Department that I knew under Eric Holder. It was the kind of place that you were proud to be part of.

Now, I'm confident that this audience is pretty familiar with all of Attorney General Holder's accomplishments, so I'm not gonna go through and catalog his achievements. I thought that I might share just a couple examples of the Eric Holder I came to know during his tenure at the Department of Justice.

Now, I've mentioned that AG Holder was bold, that he wasn't afraid to shake things up and to do things differently. As Vanita

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mentioned, for years as a society, we imprisoned offenders of drug offenses for far longer than was necessary for public safety, with really devastating consequences to individuals, to families, and to communities, particularly communities of color. And instead of just sort of looking at it and saying, "Well, you know, that's a hell of a problem there," Attorney General Holder decided to do something about it and "Smart on Crime" was born. He dramatically changed the way that we were charging and sentencing nonviolent drug offenders and imposed new restrictions on the use of mandatory minimum sentences.

Now, as you can imagine, prosecutors and agents who had been doing something one way for years and years weren't exactly jumping up and down over this new Smart on Crime initiative. I mean, there were some old school prosecutors there who were candidly really upset about it. I was a U.S. Attorney in Atlanta at the time and a group of U.S. Attorneys got together and decided to invite Attorney General Holder to go into the belly of the beast and to go to a conference of all the drug chiefs and criminal chiefs from across the country, from all the U.S. Attorney's offices, they were having a conference there, and to talk to them about what his thinking was behind Smart on Crime. Now, this wasn't anything he *had* to do, he was *the* Attorney General of the United States and he didn't have to explain his thinking to anybody. But I think he recognized that if he could capture the hearts and minds of just a few of those prosecutors, then Smart on Crime was going to be more successful.

So, he walked into a room filled with several hundred, we're not talking a smattering, several hundred hardcore drug prosecutors and criminal chiefs. And he laid out his thinking for them and he answered their questions, some of which were pretty darn hostile, candidly. And everybody left there understanding what he was trying to achieve with Smart on Crime, even if they didn't necessarily agree with it. They absolutely understood.

And you know what else they understood? They had to do it.

And as a result, the Department of Justice embarked on a much more just approach to drug offenses where enforcement was proportional to the offense. And it was married then with prevention and rehabilitation resulting in safer communities. *Smart* on crime.

And he brought this same tenacity, as Vanita already mentioned, to civil rights, whether it was voting rights or marriage equality or police reform. And he didn't just do it on a policy level. He did it by going into our communities and listening to people, particularly listening when they were angry or hurt. In the days and weeks following the death of Michael Brown, after he was shot to death by

a police officer in Ferguson, our country was really boiling. There were protests, some of which were violent. It was a really difficult time and there were a lot of angry people who felt betrayed and that no one cared. And so, then Reverend, but now, Senator, Raphael Warnock decided to host an interfaith service and community forum in Atlanta at Ebenezer Baptist Church, and he invited Attorney General Holder to come.

Well, when word got out that AG Holder was gonna be there, that resulted in the place being absolutely packed. And people were outside as well, listening outside from speakers there. Ebenezer Baptist Church, the home of the late Reverend Martin Luther King, was gripped with tension.

In the midst of AG Holder's remarks, there was a group of young people who interrupted and stood up shaking their fists and chanting, "No justice, no peace." Well, you might imagine that some of the organizers pretty quickly got the protestors and were pushing them out of the room. But AG Holder took up for the protestors telling the audience what we saw there was a genuine expression of concern and involvement. And then quoting the immortal words of Tupac Shakur, he told the protestors, "I ain't mad at ya."

AG Holder, by validating the hurt and the anger and the frustration that everyone in that room felt, demonstrated to them that justice, when then paired with the reforms that he made to police, can be more than an ethereal concept.

And that's because, for Eric Holder, serving as Attorney General wasn't just an intellectual or policy exercise, it came from his heart and he gave it his heart. When Attorney General Holder resigned, he reluctantly, and I mean really reluctantly, agreed to have a farewell ceremony there in the Department of Justice's Great Hall and he didn't want a full program of speakers. I think it was just gonna make him feel uncomfortable, probably like he feels kind of uncomfortable today. So, we settled on just one speaker—and that was President Obama. That's a pretty good speaker. Talk about not wanting to have to follow somebody after they speak.

Well, I was lucky enough to serve as the MC of that event, and we were standing backstage behind the curtain waiting to go out, and I looked at Eric and his eyes were kind of all misty—and I don't think it was because he was just leaving a job. And I'm confident it wasn't the power, or the prestige, or the rarefied position that was making him wistful. Eric Holder had been on a mission. He had been on a mission for justice.

You know, I remember every single meeting that I ever attended with Eric Holder at the Department of Justice. At the end of it, he

wouldn't say, "Now, go win that case" or "Go get a big settlement." At the end of *every* single meeting, as he was pushing away from the table, he would look at all of us and say, "Now, go do justice." That's what Eric Holder did every single day he served in the Department of Justice. And as you're gonna hear in just a minute, that's what he continues to do today. And get ready, because I think it's entirely possible when he speaks to all of us that he may charge us as well to do everything that we can to seek justice.

Thank you, Eric, for leading the way and thank you to the *NYU Annual Survey of American Law* for giving me the privilege of being able to be part of this event here today.

# TRIBUTE TO ERIC HOLDER

*JIM GARLAND*

As anyone who has worked with today's esteemed honoree knows, there is an established approach to giving remarks honoring Eric Holder. A time-tested script. John, Sally, and Vanita know well what I'm talking about.

You start with his humble beginnings as a New York City kid: born in the Bronx, raised in Queens, etc. You then run through his impressive academic credentials: Stuyvesant High School, Columbia College, Columbia Law School. And finally, you turn to his remarkable career as a lawyer and public servant: star public corruption prosecutor; D.C. Superior Court Judge, appointed by Ronald Reagan; U.S. Attorney for D.C., appointed by Bill Clinton; Deputy Attorney General under Janet Reno; beloved Covington & Burling Partner; and, ultimately, 82nd Attorney General of the United States, the first ever Black person to hold that role and the third longest-serving Attorney General in the history of the Republic. In the last few years, of course, the story also rightly includes his role as Chair of the National Democratic Redistricting Committee, fighting for fairer and freer elections across the country.

It is a career in the law, and in service to the law, that is second to none. And so, it is entirely appropriate that the Annual Survey of American Law would dedicate its 82nd volume to our 82nd Attorney General.

But of course, there is more to the man than his resume, as impressive as it may be. What the traditional version of Eric Holder's life story elides are his remarkable passion for the craft of lawyering and his commitment to passing on that craft to the next generation. At his core, Eric is a lawyer. He loves practicing law, whether as a prosecutor or a defense lawyer, a corporate strategist or a civil rights champion. He is creative, analytically incisive, savvy, strategic, and annoyingly knowledgeable. I recall one day during my time working on his staff at the DOJ when a group of experienced national security lawyers were sitting in the AG's conference room, wrestling with where to bring a prosecution for piracy on the high seas, which the

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DOJ hadn't done in more than 100 years. Passing by and overhearing our conversation, Eric offered, casually and without breaking stride, that venue for piracy cases lies in the judicial district in which the pirate is first brought ashore. Who knows that off the top of his head? Eric Holder does. Thanks, boss.

Eric sweats the details. He pores over the exhibits; he scours the transcripts; he reads the case law. He is an extraordinary listener. If you're in a meeting with Eric Holder, you have his attention; he does not multitask. Ever. He *works hard* to learn the case and to understand his client's objectives. He capitalizes on every advantage, and he zeroes in—relentlessly—on weak spots. He is an extraordinary communicator. He is uniquely able to translate exceptional legal acumen into words—written and spoken—that jurors, judges, everyday citizens, and sometimes even elected politicians can understand. His facility with language inspires people, instills confidence, calms anxieties, and persuades. It is no wonder that he has brought such great honor and distinction to the institutions he has served.

But even these traits of practice don't fully capture Eric's true essence as a lawyer. There is something more—a warmth and humility in the way Eric interacts with people that are the hallmarks of how he practices law.

I am reminded of one day, early on in his tenure as Attorney General, shortly after he had taken office. These were heady times for the Nation and for the DOJ. Weighty issues—from civil rights, to national security, to the financial crisis—dominated the agenda. But there were also more mundane matters to attend to. I recall one particular meeting where his staff sat around debating how people should address the new Attorney General. “General Holder” seemed too militaristic. “Mr. Holder” was too plain. “Judge Holder” wasn't right, either. We finally settled, creatively, on “Mr. Attorney General.” Armed with this solution, we marched into Eric's office to present our proposal. He listened intently to all the options we had considered, then leaned forward deliberately across his desk, looked us straight in the eye, and said, completely deadpan, “Henceforth, I shall be known only as . . . ‘Chocolate Thunder!’”

The point is, Eric Holder doesn't take himself too seriously, as all who know him will attest. There is an authenticity, a sense of humor, a down-to-earth genuineness that allows him to connect with real people in the real world, regardless of their station in life. This is his superpower. Even his most petty detractors will tell you privately that Eric Holder is a genuinely good guy.

Eric has instilled these traits of character in those who have had the good fortune to work with him over the course of his illustrious

career. Eric loves lawyering, and he loves lawyers. Whether in government or in private practice, he has given generously of his time to help others build their careers, opening doors and creating opportunities. He has been a mentor to countless colleagues, providing gentle but firm career advice and encouraging younger lawyers to believe in themselves and push beyond their comfort zones. He takes joy in the success of others. He shows up. Despite his stature as a lawyer and senior statesman, he is a constant source of friendship and support.

This, as much as his many extraordinary contributions to our country and the rule of law, will be an enduring part of Eric's legacy in the law. Generations of lawyers have learned from Eric how to practice with both excellence and decency, rigor and humanity. For this, we should all be very grateful.

Eric, congratulations on this extremely well-deserved recognition.

# TRIBUTE TO ERIC HOLDER

*JOHN BISOGNANO*

You might assume that by the time the fourth person comes on stage to talk about one man's life and accomplishments—especially someone so youthful—we'd start repeating ourselves. But not with Eric.

After a full career prosecuting corrupt government officials, drug dealers, and murderers, after being named Partner at one of the most competitive law firms on the planet, and after six years as the first Black Attorney General of the United States in history, he said definitively "I am not done yet." And thank God he did.

Eric Holder, with two supportive sidekicks, Barack Obama and Nancy Pelosi, embarked on a new goal: end gerrymandering and restore competitive balance to the country's electoral maps.

Together, they founded the National Democratic Redistricting Committee (NDRC), the first-ever centralized redistricting hub with a strategy to shift map-drawing power back to voters to create a more representative democracy.

As Chairman, Eric helps elect fair map champions, oversees litigation against unjust maps, guards the census against various attacks, has a team of computer engineers building innovative mapping technologies, and much, much more.

Let me add some context here: Back in 2012, the first election after the 2010 redistricting process, Republicans running for Congress across the country earned 1.4 million fewer votes than Democrats.

1.4 million fewer votes, and yet, they won 33 more congressional seats. Think about that. At the time, fixing this massive, intentional structural imbalance seemed insurmountable.

Rather than voters choosing their politicians, politicians were hand-picking their voters. Gerrymandered maps all but guaranteed the congressional election results were a lock for the Republican Party for most of the decade.

However, by 2022, the popular vote and the seat count were nearly identical. The same was true in 2024.

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This speech was delivered on April 9, 2025, at New York University School of Law at the *New York University Annual Survey of American Law's* dedication event in honor of former Attorney General Eric Holder. This transcript has been lightly edited for readability and clarity.

*The New York Times* and other independent experts said the congressional map following the 2020 census—and critically, the Attorney General and NDRC’s efforts—was the fairest in a generation.

Equally impressive as the massive shift toward fairness Eric helped engineer in our electoral maps is how he set out to tackle the problem.

You may have picked up on this already, but I am not a lawyer. So, in this room, I might be the one guy not qualified to tell you about Eric’s brilliant legal mind. Or how he has led our strategy for not one, not two, but five— five!—successful voting rights and redistricting cases before the United States Supreme Court. Yes, even this Supreme Court.

He came at the gerrymandering problem with three foundational principles: First, If the maps are fair and we trust the voters to decide, America will do just fine. Second, keep the main thing the main thing. Own our space and excel in it. Third, tackle this problem from every angle: the courts, the ballot box, and by mobilizing millions of Americans.

If you’ve worked with Eric before, number three probably sounds familiar. That’s because his approach to any challenge, no matter the size, is to attack it from every possible direction, all at the same time.

And it’s the kind of strategy that lends itself to having Eric Holder send you a late-night, all-caps message: “WHAT MORE CAN WE DO? LET’S GET CREATIVE!”

Then he repeats the blitz again and again until victory is achieved. This is, it turns out, a remarkably effective strategy.

Personally, I love it. The entire team at NDRC thrives off his energy and boldness.

When you work with Eric every day, as he transitions seamlessly from legal work to political meetings to cable news interviews, it becomes easy to take his immense talent for granted.

Why shouldn’t there be a modern version of Batman, able to tackle complex legal issues by day and spar with political news pundits by night?

It also becomes easy to look past the fact that Eric has a full life outside of his various day jobs. He is a devoted father and a supportive husband to one of the very few people who is more remarkable than he.

Looking at his career as a whole, and especially this latest era, we cannot allow ourselves to forget that life is about choices.

Eric could have, at numerous points in his life, said, “hey guys, I’ve done my part,” just before riding off into the sunset like the hero

at the end of an old Western movie. Instead, he has chosen to return, day after day, year after year. He takes on another challenge, blitzing it from all angles and winning.

To me, this is the Eric Holder superpower. His courage to take on big challenges and fight systemic inequalities over and over again, ceaselessly.

Thank you, Attorney General, for your friendship, leadership, and decades of courage you have instilled in all of us who have worked with you.

Thank you all for being here to celebrate such a remarkable man.

# ACKNOWLEDGMENT

*ERIC HOLDER*

Good afternoon, everyone—it is such a pleasure and an honor to be here.

I want to express my heartfelt thanks to Sally, Vanita, Jim, and John for their gracious words. You are all remarkable colleagues and public servants, and I am deeply proud to call you my friends. I am blessed to have you in my life. Thank you for all that you have done—and will do—for the nation.

\* \* \*

On this day of celebration and joy, we must confront the fact, the reality, that our great country is going through a generational regression. Misinformation, disinformation, and injustice loom over society like a dark cloud. The rule of law and fundamental fairness are at risk. Governing norms have been needlessly cast aside. Compassion in our government is in short supply. In this time of maximum danger to our country, all who love America most dearly must stand up and speak out for the principles that, at our best, define the nation.

I urge you to join me in reflecting on our role as lawyers in America, to revisit our Nation’s true—sometimes painful—history as a means to understand our present, and ultimately to chart a course for a more promising, more inclusive future.

Our profession, much of our life’s work, and the very institutions in which we operate have profound impacts on our fellow citizens of all ages, races, and backgrounds who are not always invited to have a seat at our table where important decisions are made. The course of many of their lives will be decided by those in our profession. It is an extraordinary responsibility. It is a power we must use wisely.

Yet, we live in a time where the reliance on real facts and accurate history to generate meaningful policy and measurable change has been diminished and demeaned. We are faced with hopelessly and needlessly polarized positions on issues that should instead invoke our community compassion, our common humanity, and our moral sense as a nation. The rule of law is being ignored to drive

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a dangerous and fundamentally un-American political agenda. The progress we have made as a nation—long sought and long fought for—is being dismantled right before our very eyes. It is seemingly, but not truly, overwhelming for even the most tenacious among us.

\* \* \*

As I stand before you on this April day, I am reminded of a different day from another time—hallowed by sacrifice and shaped by a turbulent era. A day that, on a number of levels, is personally meaningful to me.

On June 11, 1963, the Deputy Attorney General, Nicholas Katzenbach, peacefully escorted James Hood and my late sister-in-law Vivian Malone onto campus at the University of Alabama. We all know the backstory: Alabama Governor George Wallace had rejected all efforts to integrate the University, ultimately staging his infamous “Stand in the Schoolhouse Door.” After a prolonged struggle, they were finally enrolled. And, in the Oval Office that June night, President John F. Kennedy prepared to address the nation.

When the American people tuned in that night, they witnessed something extraordinary and courageous: the President of the United States speaking forcefully—from the heart and, at significant times, extemporaneously—about what he described as both “a domestic crisis” that transcended politics and “a moral issue” that is “as old as the scriptures and . . . as clear as the American Constitution.”

Every single word rang with conviction and moral clarity, making the case and pointing the way toward what would become the signature achievements of the Civil Rights Era and the foundation of modern America. And though it focused primarily on one issue, it brings to mind a way of looking at our nation today, and the unresolved racial, ethnic, and class problems that continue to divide us.

Now, as I look around this crowd, I realize that not everyone here was alive in 1963. But I can assure you that those of us who lived through that consequential year will never forget it.

From Dr. King’s Letter from Birmingham Jail in May; to the iconic “Strategy for Peace” that President Kennedy described at American University, just one day before his televised address on civil rights; to his inspiring trip to Berlin later that same month; from the March on Washington in August; to the four young Black girls murdered as a result of the bombing of Birmingham’s 16th Street Baptist Church in September; to that dark November assassination day in Dallas that forever changed the fabric of this nation: 1963 was a year of hard-won triumph and unimaginable tragedy—a year of exhilarating highs and existential lows.

The story of 1963 is not just the story of the Kennedy era, but a microcosm of the American experiment itself: a nation founded on dissent and forged through revolution, born of competing and contradictory visions for how we could govern ourselves, what we would stand for, which voices would be heard and who we, as a people, might aspire to become. And it demonstrates that we have been through difficult times before.

Still, as much as June 11, 1963 revealed much about the man in the Oval Office, it reveals even more about the nation that elected him. And I say reveals in the present tense, because it's hard not to feel—even 60 years later—that that moment in history is in direct conversation with our own. “Those who do nothing,” President Kennedy told the American people that night, “are inviting shame as well as violence. Those who act boldly are recognizing right as well as reality.”

On their own, days like June 11th do not change the shape of our society. At least not overnight. But out of that day grew legislation that transformed the nation.

It is in these extraordinary moments, these complex and contradictory chapters in the life of our nation, and through the work of ordinary yet extraordinary people that America's character is revealed and our future determined.

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And so, this gathering today is not just a recognition of past achievements; it is, like June 11, 1963, also a call to consequential action and the realization that we are still the masters of our own fate. We are the guardians of a nation worthy of our protection. But always remember: positive change does not just happen. It is the result of hard work by committed people like yourselves. Our success against the dark forces in this time will not be a function of timidity, fear, or cowardice. Nor will it be a result of resignation, appeasement, or capitulation—by people, professions, or institutions.

An energized American citizenry is a mighty force capable of making real, substantial, and lasting change. History has repeatedly shown us this. So, be engaged. Be impatient. Do not resign yourself to defeat. Do not bow down. Lead.

Every generation of Americans is ultimately called upon to defend democracy, to bring our nation closer to its founding ideals. Now it is our time. It is only now, when the times are toughest, that we are truly tested. Rest assured that we, like those before us, are up to this test. The tasks before us will not be easily accomplished. In the first year of our independence, Thomas Paine said, “Tyranny,

like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph. What we obtain too cheap we esteem too lightly; it is dearness only that gives everything its value.”

Thank you again for this humbling recognition. Let us commit ourselves in this trying time to our cause—and to one another. I will treasure this day always and use it as a reminder that my commitment and belief—and yours—must never flag.



# PERSONAL JURISDICTION AND STATE REGULATORY OVERREACH: SOME POST-FULD OBSERVATIONS

KATHERINE FLOREY\*

*Even as personal jurisdiction in the United States has long since been unmoored from the strict view of territoriality that once animated it, the doctrine has remained persistently, puzzlingly intertwined with the question of the proper territorial scope of state power. And although the Supreme Court has occasionally appeared to disavow this connection, its most recent pronouncement on personal jurisdiction standards, *Fuld v. Palestine Liberation Organization* reasserts it with unexpected force. In *Fuld*, the Court attempted to disentangle any state-specific restrictions incorporated into the Fourteenth Amendment's Due Process Clause from the (apparently more modest) limits on federal power under the Fifth Amendment's. That process led the Court to the surprising conclusion that minimum contacts analysis under the Fourteenth Amendment is, not incidentally but centrally, about maintaining the territorial balance of state power. In the wake of *Fuld*'s strong reaffirmation of personal jurisdiction's territoriality-policing component, this Article asks several questions: How did minimum contacts doctrine, created as a forceful rejection of the traditional territorial-formalist universe, come to encompass territorial concerns in the first place? What accounts for the persistent concern with the interstate balance of power that shows up so frequently in Supreme Court opinions, and how is this concern related, if at all, to personal jurisdiction's practical (but generally unacknowledged) effect of ensuring that courts do not apply forum law too broadly? And finally, given the decades' worth of suggestions by the Supreme Court that personal jurisdiction doctrine serves some anti-extraterritoriality function, how well does it fulfill that role? Ultimately, the Article argues that the extraterritoriality-restraining aspect of personal jurisdiction is a response to the lack of clear standards (or any animating theory) for when state courts should be permitted to use the application of forum law in litigation to influence out-of-state conduct. It concludes that, for the doctrine to better fulfill this purpose, it should acknowledge this function more directly and explicitly.*

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## I. INTRODUCTION

What does the question whether a court can exercise personal jurisdiction over a given defendant have to do with the extent to which the forum state can apply its legal rules to events outside its borders? At first glance, one might expect that the answer would be “nothing.” Under prevailing international norms, judicial jurisdiction (a court’s power over the defendant and subject matter in particular disputes) is generally considered to be an entirely separate category from prescriptive jurisdiction (a state’s power to prescribe standards governing day-to-day conduct).<sup>1</sup> In the U.S. context in particular, the linkage of personal jurisdiction standards to the Due Process Clause presents obvious problems for viewing the doctrine as having anything to do with the federalism concerns of overlapping state regulation as opposed to the individual fairness the Clause is supposed to secure,<sup>2</sup> a fact that has not been lost on judges<sup>3</sup> and commentators.<sup>4</sup>

Nonetheless, even as personal jurisdiction in the United States has long since been unmoored from the strict view of territoriality

1. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 401(a)–(b) (A.L.I. 2018) (defining and distinguishing between the two).

2. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (“That [Due Process] Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”).

3. See *Mallory v. Norfolk S. Ry.Co.*, 600 U.S. 122, 156 (2023) (Alito, J., concurring in part) (commenting on the incongruity of using the Due Process Clause as a mechanism to address federalism concerns given that “[t]he Due Process Clause confers a right on person[s], not States.” (internal citation and quotation marks omitted)).

4. See, e.g., Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 686 (2019) (describing widespread scholarly criticism of injecting federalism considerations into personal jurisdiction doctrine “on the ground that a matter of interstate federalism could not be an individual right under the Fourteenth Amendment that could be waived by defendants”); Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 21, 26 (2018) (“If one examines the Due Process Clause in operation in other contexts, it becomes clear just how estranged this sovereignty-infused, defendant-focused doctrine of jurisdictional due process is from its doctrinal family members.”); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RESRV. L. REV. 769, 777 (2016) (noting, although critiquing, widespread scholarly views that “sovereignty should not be seen as an animating principle behind [personal jurisdiction] doctrine” and that the doctrine should instead rest on considerations such as “convenience, consent, or fair play”); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1177 (2013) (“The peculiarity of using the ‘due process clause as an instrument of interstate federalism’ to protect *state* interests has not escaped scholarly note.”).

that once animated it,<sup>5</sup> the doctrine has remained persistently, puzzlingly intertwined with the question of the proper territorial scope of state power.<sup>6</sup> And although the Supreme Court has at times appeared to disavow this connection,<sup>7</sup> its most recent pronouncement on personal jurisdiction standards, *Fuld v. Palestine Liberation Organization*,<sup>8</sup> reasserts it with unexpected force. *Fuld's* nominal subject, to be sure, was *federal* authority to create a basis for personal jurisdiction over foreign defendants in U.S. courts in one rather specific context:<sup>9</sup> the breadth of Congress's power to subject two quasi-governmental entities to U.S. jurisdiction based on certain enumerated acts.<sup>10</sup> But in considering this issue, the Court necessarily had to disentangle any state-specific restrictions incorporated into the Fourteenth Amendment's Due Process Clause from the (apparently more modest) limits on federal power under the Fifth Amendment's.<sup>11</sup> That process led the

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5. See Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 641 (2017) (noting that modern personal jurisdiction doctrine "has moved away from notions of territorial, sovereign limits and toward notions of fairness and litigant rights . . .").

6. See, e.g., *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) ("[I]t acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.")

7. See *Ins. Corp. of Ir.*, 456 U.S. at 702 ("[The personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); *Omni Cap. Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702).

8. 606 U.S. 1, 25 (2025).

9. *Id.* at 9 (citing *Fuld's* lawsuit "invok[ing] the PSJVTA as the basis for personal jurisdiction").

10. See *id.* at 6. In 2019, Congress had passed a statute, the Promoting Security and Justice for Victims of Terrorism Act (the PSJVTA), that purported to subject alleged perpetrators of terrorism to personal jurisdiction in U.S. courts by construing certain statutorily enumerated activities as consent to jurisdiction in U.S. courts. One of these activities was making payments to people convicted of terrorist acts against U.S. nationals, another was maintaining an office or headquarters in the United States under certain circumstances. See *id.* at 8–9 (citing 18 U.S.C. § 2334(e)(1)). The question before the Court was whether a U.S. court's jurisdiction over defendants who had satisfied these jurisdictional prerequisites comported with limits on personal jurisdiction imposed by the Fifth Amendment Due Process Clause. See *id.* at 9. To do so, the Court necessarily had to consider the extent to which Fourteenth Amendment Due Process Clause constraints on personal jurisdiction in the state context did or did not apply to Congressional use of the commerce power to reach foreign defendants. As the Court ultimately reasoned, many such constraints in fact were relevant only to states because they dealt with considerations of interstate federalism. Thus, in delineating the scope of Fifth Amendment limits on congressional power, the Court ended up also providing an account of the federalist purposes served by Fourteenth Amendment curbs on states. See *id.* at 14–16.

11. See *id.* at 13 ("We have long recognized, however, that '[w]hile the language of [the two] amendments is the same,' . . . 'questions may arise in which different constructions and applications of their provisions may be proper.'").

Court to the conclusion that minimum contacts analysis under the Fourteenth Amendment is, not incidentally but *centrally*, about maintaining the territorial balance of state power.<sup>12</sup> The Court implies, that is, that the core goal of minimum contacts is to ensure that states do not extend their regulatory power too far, and that the defendant's due process rights are merely derivative of this aim—that is, that the measure of a due process violation under the minimum contacts doctrine is whether the defendant has been subjected inappropriately to state regulatory power. Given the Court's various prior disavowals of this purpose as well as the fundamental improbability of locating such an aim in due process restrictions, this unequivocal endorsement—albeit an indirect one<sup>13</sup>—of minimum contacts as a federalism-policing device comes as a surprise.<sup>14</sup>

To be sure, linkage of a sort between personal jurisdiction and state territorial sovereignty is longstanding; it is a truism that, for much of U.S. history, personal jurisdiction limits were closely linked to territorial conceptions of state power. Throughout the nineteenth century and even beyond, a formalist view of territory played an important role in legitimating exercises of a state's physical power over people and property. Thus first-year law students encounter, sometimes on their first day of class, the Court's famous pronouncements in *Pennoyer v. Neff* that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” while at the same time, “no State can exercise direct jurisdiction and authority over persons or property without its territory.”<sup>15</sup> *Pennoyer*-era jurisdictional beliefs denied that, in most situations, any assertion of state judicial authority outside state borders could be fair or legitimate; proper jurisdiction thus rested on in-state service or the presence of property within state borders.<sup>16</sup> Although the *Pennoyer*-era conception of “territory” was a formalist one that bears significant

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12. *Id.* at 14 (proclaiming that state personal jurisdiction standards, “and in particular, the requirement that a defendant have minimum contacts with the forum State” are “a consequence of territorial limitations on the power of the respective States” and are rooted in the principle that “[s]tate sovereign authority is bounded by the States’ respective borders” (internal citation and quotation marks omitted)).

13. The Court, that is, reached the issue only in the context of deciding the separate question of the reach of Congress's power to subject foreign actors to personal jurisdiction in the United States as a whole.

14. *See supra* note 10 (outlining how the *Fuld* Court engaged in an analysis of the federalist purposes served by the Fourteenth Amendment in the course of explaining why normal minimum contacts principles do not apply to the federal government's powers to assert personal jurisdiction).

15. 95 U.S. 714, 722 (1877).

16. *See, e.g.*, Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1289–91 (2017) (explaining *Pennoyer*'s doctrinal underpinnings).

differences from the way we think about territoriality today, it is nonetheless undeniable that nineteenth-century jurists saw territory and personal jurisdiction as being inextricably intertwined.<sup>17</sup>

It is equally a commonplace, however, that this era eventually came to an end. With the beginning of the modern personal jurisdiction regime in *International Shoe v. Washington*, the Court finally abandoned these formalist views and began assessing personal jurisdiction according to notions of fairness to the defendant,<sup>18</sup> a change sparked by the realization that “the strict territorialist framework for jurisdiction was no longer workable in . . . a century now dominated by both national corporate activity and expanded transportation and communication technologies.”<sup>19</sup> *Shoe’s* minimum contacts framework has been met with praise,<sup>20</sup> heavy criticism (especially in recent years),<sup>21</sup> and debate over how it should be applied, but its split with *Pennoyer’s* territorial-formalist worldview has been rightfully seen as both sharp and definitive.<sup>22</sup>

At the same time, despite minimum contacts-based jurisdiction’s apparent break with the territorialist past, the doctrine has recently been pressed into frequent service, if both sporadically and somewhat perplexingly, as a solution to a quite *different* territoriality-related question—the degree to which a state can, through litigation, apply its own regulatory rules to people and conduct outside its borders.<sup>23</sup>

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17. See Katherine Florey, *Resituating Territoriality*, 27 GEO. MASON L. REV. 141, 160–64 (2019) (discussing *Pennoyer* as focusing on “the state’s coercive power rather than its power to define policy through law,” while modern conceptions of personal jurisdiction also view it as “a boundary on state regulatory authority”).

18. 326 U.S. 310, 320 (1945) (suggesting that personal jurisdiction is proper when a defendant has “sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant] has incurred there”).

19. Paul Schiff Berman, *The Future of Jurisdiction*, 102 WASH. U. L. REV. 1169, 1180 (2025).

20. See Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1594 (2018) (describing the “popular story” under which minimum contacts doctrine is the “hero” that “discarded the inconvenient formalist fictions of the territorial era”).

21. See, e.g., James P. George, *Running on Empty: Ford v. Montana and the Folly of Minimum Contacts*, 30 GEO. MASON L. REV. 1, 5 (2022) (describing minimum contacts as an “unworkable maze of a test whose precedents are a repetitive patchwork of contradictions.”).

22. See *id.* at 21 (noting that *International Shoe* introduced a “radical new test”).

23. To be sure, the Court has never been precisely clear about the precise sort of territorial overreach it is worried about when it discusses personal jurisdiction as a mechanism for maintaining the federalist balance. As this Article will discuss, however, it seems fairly clear, by process of elimination if nothing else, that the Court’s

The Court's discussion in *Fuld* falls squarely in this vein. Although some of the Court's language in *Fuld* sounds on the surface like a throwback to *Pennoyer's* territorial formalism,<sup>24</sup> the Court's actual concern in *Fuld* was a far more modern one; the Court suggested that minimum contacts' real function is to prevent states from exercising authority over disputes in which they lack a "legitimate interest."<sup>25</sup> In other words, the Court's invocation of federalism and territoriality in cases like *Fuld* assumes (in contrast to the nineteenth-century territorial worldview) that states *do* have some legitimate authority over defendants and conduct outside their borders; the question they pose is, rather, just how broadly states can apply their decisional rules and the policy choices they embody before encroaching too far on the prerogatives of their neighbors.<sup>26</sup>

This concern with the extraterritorial projection of state *regulation* is a fairly recent one.<sup>27</sup> *Pennoyer*-era courts hardly troubled themselves with it, in part because, in a time when states drew primarily from shared common-law principles to resolve disputes, the modern idea of law as an expression of the particularized policy preferences of a single sovereign had not yet become a commonplace understanding.<sup>28</sup> By contrast, the question of how to balance the competing policy regimes of different states—which, in a mobile

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central concern is that states will adjudicate disputes and pronounce judgment on conduct that they have little legitimate interest in because it is unconnected or only loosely connected to the forum state. *See infra* Section III.C.

24. *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 14 (2025) ("State sovereign authority is bounded by the States' respective borders.").

25. *Id.* at 18 (quoting *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. 255, 263) (noting that Court in both *World Wide Volkswagen Corp. v. Woodson* and *Bristol-Myers Squibb* stressed concerns over limiting State power).

26. *See* Florey, *supra* note 17, at 143–45 (explaining the differences between these two views of territoriality); Wendy Collins Perdue, *What's "Sovereignty" Got to Do With It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 730 (2012) [hereinafter *Sovereignty*] (noting that the elements of "sovereignty and due process" were "approached in *Pennoyer* quite differently than they are described in modern opinions").

27. The concern with excessive territorial projection of state legislation was seldom a concern until the early 20th century, both because there was less variation in law between states and because the prevailing understanding of choice of law was fundamentally different from the modern one. *See* Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850–1940*, 62 UCLA L. REV. 1240, 1259–60 (2015) (documenting changes in judicial concerns about the extraterritorial application of state law).

28. *See id.* at 1256–57 (enumerating several ways in which the current understanding of extraterritoriality differs from nineteenth-century ones, among them that law applied in U.S. courts is "positive law emanating from, and pertaining to, a particular sovereign state or nation[]" as opposed to a shared body of general law).

society, encompasses the question of how far beyond state borders those policy preferences should be permitted to extend—is now an increasingly important one. The Court’s affirmation of the federalism dimension of personal jurisdiction in *Fuld* and other recent cases comes at a moment when increasing state-level polarization has made interstate extraterritorial regulation a far more urgent problem than it has generally been in the past.<sup>29</sup> Today, the policies of liberal and conservative states differ from each other along systematic lines on numerous issues: for example, whether and how to regulate certain ingredients used in prepared food,<sup>30</sup> whether to ban abortion or increase access to it, whether to require public investments to take account of environmental considerations, or the extent to which livestock should be subject to standards of humane treatment.<sup>31</sup> These questions spark public passions and inspire dedicated activists who wish to cement their views into law as widely as possible; public pressures, in turn, often drive state legislatures and courts to be more forceful in attempting to apply state law to far-flung events.<sup>32</sup> In such circumstances, as both judges<sup>33</sup> and commentators<sup>34</sup> have noted, some way of geographically allocating state power is necessary in order both to prevent states from clashing with each other and to allow individual actors to know whose legal standards will govern.

Yet as important as the question of how far state law should extend may be, the issue would seem, at least superficially, to have little to do with the personal jurisdiction of state courts. Both

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29. See Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1143–44 (2024) [hereinafter Florey, *Landscape*] (discussing increasing polarization among the states that make conflicts more likely).

30. See Nicholas Florko, *The States Are Going Full RFK Jr.*, THE ATLANTIC (July 16, 2025), <https://www.theatlantic.com/health/archive/2025/07/rfk-jr-maha-states-louisiana-texas/683557/> [https://perma.cc/H6JS-GJK7] (discussing actions taken by conservative-leaning states in response to align their policies with those of Robert F. Kennedy, Jr.); see also Grace Segers, *Blue States Are Teaming Up to Counter RFK Jr.’s Policies. Can It Work?*, THE NEW REPUBLIC (Oct. 17, 2025), <https://newrepublic.com/article/201881/blue-state-health-alliances-kennedy> [https://perma.cc/4FSE-JJKH].

31. See Florey, *Landscape*, *supra* note 29, at 1145–51 (cataloging state differences on these issues).

32. See *id.* at 1144 (noting increased “zeal for a fight” to extend extraterritorial reach).

33. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 154 (2023) (Alito, J., concurring in part) (noting that the Constitution “restricts a State’s power to reach out and regulate conduct that has little if any connection with the State’s legitimate interests”).

34. See, e.g., Jeffrey M. Schmitt, *Rethinking the Scope of State Power: Territorial Jurisdiction, Popular Sovereignty, and Extraterritorial Legislation*, WM. & MARY L. REV. (forthcoming 2025) (discussing that “each state should have the power to control policy within its borders without outside interference”).

domestically<sup>35</sup> and internationally,<sup>36</sup> courts' judicial jurisdiction—the question of their authority to hear cases against particular defendants or involving certain subject matter—has been treated as a separate question from a sovereign's prescriptive jurisdiction—the degree to which a sovereign can apply its legal rules to particular conduct. In the United States, doctrine for the most part reflects this separation: Multiple doctrines and constitutional provisions collectively determine whether state legislatures can pass laws reaching conduct outside state borders, as well as the extent to which courts can apply forum law to out-of-state events,<sup>37</sup> while a single and wholly separate body of doctrine governs the constitutionality of personal jurisdiction.<sup>38</sup> Beyond this current doctrinal separation, it is also the case that, as a historical matter, these two sources of limits on state power have seldom directly engaged with each other. As noted, concerns about state courts' jurisdictional overreach are much older and arose at a time when, because of the influence of the general law and the uniformity of state choice-of-law approaches, disputes about the scope of state *regulatory* authority were relatively uncommon.<sup>39</sup>

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35. See RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 481 (A.L.I. 2018) (“Except as provided in §§ 483–84 and § 489, a final and conclusive judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States.”).

36. To be sure, limits on application of forum law are exceptionally modest. See *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 368 (2021) (explaining that it is appropriate for the forum state to apply its own policies to out-of-state conduct when the forum has “significant interests at stake” that center on the protection of its residents).

37. See sources cited *infra* note 232 and accompanying text.

38. See Florey, *Landscape*, *supra* note 29, at 1168.

39. See Florey, *supra* note 17, at 144 (discussing shared general-law source of both state and federal common law and prevalence of “formalistic conflicts rules” that “sidestepped the more difficult question of regulation’s geographical scope”). Uncommon, of course, does not mean nonexistent. In particular, questions of the extraterritorial effects of personal status created notable friction between states dating at least from the time of slavery; courts confronted questions such as, for example, whether a Mississippi man seeking to free his enslaved sons, an action prohibited under then-current Mississippi law, had successfully done so by relocating the boys to Ohio. See *generally* *Shaw v. Brown*, 35 Miss. 246 (1858). Later, the question whether an *ex parte* divorce obtained in a state with liberal divorce laws was valid in a more restrictive state created legal confusion and interstate friction for the better part of a century. See Michael J. Higdon, *If You Build It, They Will Come: The History and Enduring Legal Legacy of Migratory Divorce*, 2022 UTAH L. REV. 295, 324–25 (citing *Williams I* which, “established that states are required to recognize *ex parte* divorces obtained in a sister state whenever either party to the marriage established domicile in the divorce-granting state.”). Personal status issues, however, have distinct qualities that make such conflicts more likely—they have immediate effects on

Although nineteenth-century notions of personal jurisdiction were preoccupied with territory, courts and scholars cared about territorial reach mostly in the sense that a state's physical control over people and property within state borders served to explain and legitimate its courts' exercises of power over defendants and cases.<sup>40</sup> Meanwhile, concerns about the excessive geographical extension of state law were relatively slow to emerge and germinated in a completely different line of cases.<sup>41</sup>

Little has changed in this respect today, even though our notions of territoriality have shifted significantly. Minimum contacts doctrine now ostensibly grounds the legitimacy of personal jurisdiction on "fair play and substantial justice" rather than raw territorial power,<sup>42</sup> but personal jurisdiction continues to operate separately from the many doctrines that speak more directly to the question of the proper geographical reach of states' legal rules, which are rooted in various constitutional provisions, particularly the dormant Commerce Clause.<sup>43</sup> Further, even as personal jurisdiction doctrine has become more complicated and sprawling, taking into account such factors as the deliberateness of the defendant's connections to the forum state itself<sup>44</sup> or the particular burdens that U.S. litigation might impose on small artisanal producers,<sup>45</sup> it continues to mandate an analysis that generally focuses on fairness and convenience to the

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daily life (indeed, this is a severe understatement in the case of slavery) and a lack of uniform treatment of them causes widespread, concrete legal problems (such as the validity of remarriage by someone considered divorced by one state but married in another). *See Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) (recognizing the exceptional nature of personal status issues).

40. *See supra* note 16 and accompanying text.

41. *See supra* note 27 and accompanying text.

42. *See Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (contrasting historical view with current one under which due process permits the exercise of jurisdiction even "if [the defendant is] not present within the territory of the forum" so long as the defendant has "certain minimum contacts with [the forum].").

43. *See Berman, supra* note 19, at 1189–90 (suggesting that the Court's concerns in personal jurisdiction cases would fit more naturally in the separate body of doctrine applying the dormant Commerce Clause).

44. *See Walden v. Fiore*, 571 U.S. 277, 290 (2014) (explaining that personal jurisdiction doctrine requires the defendant to have "formed a contact with the forum State," not merely a contact with a resident of that state).

45. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 891–92 (2011) (Breyer, J., concurring) (expressing concerns about the effects of broad personal jurisdiction on domestic producers such as an "Appalachian potter[] who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii)," and on international producers such as "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer . . .").

defendant<sup>46</sup> and that takes little or no explicit account of the appropriateness of applying the law of the forum state.

Yet despite this formal separation between fairness-driven personal jurisdiction considerations and doctrines purporting to regulate the geographical scope of state regulatory authority, territory remains entwined with personal jurisdiction doctrine in at least two ways, one explicit and the other tacit and functional. First, the Supreme Court has, at various points, simply proclaimed the existence of a link between personal jurisdiction and restraints on state territorial overstepping—a connection it has made persistently, if sometimes to the puzzlement of scholars and in contradiction to its own past statements<sup>47</sup>—and that it reaffirmed once again with particular force in *Fuld*. Despite the surprising consistency with which this theme appears, however, the Court has done little to articulate *why* this connection exists, *what* it is that personal jurisdiction restrains, and *how* exactly it functions to allocate territorial power. This lack of explanation, coupled with the obvious incongruity of locating structural federalism concerns in the individual fairness-focused Due Process Clause,<sup>48</sup> has frequently led scholars to criticize the presence of this strain of argument in the doctrine at all.<sup>49</sup>

The second way in which personal jurisdiction and territorial concerns coincide has, in notable contrast, seldom been remarked upon by courts. But despite little judicial commentary on the issue, many scholars agree that personal jurisdiction seems to function in practice as a limit on state courts' application of forum law to geographically far-flung events.<sup>50</sup> In most contexts, that is to say, few

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46. See Berman, *supra* note 19, at 1173 (observing that, in personal jurisdiction doctrine from *Pennoyer* to the present, “the focus has not been on the connection between the case and the community, but on fairness to the defendant”).

47. See Megan M. La Belle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 EMORY L.J. 781, 835–36 (2023) (noting that multiple scholars have found the Court's invocation of federalism and state sovereignty concerns in personal jurisdiction doctrine to be “inconsistent and, frankly, confusing”).

48. See *Mallory v. Norfolk S. Ry.Co.*, 600 U.S. 122, 156 (2023) (Alito, J., concurring in part) (commenting on the incongruity of using the Due Process Clause as a mechanism to address federalism concerns given that “[t]he Due Process Clause confers a right on person[s], not States.” (internal citation and quotation marks omitted)).

49. See sources cited *supra* note 4.

50. Multiple scholars have noted this connection. See, e.g., George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J.L. & POL. 1, 4 (2016) (“If the plaintiff can get personal jurisdiction over the defendant, the plaintiff can often persuade the forum to apply its own law to the case.”); Katherine Florey, *What Personal Jurisdiction Doctrine Does—And What It Should Do*, 43 FLA. ST. U. L. REV. 1201, 1239 (2016) [hereinafter Florey, *Personal*] (arguing that personal jurisdiction requirements minimize

meaningful constraints exist on state choice-of-law decision-making, leaving open the possibility that states will go too far in their application of forum law to out-of-state actors or conduct. Moreover, the Court has seemed generally uninterested either in strengthening these standards or in explaining their theoretical underpinning; indeed, it has appeared to signal its intent to get out of the business of policing state conflicts decisions in most circumstances.<sup>51</sup> In this context, personal jurisdiction doctrine steps in where choice-of-law limits do not, by requiring connections between the dispute and the forum state that make the application of forum law less likely to be an overstep.<sup>52</sup>

Abundant commentary has considered the relationship between personal jurisdiction and choice of law<sup>53</sup> and, separately, debated whether ideas of territoriality and federalism are relevant to personal jurisdiction.<sup>54</sup> In the wake of *Fuld's* strong reaffirmation of personal jurisdiction's territoriality component, this Article aims to explore a related but more fundamental set of questions: How did it come to be that minimum contacts doctrine, created as a forceful rejection of the traditional territorial-formalist universe, began to encompass territorial concerns in the first place? What accounts for the persistent concern with the interstate balance of power that shows up so frequently in Supreme Court opinions, and how is this concern related, if at all, to personal jurisdiction's practical (but generally unacknowledged) effect of ensuring that courts do not apply forum law too broadly? And finally, given the Court's decades' worth of suggestions that personal jurisdiction doctrine serves some anti-extraterritoriality function, how well does it fulfill that role?

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scenarios where "states are . . . tempted to overextend the reach of their law."); Sterk, *supra* note 4, at 1165–66 (contending that many aspects of personal jurisdiction doctrine are "rooted in choice-of-law concerns"); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 572 (1991) [hereinafter Perdue, *Beetle*] (describing personal jurisdiction as a "handmaiden of choice of law" that is a "first cut" response to fears about state overreach); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1050 (1983) (suggesting that the minimum contacts requirement helps to ensure that constitutional choice-of-law doctrine is not "overburden[ed]").

51. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988) (emphasizing that the Court should not interfere with longstanding state conflict-of-laws practices); see also *infra* note 287 and accompanying text.

52. See *Mallory*, 600 U.S. at 154 (Alito, J., concurring in part) (noting that the Constitution "restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests").

53. See *id.*

54. See sources cited *supra* note 4.

Ultimately, the Article argues that the extraterritoriality-restraining aspect of personal jurisdiction is a response to the lack of clear standards (or any animating underlying theory) for when state courts should be permitted to use litigation to influence out-of-state conduct. And although personal jurisdiction is a highly imperfect vehicle for restraining the exorbitant application of forum law,<sup>55</sup> the absence of clear alternatives means that it is likely to continue to fulfill this role. Given that reality, acknowledging this aspect of personal jurisdiction could both help it serve this function more effectively and bring coherence to this often-perplexing aspect of the doctrine.

This Article proceeds in four Parts. Part II traces the ways in which territoriality and personal jurisdiction have been intertwined historically and how that relationship has shifted over time. Part III discusses the persistent appearance of federalism and territoriality concerns in modern personal jurisdiction case law. Part IV explores some of the theories that have been advanced about why personal jurisdiction has become a locus for extraterritoriality and horizontal federalism concerns and builds on them to advance its own, arguing that personal jurisdiction doctrine fills a void that case law does not otherwise effectively address by setting minimum standards of how related a dispute must be to a state for courts to apply forum law to resolve it. Part V assesses how well personal jurisdiction fulfills this function and explores implications of this argument for personal jurisdiction standards going forward. The Article concludes by arguing for a more particularized and explicit consideration of the actual role that extraterritorial-regulation concerns play in personal jurisdiction doctrine.

## II. TERRITORIALITY, OLD AND NEW, AND PERSONAL JURISDICTION DOCTRINE

Personal jurisdiction and territory have long been intertwined; indeed, personal and in rem jurisdiction are sometimes referred to jointly as the court's territorial jurisdiction,<sup>56</sup> and nineteenth-century views of personal jurisdiction generally focused narrowly on the court's territorial power. Even today's more forgiving personal jurisdiction standards are inescapably territorial, centering on the defendant's connections with or effect on a particular place. At the

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55. *See infra* Part V.

56. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 5 cmt. a (A.L.I. 1982) (stating the scope of personal jurisdiction and reaffirming "the rules regarding territorial jurisdiction").

same time, “territory” and “territoriality” can mean many things, and both the common understanding of territory and its role in personal jurisdiction doctrine have changed dramatically over time. This Part contrasts *Pennoyer*-era territorial formalism, which functioned as a justification for exercises of coercive state power, with minimum contacts-based jurisdiction, which—at least in its initial iterations—abandoned these formalist ideas and suggested that the location of litigation or activity should be relevant only insofar as it bears on fairness to the defendant. Finally, this Part differentiates both historical views of personal jurisdiction from current issues of territoriality, which focus on maintaining an appropriate geographical balance of regulatory power among states.

#### A. *The Territorial-Formalist Framework*

Historically, personal jurisdiction was intimately connected to territory, but in a manner that has ceased to be particularly relevant today. For nineteenth-century commentators, the territorial element of personal jurisdiction doctrine was highly focused on legitimacy, which served to explain why a state should have the ability to coerce an unwilling nonresident defendant into court.<sup>57</sup> Many commentators agreed that the state’s physical power over people and things within its borders created this ability. For early nineteenth-century commentators, for example, the reach of process into other states was an intolerable overstep not principally because it inconvenienced the defendant but because the very notion of states asserting power outside their borders was inherently illegitimate.<sup>58</sup>

These beliefs were standard long before the Fourteenth Amendment became law. In the early nineteenth century, state courts frequently assessed the propriety of personal jurisdiction in deciding whether to enforce sister-state judgments.<sup>59</sup> After some uncertainty

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57. See Florey, *supra* note 17, at 161 (describing how the legitimacy of jurisdiction comes from the state’s ability to physically take custody of a defendant).

58. See Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 MINN. L. REV. 679, 685 (2020) (suggesting that *Pennoyer*-era doctrine involved “draw[ing] a circle around the territory of the state” then holding that only “actors that intrude into that circle . . . could be justifiably subject to state legislative or judicial authority”). See also Florey, *supra* note 17, at 162–64 (summarizing *Pennoyer*-era views in similar terms).

59. See Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 278–79 (1990) (stating that state courts “guarded certain aspects of state sovereignty held before ratification” by “engrafting an exception onto the full faith and credit clause that, in effect, retained the common-law doctrine of territorial jurisdiction”).

about whether this practice was permissible, the Supreme Court endorsed it in the 1850 case *D'Arcy v. Ketchum*.<sup>60</sup> Of course, assessing whether a court had validly obtained personal or in rem jurisdiction required an understanding of what proper jurisdiction actually was. Courts at the time were clear on this question: Valid *in personam* jurisdiction required that the defendant “either consented to personal jurisdiction or was served while physically present in the forum.”<sup>61</sup> In rem and quasi in rem jurisdiction likewise required the physical presence of property within the state.<sup>62</sup>

This focus on the territorial nature of power was rooted in the general law, which was reworked as a distinctive body of law by American judges.<sup>63</sup> Strict territoriality had symbolic importance, affirming states’ sovereignty and independence at a time when “the power of the federal government was not fully established and the relationship of the federal government to the states was not well-defined.”<sup>64</sup> The requirement of in-state service reinforced the broader belief that jurisdiction was legitimate only when founded on the state’s physical power over the defendant’s person.<sup>65</sup> In addition to these largely abstract considerations, courts also looked at the issue more pragmatically, believing that strict territorial

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60. See 52 U.S. (11 How.) 165, 176 (1851) (holding that judgment rendered without personal jurisdiction need not be enforced in another state).

61. Jacobs, *supra* note 20, at 1595.

62. See Charles W. “Rockey” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 391 (2012) (explaining that in rem jurisdiction, like in personam jurisdiction, rested on a “state’s power with regard to its territorial boundaries”).

63. See Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1087 (1994) (discussing the general law as “vitaly important in the nineteenth century and . . . vital to the development of the modern law of jurisdiction”).

64. Drobak, *supra* note 50, at 1022. See also Kogan, *supra* note 59, at 279 (noting that this category of cases represented an “opportunity to sketch the outlines of a vision of interstate relations under the Constitution.”).

65. See Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 94 (1968) (observing that “common law courts neither exercised nor believed they could exercise jurisdiction in personal actions without either physical custody of the defendant or an appearance by him”); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 (1987) (describing nineteenth-century views that “the state [must] have immediate physical power over the defendant or her property as a predicate to exercising jurisdiction” and the “clear rationale for [this] rule: a state has police power over persons and property within its borders, and judicial actions constitute an exercise of that police power”); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (equating “service upon the person” with an exercise of the state’s “physical power”).

limits on state power promoted fairness by protecting out-of-state defendants from home-state bias<sup>66</sup> and from the lack of notice that might ensue were the requirement of in-person service to be dispensed with.<sup>67</sup>

Yet one issue notably missing from early cases was any concern that states might inappropriately project their regulatory policies to reach conduct in neighboring states. This was largely because, in many situations, courts took their decisional rules from the general law, a law that “existed by common practice and consent among a number of sovereigns” rather than being “attached to any particular sovereign.”<sup>68</sup> Because the bulk of the decisional law applied by courts drew from interjurisdictional consensus rather than being seen as the expression of an individual sovereign’s policy preferences, courts were mostly untroubled by the idea that state courts might be tempted to extend forum law too far. Although this view would begin to change after the Civil War, “antebellum jurists rarely expressed concern over the possibility that the application of municipal law by the forum amounted to impermissibly giving extraterritorial effect to that law[.]”<sup>69</sup>

In 1878, *Pennoyer v. Neff*<sup>70</sup> famously suggested for the first time that limits on personal jurisdiction could be challenged by means of the Due Process Clause of the newly ratified Fourteenth Amendment,<sup>71</sup> while also stressing that in-person, in-forum service was an indispensable prerequisite to proper *in personam* jurisdiction in nearly all cases.<sup>72</sup> In so doing, *Pennoyer* strongly affirmed the territorial-formalist perspective on personal jurisdiction—which centered on the idea that “every State possesses exclusive jurisdiction and

66. See Kogan, *supra* note 59, at 283 (discussing courts’ concerns about possible bias toward nonresidents); *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 240 (1828) (expressing concern over citizen being bound by judgment in faraway state of which he received no notice).

67. See *id.*

68. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

69. See Spillenger, *supra* note 27, at 1259–60.

70. 95 U.S. 714, 733 (1877).

71. See Sachs, *supra* note 16, at 1252–53 (explaining that the Due Process Clause of the Fourteenth Amendment “turned the presence or absence of jurisdiction, full stop, into a matter of constitutional concern,” while general law dictated whether a state court actually had jurisdiction).

72. See *id.* at 1289–90 (discussing *Pennoyer*’s holdings that neither mailing process to out-of-State defendants nor internal publication of notice could accomplish the “official legal act” of personal service necessary for personal jurisdiction).

sovereignty over persons and property within its territory,” while lacking authority to extend its process beyond it.<sup>73</sup>

Scholars have disagreed about whether *Pennoyer* developed,<sup>74</sup> resolved,<sup>75</sup> or merely restated a general consensus upon<sup>76</sup> the principles of territory and power on which it relied. In any event, although *Pennoyer* certainly rested on a robust notion of territorial limits, it was one fundamentally different from the ideas that the Court would later interject into cases like *World-Wide Volkswagen v. Woodson*.<sup>77</sup> The Court was not, that is, principally concerned with maintaining a flexible federalist balance of power or ensuring that states would only hear matters in which they were legitimately interested. Rather, it was reinforcing a view of state sovereignty that emphasized each state’s unquestioned dominion within its borders and its absence of authority outside them;<sup>78</sup> federalism came into play only to the extent that the same rules were considered to bind all sovereigns and any violations of them by one state would necessarily constitute an impingement on the powers of others.

### B. From Formalism to Fairness

How the territorial-formalist view eventually changed is a familiar story.<sup>79</sup> As interjurisdictional disputes became more common, the rigidity of the territorial-power approach became apparent. States wanted to secure their citizens redress against out-of-state corporations that might have bilked them or reckless drivers from

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73. *Pennoyer*, 95 U.S. at 722. *But see* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289, 293–300 (1956) (contesting the view that pre-*Pennoyer* notions of judicial jurisdiction focused so closely on the state’s physical power to summon a defendant to court).

74. Geoffrey C. Hazard, Jr., for example, has argued that, in insisting that property be seized at the outset of the case for proper in rem jurisdiction to be present, the Court invented a “wholly novel” requirement. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 269 (1965); *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 190 (2004) (noting, while departing from, the views of many scholars that *Pennoyer* developed new theories of jurisdiction).

75. *See* Ehrenzweig, *supra* note 73, at 308 (arguing that the question of in-state service and its underlying jurisdictional justification “remained unsettled” until *Pennoyer* helped to resolve them).

76. *See, e.g.*, Weinstein, *supra* note 74, at 191–99.

77. 444 U.S. 286 (1980).

78. *Pennoyer*, 95 U.S. at 722.

79. *See* Jacobs, *supra* note 20, at 1594 (recounting, while critiquing, the “popular story of personal jurisdiction”).

other states who caused them injury.<sup>80</sup> The resulting patchwork of legal fictions that served as territorial workarounds began to fray until the Court finally replaced it with the comprehensive system of contacts-based personal jurisdiction first rolled out in *International Shoe v. Washington*, under which the Court famously authorized personal jurisdiction over defendants who had “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>81</sup>

As a result, fairness concerns—to be sure, arguably an embedded limit on personal jurisdiction from the beginning<sup>82</sup>—became for a time the primary focus of personal jurisdiction doctrine.<sup>83</sup> In many ways, this is unsurprising; the act of summoning an unwilling defendant before a judge would seem to logically give rise to questions about the justness of doing so. If a court’s command to appear is arbitrary or the costs of doing so unduly onerous, the proceeding may impose an unjust or excessive burden on the defendant.<sup>84</sup> Exorbitant exercises of personal jurisdiction may also be unfair in the sense that they undermine the quality or neutrality of the proceedings—if, for example, distance or expense prevents the defendant from properly mustering evidence, or if local bias makes the forum an inherently hostile one.<sup>85</sup> Place still matters in a fairness analysis, of course, on both sides of the equation: on the one hand, traveling to a distant or unfamiliar location may make the assertion of personal jurisdiction particularly burdensome to the defendant;

80. See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 42–43 (2018) (summarizing the mechanisms courts used and later critiques of them).

81. 326 U.S. 310, 316 (1945) (internal citation and quotation marks omitted).

82. See Effron, *supra* note 80, at 46 (arguing that the concept of notice went through a “great deal of doctrinal development” between *Pennoyer* and *Shoe*); Drobak, *supra* note 50, at 1023–24 (noting that early personal jurisdiction cases “[u]sually . . . commingled notions of fairness with the territorial theory of jurisdiction”).

83. See Berman, *supra* note 19, at 1173 (arguing that tying personal jurisdiction to the Due Process Clause has made it so “the focus has not been on the connection between the case and the community, but on fairness to the defendant”).

84. See Florey, *Personal*, *supra* note 50, at 1203 (one of the purposes of personal jurisdiction outlined by the Supreme Court is “protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum.”) (citation omitted).

85. See Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97, 154 n.317 (“Expanding the choice of forums systematically disadvantages defendants positioning litigation[—]and the opportunity for making precedents[—]in particularly unfriendly forums.”); Leslie W. Abramson, *Clarifying “Fair Play and Substantial Justice”: How Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 449–50 (1991) (nothing difficulties with obtaining tangible evidence and the testimony of witnesses across long distances.).

on the other, the defendant's deliberately forged connections with that place may make the need to submit to jurisdiction there both less surprising and more just.<sup>86</sup> Minimum contacts, at least in theory, made territory simply an ingredient of the overall analysis, not a justification in itself for the exercise of state power.<sup>87</sup>

Of course, one can also imagine how both the older concerns about legitimacy and the newer ones about fairness might become, in certain circumstances, intertwined with various sorts of interstate conflict. Suppose overreaching State A attempts to extend its power improperly outside its borders to summon defendants from State B into its courts, perhaps to benefit its resident plaintiffs. Such an action would raise legitimacy concerns; in attempting to overstep jurisdictional limits, State A is improperly encroaching on State B's sovereign interests in protecting its own citizens and hearing disputes in its own courts.<sup>88</sup> Meanwhile, it would also raise issues of fairness to the State B defendants, who (even assuming they had notice of the proceeding) would have lost the chance to have the case against them heard in a more familiar and convenient (and perhaps friendlier) setting.<sup>89</sup>

Notably, however, under both past and present views of personal jurisdiction, the connection between State A's overreaching in such situations and State B's *regulatory* interests seems less obvious.<sup>90</sup> That is to say, State A's aggressive exercise of power might be criticized on various grounds, but it is difficult to say that it is improperly displacing State B's *policy* preferences with its own. Any concerns about jurisdiction we have in this scenario likely center on the occurrence of the State A proceeding itself, not that the effect of the proceeding

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86. See Florey, *Personal*, *supra* note 50, at 1206 (suggesting the requirement of purposeful availment in minimum contacts doctrine is rooted in conceptions of fairness).

87. See Kogan, *supra* note 59, at 371 (arguing that, although some "lurking" territorial considerations remain, "personal jurisdiction . . . appears on the surface to eschew any consideration of territorial boundaries and sovereignty").

88. See Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 266 (2014) (noting the existence of "non-regulatory state interests" that include "protecting citizens and visitors from harms suffered within the state and providing a convenient forum for . . . citizens injured by nonresidents").

89. See Campbell, *supra* note 85, at 154 n.317 (discussing concerns about exposing defendants to potentially hostile courts).

90. This would have been especially true in the early to mid-nineteenth century, when courts of different states would have applied roughly similar common-law doctrines in a large swath of cases. See Fletcher, *supra* note 68, at 1517-21 (explaining that state courts frequently relied on a general, rather than state-specific, common law).

will be to extend State A's law inappropriately.<sup>91</sup> The same would also seem to be true under newer views of the role of territory in personal jurisdiction, which focus on how the defendant's connections with the forum state establish expectations, familiarity, and reciprocal obligations<sup>92</sup>—an analysis in which the state's own regulatory interests would seem to have little role to play.

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91. This seeming lack of concern is also reflected in the fact that defendants subject to federal claims in state court are also entitled to minimum contacts protections. The operative concern in cases involving federal law cannot, for obvious reasons, be state regulatory overreach; it presumably centers instead on fairness issues involved in requiring the defendant to defend in a particular forum. Likewise, although federal courts follow state long-arm statutes in most cases, they do so only because of the command of Fed. R. Civ. P. 4(k)(1), not constitutional concerns about overreaching state law. Congress appears to possess the power to subject defendants to nationwide jurisdiction in federal court, even as to state-law claims. Congress has, for example, made nationwide jurisdiction available in federal court interpleader proceedings, which are typically rooted in state-law issues; in general, “[w]ithout any fuss, federal courts have assumed that the grant of nationwide jurisdiction here is constitutional.” Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way To (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 442 (2017). The different jurisdictional rules attached to federal claims in state court (which must, as a constitutional matter, satisfy minimum contacts standards) and state claims in federal court (where nationwide jurisdiction is constitutional if authorized by Congress) perhaps reflect remnants of territorial-formalist thinking under which, as Justice Scalia has observed, the notion of contacts substitutes for physical presence in the interstate context. See *Burnham*, 495 U.S. at 617–18 (1990) (plurality opinion) (“As *International Shoe* suggests, the defendant’s litigation-related ‘minimum contacts’ may take the place of physical presence as the basis for jurisdiction.”) Under this view, state courts, regardless of whether they are adjudicating state or federal claims, gain authority through the defendant’s metaphorical presence through contacts; by contrast, the interpleader statute, which effectuates nationwide jurisdiction through nationwide service of process, relies on the defendant’s more literal presence within the borders of the United States. The notion of “presence” in personal jurisdiction has, to be sure, fallen out of favor in the minimum contacts era; the *Int’l Shoe* Court itself notes that the word is “used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.” See *Int’l Shoe*, 326 U.S. at 317. But in any event, whether the concerns at play have to do with territorial formalism or fairness, the rules regarding state claims in federal court and federal claims in state court seem to have been constructed without any thought of issues regarding the proper territorial scope of state law.

92. See Sterk, *supra* note 4, at 1165 (“[J]urisdictional rules protect an entity against defending itself in a forum likely to ignore the legal norms and rules the entity might reasonably expect to govern its legal affairs.”); *id.* at 1166 (“[L]imits on the forum state’s sovereign authority protect . . . the reliance interest of defendants who plan their behavior to conform to the regulatory scheme of the jurisdiction in which they act.”).

C. *Introducing a Sovereignty/Regulatory Focus*

Despite the absence of any apparent connection under either the *Pennoyer* or *Shoe* approaches between personal jurisdiction and state regulatory authority, the Supreme Court has in recent decades suggested persistently, if sporadically, that personal jurisdiction doctrine incorporates a concern beyond the two classic functions of ensuring that state judicial power is exercised legitimately (the Court's historical preoccupation) and in a manner fair to the defendant (the Court's post-*Shoe* focus). That third function, the Court has indicated, has to do with maintaining the balance of state spheres of authority necessary to horizontal federalism. In the Court's puzzling yet lastingly influential words in *World-Wide Volkswagen*, personal jurisdiction "ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>93</sup>

Although this language to some extent recalls the Court's rhetoric in *Pennoyer*, its animating concerns are quite different. To the *Pennoyer* Court, any exercise of state power outside state borders was simply illegitimate, full stop. This is clearly not the theory behind current doctrine, which permits the assertion of power over out-of-state defendants all the time in a variety of circumstances. The Court, then, seems to have something else in mind, although exactly what is unclear.

Compounding this ambiguity is the fickleness of Court's pronouncements on the subject. In the years after *World-Wide*, the Court's interest in horizontal-federalism concerns seemed to wane to the point of near-repudiation. In *Insurance Corp. of Ireland, v. Compagnie des Bauxites de Guinee*,<sup>94</sup> the Court appeared to shut down the federalism-focused elements of *World-Wide* more or less conclusively, setting forth as a common-sense proposition that the Due Process Clause protects "first of all an individual right"<sup>95</sup> and thus "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."<sup>96</sup> The Court continued to rely on this reasoning in later cases, such as *Omni Capital v. Rudolf Wollf & Co.*<sup>97</sup>

More recently, however, the idea that personal jurisdiction doctrine polices the excessive projection of state regulatory power

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93. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

94. 456 U.S. 694 (1982).

95. *Id.* at 703.

96. *Id.* at 702.

97. 484 U.S. 97, 104 (1987) ("[The personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702)).

appears to have gained renewed ground. In *McIntyre v. Nicastro*, Justice Kennedy’s plurality opinion reasoned that “if [a] State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>98</sup> A near-unanimous Court in *Bristol-Myers Squibb v. Superior Court*,<sup>99</sup> citing *World-Wide* among other cases, noted that personal jurisdiction is a “consequence of territorial limitations on the power of the respective States” and that in some cases “this federalism interest may be decisive.”<sup>100</sup> Concurring in *Mallory v. Norfolk Southern Railway Co.*, Justice Alito—while recognizing the incongruity of locating federalism concerns in the Due Process Clause—also worried that an undue expansion of a state’s personal jurisdiction over suits with little connection to the forum “may violate fundamental principles that are protected by . . . the very structure of the federal system.”<sup>101</sup> Most recently, the Court in *Fuld v. Palestine Liberation Organization* forcefully returned to the federalism fold, describing the Court’s focus on individual liberty in cases like *Insurance Corp. of Ireland* as merely an “occasional[] frame[]” that was “best understood” as being less about inconvenience than about the “individual’s right to be subject only to lawful power,” with “lawful” meaning within the scope of state sovereign authority.<sup>102</sup>

The Court, therefore, has intimated that personal jurisdiction plays some role in maintaining the horizontal-federalist balance, but it has failed either to articulate that interest clearly or to tie it to the Due Process Clause that ostensibly provides personal jurisdiction’s constitutional anchor. Perhaps as a result, scholars have taken disparate positions on the degree to which federalism concerns should or do figure in personal jurisdiction analysis.<sup>103</sup> Before exploring possible normative stances on this issue, however, it is worth considering a couple of prior questions. First, how did a concern with maintaining

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98. 564 U.S. 873, 884 (2011) (plurality opinion).

99. 582 U.S. 255 (2017).

100. *Id.* at 263 (citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

101. 600 U.S. 122 (2023) (Alito, J., concurring in part and concurring in the judgment).

102. 606 U.S. 1, 17 (2025). This somewhat confused and circular formulation, abundantly criticized when Justice Kennedy first introduced it in *McIntyre*’s plurality opinion, seems directly at odds with what the Court actually said in *Insurance Corp. of Ireland*. See *infra* notes 138–45 and accompanying text.

103. Compare Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 73–74 (2010) (critiquing courts’ treatment of personal jurisdiction as a “separate enclave” from horizontal federalism issues), with Drobak, *supra* note 50, at 1047 (arguing that “the federalism theme in personal jurisdiction cannot be an independent restriction on the sovereign power of a court; otherwise, waiver would not be possible”).

the federalist balance of power by ensuring that states do not “reach out” beyond reasonable limits become embedded into personal jurisdiction doctrine in the first place? And second, what precisely is the Court talking about when it speaks of a significant, perhaps determinative federalism interest?

## II.

### THE EMERGENCE OF “MODERN” TERRITORIALITY CONCERNS IN PERSONAL JURISDICTION

This Part traces the route by which personal jurisdiction doctrine, having forcefully rejected territorial formalism, nonetheless came to be bound up (even if only intermittently and inconsistently) with a new set of territoriality issues. For all their differences, that is, *Pennoyer* and *Shoe* were both largely unconcerned with the issue of regulatory overreach. Later minimum contacts cases, however, began to speak of personal jurisdiction doctrine as an important mechanism for maintaining the federalism balance—a position that appeared to encompass previously unexpressed concerns about the extraterritorial impact of state policy. This Part explores that evolution.

#### A. *The Absence of Regulatory Overreach Concerns in Pennoyer and Shoe*

Consider first the question of why personal jurisdiction might ever be said to have anything to do with federalism or extraterritoriality at all. As the previous Part discussed, one answer is that, in the nineteenth century, commentators believed that a state’s physical power over people and property within its borders justified its exercise of authority over them.<sup>104</sup> This particular strain of territoriality, however, has long ceased to be a factor in the law, and even those who find some aspects of *Pennoyer*-era jurisdictional reasoning to be appealing have for the most part not advocated the return of territorial-formalist beliefs *per se*.<sup>105</sup> Notably, when the Court in *International Shoe* developed a new theoretical basis for the assertion of personal jurisdiction based on contacts, it specifically critiqued the *Pennoyer*-era belief that jurisdiction must be rooted in physical

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104. *See Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (“Historically the jurisdiction of courts to render judgment in personam [was] grounded on their de facto power over the defendant’s person.”).

105. *See, e.g., Sachs, supra* note 16, at 1249–50 (arguing that, as conventions in international law and American practice evolve over time, “*Pennoyer’s* reasoning can be right without *International Shoe’s* outcome being wrong”).

power, observing that the *capias ad respondendum* (a centuries-old British procedure under which the defendant was physically confined to ensure their presence in court and payment of any damages) had “given way to” methods of service not based on states’ “de facto power over the defendant’s person.”<sup>106</sup>

Accordingly, *Shoe* lacked any mention of the federalism concerns that the Court would bring up in later cases. Rather, the Court’s sole concern appeared to be fairness—the “fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”<sup>107</sup> The term “federalism” and “sovereignty” do not appear a single time in the opinion.<sup>108</sup> Justice Black’s separate opinion—while also containing little hint of horizontal-federalism concerns per se—critiqued the majority for focusing on “fair play and substantial justice” rather than deciding the case based on sovereign states’ inherent power to “tax and sue those dealing with its citizens within its boundaries.”<sup>109</sup>

It is notable that *Shoe*’s focus on fairness rationales was, in some ways, more consistent with earlier case law than the Court’s later interjections of structural federalism concerns would be. After all, as the Court specifically observed in *Pennoyer*, a potential problem with more lenient personal jurisdiction requirements was that they were less reliably able to provide notice—a particular issue, of course, before the existence of modern communications—and thus would allow bad actors to make lawsuits “the constant instruments of fraud and oppression.”<sup>110</sup> To be sure, this observation was less an independent justification for *Pennoyer*’s holding than an illustration of its broader rationale that the projection of state physical authority beyond territorial boundaries was an illegitimate act that might work multiple evils. Nonetheless, the same concern for notice occurs in other early personal jurisdiction cases,<sup>111</sup> and it is consistent

106. *Int’l Shoe*, 326 U.S. at 316.

107. *Id.* at 319. Interestingly, a decade prior to *International Shoe*, its main opinion’s author, Justice Stone, had endorsed the idea that a state court’s jurisdiction over a case suggested the propriety of applying forum law. See *Alaska Packers Ass’n v. Industrial Acc. Com’n*, 294 U.S. 532, 547–48 (1935) (stating that “[p]rima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted” unless “the conflicting interests . . . of the foreign state are superior to those of the forum”).

108. The closest the Court comes to any mention of these concerns is a brief note that satisfaction of due process is considered “in the context of our federal system of government.” *Int’l Shoe*, 326 U.S. at 317.

109. *Id.* at 323–24 (Black, J., concurring).

110. *Pennoyer v. Neff*, 95 U.S. 714, 726 (1877).

111. See Florey, *supra* note 17, at 159–60 (citing a case in which the court addressed the issue of notice in regard to state court jurisdiction over those who could be thousands of miles from the state in question).

with courts' linkage of personal jurisdiction issues to general-law norms, under which notice and proper authority to hale a defendant into court represented separate but sometimes overlapping requirements.<sup>112</sup> It is also worth noting that, despite its territorial-formalist rhetoric, *Pennoyer* also contained a note of pragmatism, suggesting ways by which courts could determine issues of personal status even as to those residing outside the state<sup>113</sup> or allow citizens to seek redress against out-of-state corporations<sup>114</sup> within the strictures of the framework *Pennoyer* imposed.

*Pennoyer* and *Shoe* thus differed sharply on one point—the extent to which a court's power must derive from its territorial control—but displayed a degree of common ground in their concerns about both fairness to the defendant and courts' practical ability to deliver relief on important issues. In any case, in neither opinion did the Court appear particularly troubled by federalism issues per se. The *Pennoyer* Court applied what it would have seen as standard international norms for legitimizing a court's exercise of authority over someone—norms that were rooted in territory, to be sure, but that nonetheless had little to do with the proper scope of sovereign *regulatory* power or with the particular context of U.S. federalism at all. *Shoe*, as noted, simply sidelined ideas of state sovereignty and federalism entirely. It would not be until significantly later that the idea of personal jurisdiction as a guardian of the interstate regulatory balance would come into play.

### B. *Early Mentions of Federalism in the Minimum Contacts Era*

The first introduction of “new” territoriality concerns into minimum contacts doctrine appears to have emerged thirteen years after *Shoe*. In *Hanson v. Denckla*, the Court announced that, even in the minimum contacts era, personal jurisdiction restrictions were rooted in “territorial limitations on the power of the respective States.”<sup>115</sup> Further, the Court linked this idea specifically to the minimum contacts standard, noting that “[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State

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112. See Sachs, *supra* note 16, at 1300.

113. See *Pennoyer*, 95 U.S. at 734–35 (noting that States retain power to adjudicate divorce proceedings between citizens and former citizens).

114. See *id.* at 735 (noting that states retain power to condition non-residents' business relationships with residents on appointment of in-State agent to receive process).

115. 357 U.S. 235, 251 (1958).

that are a prerequisite to its exercise of power over him.”<sup>116</sup> In some ways, this passage simply reiterated what had already been clear: Minimum contacts had replaced territorial formalism as the basis for the validity of the court’s authority. But by suggesting that minimum contacts did not have to do with burden per se but instead formed the basis for the legitimacy of the court’s power over the defendant, the Court introduced an angle that was largely absent in *Shoe* itself.

What could account for this surprising turn just thirteen years after *Shoe*? To some extent, the Court’s renewed stress on sovereignty and legitimacy may have been merely instrumental—a product of its wish to resolve the case in a particular way. A year prior to *Hanson*, the Court had decided *McGee v. International Life Insurance Co.*<sup>117</sup> Aside from involving a notably more sympathetic plaintiff,<sup>118</sup> *McGee* featured roughly similar circumstances to *Hanson* in that both cases rested on a defendant’s single contact with the forum state.<sup>119</sup> Yet the Court purported to distinguish them based on a fairly technical ground<sup>120</sup> that one commentator has called “an obvious example of result-orientation.”<sup>121</sup> Reorienting minimum contacts doctrine to focus less on fairness per se and more on examining the precise nature of the defendant’s contacts with the state—including the degree to which the defendant had “invoke[ed] the benefits and protections of

116. *Id.*

117. 355 U.S. 220 (1957).

118. *See id.* at 221–22 (Lulu McGee was a bereaved parent wrangling with her late son’s life insurer); by contrast, *Hanson* involved the efforts of two sisters, who had already received substantial bequests under their mother’s will, to invalidate a trust their mother had created for the benefit of a third sister’s children, a scenario that at least one commentator has analogized to the plot of King Lear (with the sister-plaintiffs presumably taking on the Goneril and Regan roles). *See* Michael Vitiello, *The Supreme Court’s Latest Attempt at “Clarifying” Personal Jurisdiction: More Questions Than Answers*, 57 TULSA L. REV. 395, 402 (2022) (noting that “like King Lear,” the mother “divided her estate into three roughly equal parts” and arguing that the Court was likely swayed to some extent by the “equities” of the situation).

119. *See* Rebecca Hollander Blumoff, *The Procedural Justice of Personal Jurisdiction*, 65 ARIZ. L. REV. 643, 663–64 (2023) (noting that both cases arose out of the defendant’s lone contact with the forum state, although the defendant in *McGee* had arguably engaged in the more purposeful contact).

120. The *McGee* defendant had mailed a reinsurance certificate to the insured in California after agreeing to assume the business of his prior insurer, 355 U.S. at 221–22, while the *Hanson* defendant had merely continued to administer a Delaware-formed trust after the settlor moved from Pennsylvania to Florida, an activity the Court found to be more passive. *See Hanson*, 357 U.S. at 251–52 (“[T]he record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*”).

121. Vitiello, *supra* note 118, at 402.

[the forum state's] laws"<sup>122</sup>—gave the Court space to reach different outcomes in these two cases.

In addition to its concerns about the specific result in *Hanson*, the Court may also have wished to reorient the doctrine more generally to avoid giving the impression that personal jurisdiction would be available whenever the defendant would not be inconvenienced, a view that could have resulted in an undesirable broadening of the doctrine at a time when long-distance travel was becoming ever more commonplace. In *McGee*, the Court had taken a multifaceted approach in which its primary focus was a balancing of fairness concerns, such as the comparatively minor inconvenience to the defendant in that case, the general recognition that “modern transportation and communication have made it much less burdensome” to defend across state lines, the location of witnesses, and the “severe disadvantage” that plaintiffs might face if forced to litigate in a “distant state.”<sup>123</sup> By contrast, *Hanson* sidelined these considerations, focusing almost entirely on the defendant’s contacts and the idea that the defendant must “purposefully avail[] itself of the privilege of conducting activities within the forum,”<sup>124</sup> a requirement that would ultimately become virtually synonymous with the test for specific jurisdiction more generally.<sup>125</sup> More broadly, the Court attempted to clarify that the trend toward relaxed personal jurisdiction requirements did not “herald[] the eventual demise of all restrictions . . . .”<sup>126</sup> In this context, the Court’s callback to *Pennoyer*-esque “territorial limitations” on state power was perhaps intended to reinforce its shift in *Hanson* to a stricter standard more focused on the defendant’s conduct than simply the absence of severe inconvenience.

Whatever the Court’s motives in *Hanson* for suggesting—more or less in passing—that personal jurisdiction and structural territorial limitations on state power might be intertwined, it is notable that *Hanson* specifically indicated that neither choice-of-law concerns nor convenience played a role. As the Court explained, “[a court] does not acquire . . . jurisdiction by being the ‘center of gravity’ of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law.”<sup>127</sup> This leaves the meaning

122. *Hanson*, 357 U.S. at 253.

123. *See McGee*, 355 U.S. at 222–24.

124. *Hanson*, 357 U.S. at 253.

125. *See, e.g.*, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (explaining that “the contacts needed for [specific] jurisdiction often go by the name ‘purposeful availment’”).

126. *Hanson*, 357 U.S. at 251.

127. *Id.* at 254.

of the Court's pronouncements somewhat mysterious; if the danger of overreach here is neither the burden on the defendant in traveling to the forum nor the risk of excessively broad application of the forum's law, what exactly was the Court concerned about?

This confusion would be compounded by mixed signals in later cases considering the issue. *Shaffer v. Heitner*,<sup>128</sup> for example, represented in most respects the clearest repudiation of *Pennoyer* territorial formalism since *Shoe* itself. The Court overruled an aspect of *Pennoyer* that *Shoe* had left untouched, holding that the presence of property in a state alone could not be the basis for *quasi in rem* jurisdiction over an unrelated matter.<sup>129</sup> Further, the Court made clear that (at least for the moment) *Pennoyer's* territorial focus would no longer carry the day, rejecting *quasi in rem* jurisdiction as an "ancient form without substantial modern justification" and concluding that, going forward, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"<sup>130</sup> (language from which, to be sure, a plurality of the Court would ultimately retreat in *Burnham v. Superior Court*).<sup>131</sup> It is perhaps unsurprising, then, that the *Shaffer* Court, in a footnote,

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128. 433 U.S. 186 (1977).

129. *See id.* at 211 ("Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property.").

130. *Id.* at 212.

131. *See Burnham v. Superior Court of California*, 495 U.S. 604, 621 (1990) (plurality opinion) (arguing that this statement was intended to be limited to the observation that "*quasi in rem* jurisdiction, that fictional 'ancient form,' and *in personam* jurisdiction . . . are really one and the same and must be treated alike"). Notably, however, despite the efforts of a plurality of justices in *Burnham* to distance themselves from *Shaffer's* reasoning, and despite the Justices' unanimous endorsement, albeit in fractured opinions, of transient jurisdiction, the case does not really mark a return to territorial formalism. Rather, all four opinions in the case rest to an extent on some notion of fairness—for Justice Scalia in his plurality opinion, the traditional nature and wide contemporary acceptance of transient jurisdiction, *id.* at 622; for Justice Brennan, speaking for an equal plurality, the minimal burden of requiring someone who has already traveled to a state on their own to defend in litigation there, *id.* at 638–39 (Brennan, J., concurring); for Justice White, the belief that the procedure had not been shown to be "arbitrary" or "lacking in common sense," *id.* at 628 (White, J., concurring); for Justice Stevens, some combination of the above. *Id.* at 640 (Stevens, J., concurring). Of course, some early affirmations of transient jurisdiction were rooted in more rigidly territorial thinking. In *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959), a federal district court famously found service on a plane passing through Arkansas's airspace sufficient to confer personal jurisdiction over the defendant; the court's conclusion rested entirely on its reasoning that a state's airspace constituted space within the state's territorial limits.

appeared to dismiss the state-sovereignty language in *Hanson* as essentially meaningless, explaining that “the *Hanson* Court’s statement that restrictions on state jurisdiction ‘are a consequence of territorial limitations on the power of the respective States’ simply makes the point that the States are defined by their geographical territory,” and reflected the fact that, in *Hanson*, “the Court . . . determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State . . . .”<sup>132</sup> In other words, the Court seemed to be arguing, territory was relevant to personal jurisdiction only in the obvious sense that, because states have territorial borders, minimum contacts with a particular state are also defined by reference to a state’s territory.

Yet despite *Shaffer*’s overall rejection of the *Pennoyer* framework and its sidelining of territoriality and state sovereignty rhetoric in particular, the Court picked up the federalism theme forcefully less than three years later in *World-Wide Volkswagen Corp. v. Woodson*.<sup>133</sup> There, the Court appeared to clarify the relationship between fairness and federalism concerns, calling these “two related, but distinguishable, functions” of the “concept of minimum contacts”<sup>134</sup>—on the one hand, “protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum” and, on the other, “ensur[ing] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”<sup>135</sup> The Court went further in suggesting that the second function swept beyond the defendant’s immediate interests; it noted that “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . . , the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”<sup>136</sup>

The Court’s decision to situate considerations of federalist balancing as central to *World-Wide* perplexed and divided scholars.<sup>137</sup> This was especially true in light of another about-face: the Court’s seeming repudiation of such concerns shortly thereafter in *Insurance*

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132. *Shaffer*, 433 U.S. at 204 n.20.

133. 444 U.S. 286, 292 (1980).

134. *Id.* at 291–92.

135. *Id.* at 292.

136. *Id.* at 294.

137. See Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1706–07 (2011) (“Currently, there is a lively debate among jurisdiction scholars over whether due process concerns are the sole considerations relevant to assessing the boundaries of state court jurisdiction, or whether state sovereignty concerns are also pertinent.”).

*Corp. of Ireland v. Compagnie des Bauxites de Guinée*.<sup>138</sup> There, the Court had to consider whether a federal court was justified in imposing a finding of personal jurisdiction over the defendant as a sanction for its failure to produce discovery relevant to the question of whether it had minimum contacts with Pennsylvania.<sup>139</sup> In a unanimous decision—with only Justice Powell in concurrence expressing any reservations<sup>140</sup>—the Court found that such a sanction was valid, clearly and forcefully rejecting the idea that personal jurisdiction was bound up with state sovereignty for two central reasons. First, the Court reasoned, protection against overreaching personal jurisdiction derived from the Fourteenth Amendment Due Process Clause rather than Article III or other structural limitations on judicial power; therefore, the Court argued, it involved an “individual right”<sup>141</sup> and “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”<sup>142</sup> Second, in many circumstances, personal jurisdiction restrictions could be waived or estopped based on the defendant’s conduct, a “characteristic[.]” that, for the Court, “portray[s] it for what it is—a legal right protecting the individual.”<sup>143</sup>

The Court made little effort to explain its divergence from prior cases. The opinion’s only mention of *World-Wide* came in a footnote responding to Justice Powell’s concurrence, in which the Court dismissed the discussion of state sovereignty in *World-Wide* as “ultimately a function of the individual liberty interest preserved by the Due Process Clause.”<sup>144</sup> Again, the Court rested on the same two points—that the Due Process Clause “is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns” and that personal jurisdiction is waivable, whereas “if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement[.]”<sup>145</sup>

Notably, then, the Court appeared to take three quite different positions on the issue within a five-year period from 1977 to 1982.

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138. 456 U.S. 694 (1982).

139. *Id.* at 699–700.

140. *Id.* at 710 (Powell, J., concurring) (expressing concerns that the Court’s “theory could require a sweeping but largely unexplicated revision of jurisdictional doctrine” that might have unwarranted effects on “sovereign limitations on state jurisdiction”).

141. *Id.* at 703 (majority opinion).

142. *Id.* at 702.

143. *Id.* at 704.

144. *Id.* at 702 n.10.

145. *Id.*

In *Shaffer*, the Court sidelined territoriality and stressed that the advent of the minimum contacts standard represented a sharp break with the *Pennoyer*-era worldview. In *World-Wide*, the Court couched more modern concerns about overstepping states in *Pennoyer*-esque rhetoric, ultimately suggesting that minimum contacts requirements had a sovereignty-policing function quite apart from any issues of unfairness to the defendant. In *Insurance Corp. of Ireland*, the Court appeared to think better of this idea, stressing that the location of limits on personal jurisdiction in the Due Process Clause necessitated a focus on the defendant's interests. Although scholars continued to debate the issue, for many the more extensively reasoned rejection of the state sovereignty rationale in *Insurance Corp. of Ireland* suggested for the moment that such concerns had gone by the way-side, perhaps representing an unfortunate intrusion of *Pennoyer*-era language that the Court had quickly thought better of and repudiated. But the Court's later embrace of *World-Wide*'s federalism concerns would ultimately prove this interpretation to be incorrect.<sup>146</sup>

### C. *The Meaning and Impact of World-Wide's Federalism Dimension*

Given such rapid-fire shifts on the relevance of territoriality concerns, it is worth considering at this juncture what exactly the Court might have meant in the first place when it suggested in *World-Wide* that personal jurisdiction serves as an "instrument of interstate federalism" that restrains states from "reach[ing] out beyond the limits imposed on them . . . as coequal sovereigns in a federal system."<sup>147</sup> Both commentators and later cases have attempted to supply explanations, but despite the Court's frequent invocation of this passage in subsequent cases, its meaning remains far from clear. One common interpretation is that *World-Wide*'s interstate federalism discussion is simply a nod to tradition, an effort to stress that the *Pennoyer*-era understanding of state sovereignty has not gone away (at least in the sense that territory still poses meaningful limits on a court's power over out-of-state defendants).<sup>148</sup> A second view, more prominent recently and invoked by the Court in *Fuld*, is that a defendant's due

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146. See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 70 (1990) (giving modest praise to *Insurance Corp. of Ireland* by noting that "[f]or once, the Court appeared to have read the fourteenth amendment [sic] before launching into another long opinion reciting a huge laundry list of factors" and expressing optimism that the case was "perhaps . . . the first crack in the foundation" of the irrational aspects of minimum contacts doctrine).

147. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

148. See *infra* notes 150–51.

process rights have less to do with fairness (in the sense of convenience or lack of forum bias) than with being subject to jurisdiction only in a court that is acting within federalism-driven limits on its regulatory authority.<sup>149</sup> As the following discussion argues, however, neither of these explanations is fully satisfactory.

To begin with, an obvious way of understanding the sovereignty/federalism discussion in *World-Wide* is as a callback to *Pennoyer*, either in the more direct sense of suggesting a fundamental continuity between the minimum contacts standard and the territorial-formalist view or in a looser way intended to stress more generally that, despite its break with the strict territoriality of the past, minimum contacts is not an anything-goes standard. Either understanding would suggest that the Court was motivated by some of the same preoccupations that it was in *Hanson*, and the two cases do share similar postures and concerns: As in *Hanson*, the defendant in *World-Wide* prevailed on the personal jurisdiction issue, and the *World-Wide* opinion at several points stressed the importance of maintaining significant limits on personal jurisdiction's availability even in an interconnected world.<sup>150</sup>

Many commentators, particularly those who defended *World-Wide*'s approach, initially understood the case this way, seeing a consistent line of territoriality concern within personal jurisdiction doctrine dating from *Pennoyer*-era and even pre-*Pennoyer* times.<sup>151</sup> Under this view, as commentators have argued,<sup>152</sup> the Court was

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149. *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 17–18 (maintaining that assessing burden on defendant involves not only a consideration of practical problems created by litigating in a certain forum, but also of interstate federalism concerns of submitting the defendant to the power of a certain state); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884–85 (2011) (explaining the relationship between personal jurisdiction and the restraints imposed by federalism on the scope of each state's lawful power).

150. *World-Wide*, 444 U.S. at 296 (expressing concern that, under the broader theory of personal jurisdiction proposed by the plaintiffs, “[e]very seller of chattels would in effect appoint the chattel his agent for service of process”).

151. See, e.g., Stein, *supra* note 65, at 690 (arguing that, from *Pennoyer* through *Shoe*, “inappropriate assertions of jurisdiction were viewed not as mere infringements on a defendant’s freedom, but as violations of the sovereignty of other states”); Rhodes, *supra* note 62, at 406 (noting that the purposeful availment requirement reflects commonalities between “post-*Shoe*” and “pre-*Shoe*” doctrine); *id.* at 391, nn.12–14 (collecting pre-*Pennoyer* cases that applied a territorial approach to jurisdiction).

152. See Rhodes, *supra* note 62, at 387–88 (arguing that while “the nomenclature has changed [and] realism has replaced formalism,” modern personal jurisdiction doctrine has “the same conceptual core as it did in the nineteenth century,” with both relying on a “social contract philosophical tradition”); Kogan, *supra* note 59, at 262 (describing different iterations of personal jurisdiction doctrine over the centuries as versions of a “neo-federal autobiography”); Glenn B. Manishin, Comment,

perhaps attempting to rework *Pennoyer's* territorialist framework for a later era less comfortable with rigid formalist limits.

If the territorial-formalist worldview is understood in a very broad and general way to mean a perspective that dangers exist in broadly extending individual states' personal jurisdiction over far-flung defendants, this interpretation perhaps has some merit. Indeed, the Court's own apparent, if temporary, repudiation of the state-sovereignty idea in *Insurance Corp. of Ireland* suggests that the Court itself saw *World-Wide* this way—as an offhand invocation of *Pennoyer*-era values of which it later thought better.<sup>153</sup>

At the same time, there are several reasons why this idea fails to provide a complete or fully satisfactory explanation. To begin with, it is difficult to trace a meaningful connection between the formalism that informed *Pennoyer* to anything the Court might have been concerned with in *World-Wide*.<sup>154</sup> The Court has, over the years, advanced many theories to explain why contacts-based personal jurisdiction is constitutional: the idea that contacts ensure the forum state's legitimate interest in hearing a case,<sup>155</sup> that they manifest the defendant's implicit acquiescence to suit in a particular forum,<sup>156</sup> and—perhaps most persistently—that they reflect a basic bargain of fairness, in which a defendant who has voluntarily benefited from an association with a state should be reasonably expected to answer for any harm arising from its activities there.<sup>157</sup> All of these justifications, however, reflect a worldview that is not just different from *Pennoyer's*

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*Federalism, Due Process, and Minimum Contacts*, 80 COLUM. L. REV. 1341, 1343, 1350, 1357 (1980) (explaining that there was a shift from the more rigid *Pennoyer* framework to a “more pragmatic evaluation of the defendant's activities in relation to the forum state.”).

153. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (attempting to minimize *World-Wide's* invocation of federalism and sovereignty).

154. See Drobak, *supra* note 50, at 1024 (pre-*Pennoyer* courts “accepted the proposition of territorial limits on jurisdiction as a maxim, but they did not justify their use of this proposition as a means to protect federalism or the sovereignty of the states”).

155. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 263 (2017) (suggesting that personal jurisdiction is improper when the forum state has “little legitimate interest in the claims in question”).

156. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (“The principal inquiry in [personal jurisdiction] cases . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign.”).

157. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (noting that, when a defendant has significant contacts with a state, “because his activities are shielded by ‘the benefits and protections’ of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well”).

but fundamentally incompatible with it.<sup>158</sup> Territorial-formalist reasoning about personal jurisdiction had nothing to do with whether a state had a meaningful interest in a dispute or whether the defendant might be reasonably held to account based on its activities in a certain place. Rather, it reflected an inherent limit on the assertion of state coercive power outside state borders, in the same way that today we do not permit state authorities to journey into another state to make an arrest or to ensure that a factory is conforming to relevant environmental standards.<sup>159</sup> On some level, to be sure, these restrictions protect each state's territorial integrity and thus, in some sense, safeguard their retained sovereignty within a federalist system. At the same time, they have nothing to do with the question of balancing interstate power in the realm of regulatory authority, where the proper reach of state power is not so neatly delineated.

Another reason why the *Pennoyer*-revival explanation seems inadequate is that the Court itself, in recent years, appears to have opted for an alternative understanding. Perhaps cognizant of the need to reconcile its continued invocation of state sovereignty with *Insurance Corp. of Ireland* in some fashion, the Court has attempted—at times rather awkwardly and despite concerns like those expressed by Justice Alito in *Mallory*<sup>160</sup>—to yoke these concerns to the due process interests of the defendant and, in particular, to reconcile them with the defendant's ability to waive personal jurisdiction objections.

This line of reasoning seems to have surfaced first in *McIntyre*, in which Justice Kennedy, writing for a plurality, reasoned as follows: Citing *Insurance Corp. of Ireland*, he framed the due process interests protected by the Fourteenth Amendment as centering on “the individual's right to be subject only to lawful power.”<sup>161</sup> But power, in this formulation, is lawful only when “the defendant's activities manifest an intention to submit to the power of a sovereign,”

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158. To be sure, some commentators have seen continuities between *Pennoyer* and minimum contacts-era cases. See, e.g., Weinstein, *supra* note 74, at 210 (noting that the minimum contacts standard “[l]ike its predecessor . . . focuses on state borders” and that “[t]he problem of adequately explaining highly territorial rules in due process terms has thus persisted even after [*International Shoe*]”).

159. See Campbell, *supra* note 85, at 157 (arguing that, in contrast to many instances in which state courts assert personal jurisdiction, states would have a “legitimate grievance” in such scenarios).

160. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 156 (Alito, J., concurring in part and concurring in the judgment) (noting that defendant's ability to waive personal jurisdiction defenses creates “a significant obstacle to addressing [federalism] concerns through the Fourteenth Amendment”).

161. *McIntyre*, 564 U.S. at 884 (plurality opinion).

which the defendant presumably does by forming the sort of contacts with the forum sufficient for specific personal jurisdiction.<sup>162</sup> As Kennedy went on to explain, “[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”<sup>163</sup> Although this explanation is primarily focused on the defendant’s conduct, Kennedy also suggested that overreaching assertions of personal jurisdiction could have broader consequences for interstate relations, explaining that a state’s decision “to assert jurisdiction in an inappropriate case” would “upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>164</sup>

A few features of this explanation are worth noting. To begin with, Justice Kennedy seems to introduce a new, consent-like formulation to respond to the incongruity, regularly noted by the Court itself,<sup>165</sup> of locating structural federalism issues in the individual rights-focused Due Process Clause.<sup>166</sup> The *McIntyre* plurality suggests—straightforwardly enough, though in a way that is in some tension with other personal jurisdiction cases that had sought to move away from a consent-based framework<sup>167</sup>—that power over the defendant is lawful where minimum contacts are present because, by undertaking various activities in a state, the defendant has implicitly acceded to it.

As presented in *McIntyre*, however, this explanation falters for two reasons. First, there is an element of circularity in conceiving of the Due Process Clause as protecting the “right to be subject only to lawful power” where the standards of lawfulness derive from the Due Process Clause itself.<sup>168</sup> Second, restating the test for personal jurisdiction as an index of the lawfulness of state power still does

162. *Id.* at 881–82.

163. *Id.* at 884.

164. *Id.*

165. *See* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 10 (1982) (noting that the Fourteenth Amendment Due Process Clause is “the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”).

166. *See McIntyre*, 564 U.S. at 879–80 (plurality opinion) (explaining that due process protections exist both “with respect to the power of a sovereign to resolve disputes through judicial process [and] with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.”)

167. *See Burnham*, 495 U.S. at 617–18 (describing the Court as having moved away from an implied consent framework in personal jurisdiction doctrine).

168. *See* Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. REV. 65, 118–19 (2015) (arguing that *McIntyre*’s conclusion that “a lack of

not explain why it should be spoken of as a federalism question at all rather than an individual right. In this initial framing, that is, the lawfulness of state power rests entirely on the defendant's intentions and activities that manifest those intentions, not on any larger structural constraints on state authority. Ultimately, then, as Professor Scott Dodson has argued, the plurality's reasoning seems primarily a way to recast the focus of minimum contacts doctrine to an idea of implicit consent as a measure of fairness.<sup>169</sup>

Although this understanding is at least consistent with the idea that jurisdiction is a process-based, waivable right, it does nothing to explain why or how personal jurisdiction doctrine might function as a cap on state sovereignty in a way unrelated to the defendant's immediate interests.<sup>170</sup> Indeed, *McIntyre's* plurality seems to tacitly acknowledge its failure to make this connection by suggesting that, despite the opinion's apparent focus on whether the defendant has displayed an "intention to submit to the power of a sovereign," its true concern is not the defendant's intent but the state's legitimate stake in the dispute. After all, one of the key question, the plurality suggests, is whether the defendant's conduct is sufficiently connected to the state's "society or economy" such that the state may legitimately render "judgment concerning that conduct" without "upset[ing] the federal balance."<sup>171</sup> Thus, the plurality suggests, a defendant submits to the forum state's power precisely to the extent that the defendant engages in conduct that the forum state has a right to regulate. Given that, framing the issue in terms of the defendant's intent seems largely superfluous; the real question is whether the

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submission to a sovereign means that the exercise of personal jurisdiction violates the defendant's due process rights" is circular).

169. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 25 (2018). Notably, in *Mallory*, the Court also focused on consent in personal jurisdiction, finding that Pennsylvania could assert general personal jurisdiction over a nonresident defendant based on a statute requiring consent to personal jurisdiction as a condition of doing business in the state. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 144–46 (2023) (plurality opinion). Nonetheless, the *Mallory* defendant's "submission to Pennsylvania's corporate registration statute was unlike any of *McIntyre's* recognized categories of consent." See Linda S. Mullenix, *Railroading Personal Jurisdiction*, 43 REV. LITIG. 141, 172 (2024).

170. See Perdue, *supra* note 26, at 740 (noting how, "despite frequent references to sovereignty," Justice Kennedy's jurisdiction analysis ultimately centers defendants); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 497–98 (2012) (noting that Justice Kennedy's "choosing to speak in terms of sovereignty or submission does not necessarily entail a substantive difference in terms of the permissible scope of jurisdiction").

171. See *McIntyre*, 564 U.S. at 884.

defendant's actions are sufficiently connected to the forum state to justify that state's intervention. And if that is the case, it remains unclear why the Due Process Clause enters into the equation at all.

*McIntyre* in general, and its plurality opinion in particular, received highly negative reviews from commentators.<sup>172</sup>; Patrick J. Borchers, for example, described Kennedy's opinion as "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era," in large part because of its "bull-headed attempt to ground personal jurisdiction in a sovereignty theory."<sup>173</sup> But despite such criticism, as well as Justice Kennedy's apparent failure to garner a majority for the sovereignty theory in *McIntyre* itself,<sup>174</sup> the Court nonetheless has sounded similar themes in subsequent personal jurisdiction cases. Of particular note, in *Bristol-Myers Squibb v. Superior Court*,<sup>175</sup> an 8–1 majority put forth an argument similar to the *McIntyre* plurality's in a context where structural limits on state power appeared all the more relevant to the dispute. At stake in *Bristol-Myers Squibb* were California's efforts to assert personal jurisdiction over a large, multi-state action alleging harm from the defendant's blood-thinning prescription drug; although the defendant sold and marketed the product in California, the out-of-state plaintiffs had been prescribed and ingested the drug elsewhere.<sup>176</sup> Calling the California court's finding that it could assert personal jurisdiction over the defendant based on its extensive California contacts a "loose and spurious form of general jurisdiction," the Court reversed.<sup>177</sup>

As the plurality had in *McIntyre*, the Court tried once more to thread the needle of suggesting that personal jurisdiction encompassed federalism concerns while also attempting to cast such concerns in terms of due process owed to the defendant personally. Although acknowledging that the burden on the defendant,

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172. Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2011); see also Mullenix, *supra* note 169, at 168 (noting that "*McIntyre* did little to clarify" unsettled doctrinal issues and instead "offered a surprising, new, and lengthy digression on a state sovereignty theory of personal jurisdiction . . ."); Perdue, *supra* note 26, at 729 ("Personal jurisdiction also seems to inspire foolish remarks and poor opinions, and [*McIntyre v.*] *Nicastro* may set a new low in that regard."); Charles W. "Rocky" Rhodes & Cassandra B. Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. LEGIS. 377, 395 n. 111 (2020) (citing scholarly criticism).

173. Borchers, *supra* note 172, at 1263.

174. See *id.* (noting that the only "saving grace" of Kennedy's opinion is that it garnered only four votes).

175. *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017).

176. *Id.* at 258–59.

177. *Id.* at 264.

including the “practical problems resulting from litigating in the forum,” was personal jurisdiction’s primary focus, the Court suggested that the defendant’s burden also “encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”<sup>178</sup> Quoting *Hanson*, the Court reiterated that personal jurisdiction limits are a “consequence of territorial limitations on the power of the respective States” and noted that “this federalism interest may be decisive” even in situations where the defendant suffers no inconvenience.<sup>179</sup>

Again, the argument the Court is making is difficult to parse. To begin with, although the Court clearly wished to tie federalism and state sovereignty considerations to the defendant’s individual rights protected by the Due Process Clause, the Court failed to explain why this “more abstract matter” would ever be a concern to a defendant who suffers no practical harm from being sued in a particular forum. To be sure, it is possible to imagine why the application of a particular forum’s *law* might be unfair to the defendant, but exorbitant application of forum law has traditionally been seen as another matter entirely, governed by a separate line of cases with no connection to personal jurisdiction doctrine *per se*.<sup>180</sup> Moreover, after having suggested that concerns about improper projection of state authority played a role in personal jurisdiction doctrine only because of their effect on the defendant, the Court went on to discuss the possibility that federalism interests apart from the defendant’s individual concerns could be “decisive” in personal jurisdiction cases.<sup>181</sup>

One can certainly understand why the defendant might have resisted a personal jurisdiction finding in this case, but the defendant’s true concerns likely centered either on the scale of the action (it is obviously to defendants’ advantage if it is more difficult for mass litigation involving parties from multiple states to proceed) or dislike of the forum (the defendant might prefer to be sued in its home forum or at least a state it perceives to be less plaintiff-friendly).<sup>182</sup> Both

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178. *Id.* at 263.

179. *Id.*

180. *See, e.g.,* Allan Erbsen, *Personal Jurisdiction’s Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists*, 75 FLA. L. REV. 415, 473 (2023) (describing personal jurisdiction and choice of law as “discrete silos of doctrine”). Stewart E. Sterk has suggested that the concerns at issue when the Court speaks of sovereignty and federalism are not limited to the forum’s substantive rules of law but involve its “legal environment” more generally. *See* Sterk, *supra* note 4, at 1175–76. Again, however, the Court fails to spell this out.

181. *Bristol-Myers Squibb*, 582 U.S. at 263.

182. Stewart E. Sterk thus suggests that personal jurisdiction restrictions are related to restrictions on choice of law but go beyond them by attempting to ensure

concerns, to the extent they are relevant to personal jurisdiction doctrine at all, would seem to fall under a fairness/burden umbrella rather than a federalism one.

In other post-*McIntyre* cases mentioning a federalism/sovereignty interest, the Court has devoted less effort to packaging these concerns as part of a due process/defendant-fairness analysis, further complicating the landscape by suggesting, contrary to the *McIntyre* plurality, that any sovereignty component that personal jurisdiction doctrine might contain can, in fact, be wholly differentiated from the defendant's individual rights. Thus, in *Ford Motor Co. v. Montana Eighth Judicial District*,<sup>183</sup> the Court concluded that Ford's sales and advertisements in the two forum states at issue were sufficient to establish personal jurisdiction over it for claims involving injuries allegedly caused by Ford vehicles, even though the cars in question had been designed and purchased out of state. Although the Court's analysis rested largely on the idea that "allowing jurisdiction in these cases treats Ford fairly" because Ford had availed itself of the privileges of doing business in the forum states and could reasonably expect to be sued there,<sup>184</sup> the Court also considered the federalism angle. From that perspective, the Court found, personal jurisdiction would be proper because the forum states had "significant interests at stake," including "providing . . . residents with a convenient forum for redressing injuries inflicted by out-of-state actors," and "enforcing their own safety regulations."<sup>185</sup>

This analysis again suggests, in more explicit terms than some other cases, that the federalism element of personal jurisdiction is

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that defendants are subject to the "the entire legal environment" (including such issues as discovery restrictions or corporation-friendly statutes of limitations) of the state with the strongest interest in regulating them. See *Sterk*, *supra* note 4, at 1175–76. In this vein, it is worth noting that a likely effect of *Bristol-Myers Squibb* is to require multistate class actions to be filed in the defendant's principal place of business or state of incorporation, where general jurisdiction is likely to be present. See *Bristol-Myers Squibb*, 582 U.S. at 268 (suggesting that plaintiffs could bring suit by "joining together in a consolidated action in the States that have general jurisdiction" over the defendant, and naming the states where *Bristol-Myers Squibb* was incorporated or had its principal place of business). Scholars have commented on the Court's "undue solicitude for corporations" in *Bristol-Myers Squibb* and other personal jurisdiction cases. See, e.g., Judy M. Cornett, *The Not-So-Stealthy Revolution in Personal Jurisdiction: A Response to Michael Hoffheimer*, UNIVERSITY OF TENNESSEE LAW FACULTY PUBLICATIONS (2018), [https://ir.law.utk.edu/utklaw\\_facpubs/111/](https://ir.law.utk.edu/utklaw_facpubs/111/) [<https://perma.cc/9ETJ-ESMX>].

183. 592 U.S. 351, 355–57 (2021).

184. *Id.* at 367–68.

185. *Id.* at 368 (internal quotation marks omitted) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

closely linked to the assumption that the forum will apply its own law. The Court both assumed that the forum states would apply “their own” regulations (even though much of the conduct at issue—vehicle design and sale—had occurred out of state<sup>186</sup>) and would do so out of a concern for protecting their own domiciliaries—an interest that is frequently determinative in modern choice-of-law analysis.<sup>187</sup> However this language is understood, the Court omitted any explanation of why the presence or absence of state interests should bear on the defendant’s due process rights.

#### D. Fuld’s Sharp Turn Toward a Federalism-Centered View

Despite the Court’s failure to satisfactorily explain in *McIntyre* or *Bristol-Myers Squibb* why interstate federalism issues should be bound up with the Due Process Clause or with personal jurisdiction doctrine more generally,<sup>188</sup> it appears in *Fuld v. Palestine Liberation Organization*<sup>189</sup> to have doubled down on the same reasoning. Unlike the other personal jurisdiction cases in which the Court has discussed federalism/sovereignty functions of personal jurisdiction, *Fuld* had nothing to do with state power at all. Rather, the question at issue was whether the federal government could subject alleged perpetrators of terrorism to personal jurisdiction in U.S. courts by construing certain statutorily enumerated activities as consent to jurisdiction.<sup>190</sup> In analyzing this question, the Court declined to apply the Fourteenth Amendment minimum contacts framework at all.<sup>191</sup> The Court found instead that Congress’s assertion of jurisdiction was valid because it rested on “conduct closely related to the

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186. *See id.* at 366–67 (“[T]he company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States’ residents.”).

187. *See Spillenger, supra* note 27, at 1243 (“The most important change wrought by the revolution in American choice-of-law doctrine during the second half of the twentieth century is the increased emphasis on party domicile in resolving conflicts of laws.” (footnote omitted)); *see also infra* Part IV.

188. In *Mallory*, Justice Alito suggests that exercises of personal jurisdiction could in fact raise federalism concerns but that it would be inappropriate to address such issues via the Due Process Clause. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 156–57 (2023) (Alito, J., concurring in part and concurring in the judgment).

189. 606 U.S. 1 (2025).

190. *Id.* at 1–2.

191. *See id.* At 16 (“Because the State and Federal Governments occupy dramatically different sovereign spheres, the Court declines to import the Fourteenth Amendment minimum contacts standard into the Fifth Amendment. Rather, the Fifth Amendment permits a more flexible jurisdictional inquiry commensurate with the Federal Government’s broader sovereign authority.”).

United States that implicates important foreign policy concerns.”<sup>192</sup> Without deciding whether a separate fairness analysis was necessary, the Court also found that the exercise of personal jurisdiction was reasonable under the test first applied in *Asahi Metal*.<sup>193</sup>

Reaching this result, however, required the Court to clarify precisely *which* elements of standard personal jurisdiction analysis did not apply in the Fifth Amendment context and to explain why that was the case. And in concluding that, for the most part, the strictures of minimum contacts had no relevance in the federal arena, the Court—leaning on language from *World-Wide Volkswagen, Nicastro*, and *Bristol-Myers Squibb*, among other cases—suggested that the explanation for this holding was that minimum contacts doctrine was inextricably linked to issues of interstate federalism (and thus would obviously have no relevance to the federal and international context at hand). Quoting *World-Wide’s* pronouncement that personal jurisdiction doctrine serves “two related, but distinguishable, functions”<sup>194</sup> of both “treating defendants fairly” and “protecting interstate federalism,”<sup>195</sup> the Court nonetheless highlighted the importance of the second purpose in at least three ways. First, the Court stressed that “interstate federalism concerns . . . may be *decisive* for Fourteenth Amendment purposes,” even in situations where personal jurisdiction is not unduly burdensome to the defendant.<sup>196</sup> Second, the Court suggested that the fairness function was in fact closely related to (or even derivative of) the

192. *Id.* at 18.

193. In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the Court was evenly divided on whether minimum contacts were present, but nonetheless held that there was no personal jurisdiction over the defendant on the ground that it would be unreasonable to require the defendant to appear in the case at hand. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). The Court thus suggested that reasonableness considerations could defeat personal jurisdiction even where the defendant had established minimum contacts with the forum, especially where a non-domestic defendant was concerned. *See id.* at 116 (plurality opinion) (citing “the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State” as grounds for a finding of unreasonableness). The reasonableness factors named by the Court included “the burden on the defendant, the interests of the forum State, . . . the plaintiff’s interest in obtaining relief[,] . . . ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.’” *Id.* at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

194. *Fuld*, 606 U.S. at 14 (quoting *World-Wide*, 444 U.S. at 291–92).

195. *Id.* at 13 (internal quotation marks omitted) (quoting *World-Wide*, 44 U.S. at 293).

196. *Id.* at 17.

interstate federalism one, echoing the *McIntyre* plurality's reasoning that a central measure of fairness is ensuring that the defendant is "subject only to lawful power"<sup>197</sup>—in other words, power that does not exceed the state's proper territorial scope. Finally, in a later discussion of fairness in the federal personal jurisdiction context, the Court suggested that the so-called "reasonableness" factors first articulated in *Asahi Metal*, as opposed to the minimum contacts analysis itself, were the area of doctrine intended to address core fairness concerns.<sup>198</sup>

Because *Fuld* is only indirectly about the purpose of minimum contacts, it is possible that it will have little direct doctrinal relevance in future cases. Moreover, it is certainly less than clear that the Court intended for its minimum contacts comments to have broad significance. It is conceivable, that is, that the Court was not so much concerned with cementing the state sovereignty/minimum-contacts connection as it was eager to find a basis for finding the minimum contacts standard inapplicable to the federal context in order to uphold a federal statute that it clearly thought was a valid exercise of congressional power.<sup>199</sup>

Nonetheless, the Court's preoccupation with the federalism elements of personal jurisdiction doctrine in *Fuld*, in a discussion that carefully stitches together relevant language from several prior cases,<sup>200</sup> is striking. And while *Fuld* itself may be a one-off case in the sense that it addresses a novel issue unrelated to how personal jurisdiction in the state context is administered, it nonetheless caps off what seems to be a clear trend in recent personal jurisdiction cases for the Court to reassert the centrality of the interstate balance of power.

Further, the implications of the Court's minimum contacts discussion in *Fuld* potentially sweep further than any of its previous statements. By suggesting that it is only through the *Asahi Metal* reasonableness factors—first applied more than forty years after

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197. *Id.* at 14 (quoting *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884).

198. *Id.* at 23–24 (maintaining that because the PSVJTA comports with the *Asahi* reasonableness factors, its authorization for the exercise of personal jurisdiction is fair).

199. For example, despite Justice Alito's seeming discomfort in his *Mallory* concurrence with locating federalism concerns in due process-based personal jurisdiction analysis, he joined the *Fuld* opinion without comment. Compare *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 156 (2023) (Alito, J., concurring in part and concurring in the judgment), with *Fuld v. Palestine Liberation Org.*, 606 U.S. 1 (2025).

200. See *Fuld*, 606 U.S. at 11–16 (analyzing the line of personal jurisdiction cases applying to jurisdiction arising from federal statute).

*International Shoe* was decided<sup>201</sup>—that convenience and burden issues are weighed, the Court implied, in what would be a sharp departure from past understanding, that minimum contacts analysis has little or nothing to do with these issues.<sup>202</sup> Rather, the purposes of minimum contacts, in the Court’s view, are (1) “treating defendants fairly”<sup>203</sup>—fairness, however, meaning not the practical burdens of litigation but the lawful-sovereignty-as-due-process formulation of the *McIntyre* plurality<sup>204</sup>; and (2) “protecting interstate federalism,” a goal advanced “in particular,” in the Court’s view, through “the requirement that a defendant have minimum contacts with the forum State,” which “functionally ‘ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.’”<sup>205</sup> This formulation suggests several novel propositions simultaneously: that minimum contacts doctrine’s central purpose is to restrain the excessive extraterritorial projection of state authority; that the only individual right the doctrine protects is the right of the defendant to be free from inappropriate assertions of state regulatory power; and that an equally important function of the doctrine is to restrain state overreaching even when the defendant is personally unaffected by it. It is worth remarking on how radically this description of minimum contacts departs from the way the doctrine is presented in *International Shoe* (not to mention *Insurance Corp. of Ireland*),<sup>206</sup> it further bears noting how incongruous this federalism-policing purpose is in a doctrine that is rooted in constitutional due process and that focuses almost exclusively on the defendant’s own actions.

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201. Although the Court first mentioned the factors in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), it was not until *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), that the Court clarified how they should be used and applied them in a way that affected the ultimate outcome.

202. See *Fuld*, 606 U.S. at 23–24 (declining to apply Fourteenth Amendment minimum contacts requirement to the Fifth Amendment Due Process Clause in favor of a flexible reasonableness standard).

203. *Id.* at 13.

204. The Court appeared to indicate as much by citing the *McIntyre* plurality in stating that this “framing” of these issues “follows from the principles of interstate federalism embodied in the Constitution . . . and the related protections of due process which ensure that individuals are ‘subject only to lawful power[.]’” *Id.* at 14 (internal citation and quotation marks omitted).

205. *Id.* at 13–14 (internal quotation marks omitted) (quoting *World-Wide*, 444 U.S. at 292).

206. See *World-Wide*, 444 U.S. at 292 (noting that personal jurisdiction “ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”).

IV.  
MAKING SENSE OF MINIMUM CONTACTS AS A TOOL TO  
RESTRAIN STATE POWER

As the previous Part has emphasized, it is not clear that the Court's halting, intermittent, and self-contradictory explanations of the federalism-personal jurisdiction link can be trusted as a guide to the Court's true concerns. Although some of the Court's characterizations of this connection evoke *Pennoyer*, they seem to focus on territoriality in an altogether different sense—not as a theoretical justification for the exercise of the state's physical power but as a way of delineating the proper reach of the state's regulatory interests. And, although the Court has tried awkwardly to cast interstate federalism issues as an element of the defendant's due process rights, it has failed to explain the connection between the two—that is, to spell out why a defendant sued in a convenient and unbiased forum that has not overreached in the application of forum law could possibly have any sovereignty-based complaints.

Given these realities, what could it possibly mean to enlist personal jurisdiction as a mechanism to ensure that states do not reach out beyond the proper limits of their power? The following Part discusses several possibilities suggested by scholars and then advances its own: that U.S. law is currently lacking in a theory of when states should be permitted to apply their decisional rules to out-of-state conduct or events. Under this view, personal jurisdiction is an attempt to fill this gap.

A. *Previously Suggested Rationales*

A primary way many scholars have understood the Court's federalism/sovereignty rhetoric is that the Court is cognizant of the tendency of state courts to favor forum law in many cases and that, given this, personal jurisdiction doctrine helps to ensure that the defendant has a meaningful enough connection with the forum state to justify application of that state's law.<sup>207</sup> Although this concern might be better addressed through direct limits on choice of law, the difficulty of policing such limits perhaps makes personal jurisdiction, as one scholar has suggested, an attractive "first cut" solution to the problem.<sup>208</sup>

Indeed, commentators have argued with some frequency that concerns about choice of law (or prescriptive jurisdiction more

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207. See generally *supra* note 52.

208. See *Perdue, Beetle*, *supra* note 50, at 572.

broadly) have been baked into minimum-contacts analysis from the start. Joseph William Singer suggests that the Court's decision to focus on contacts indicates that its concern has never been purely with the burden on the defendant but instead has also included "sovereign regulatory interests."<sup>209</sup> For example, he argues, the defendant's in-state sales activity in *International Shoe* gave rise to Washington's legitimate interests in collecting its unemployment insurance tax.<sup>210</sup> Stewart E. Sterk has tied a similar argument more explicitly to choice of law, arguing that "jurisdictional rules protect an entity against defending itself in a forum likely to ignore the legal norms and rules the entity might reasonably expect to govern its legal affairs."<sup>211</sup> Although, Sterk observes, the Court's "explicit acknowledgment that choice of law plays a role in jurisdictional determinations has been grudging at best," choice of law has nonetheless proved a "critical factor" in Supreme Court decisions that the forum state lacked jurisdiction.<sup>212</sup>

Despite the fact that, as Sterk notes, the Court has been somewhat oblique in its allusions to this concern, mentions of the issue have not been entirely absent from personal jurisdiction opinions. Dissenting in *Hanson*, for example, Justice Black objected to the majority's conclusion that no personal jurisdiction existed over the defendant in Florida, explaining that "it could hardly be denied that Florida had sufficient interest so that a court with jurisdiction might properly apply Florida law . . . ."<sup>213</sup> Although recognizing that jurisdiction and choice of law were separate questions, he contended that "the two are often closely related and to a substantial degree depend upon similar considerations."<sup>214</sup>

A second rationale that many commentators have proposed is that personal jurisdiction might be an effort to replace the gap left by *Pennoyer's* waning by establishing an alternative theory for establishing the legitimacy of judicial power.<sup>215</sup> This legitimacy, for different

209. Joseph William Singer, *Hobbes & Hanging: Personal Jurisdiction v. Choice of Law*, 64 ARIZ. L. REV. 809, 823 (2022).

210. *Id.*

211. Sterk, *supra* note 4, at 1165.

212. *Id.*

213. *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting).

214. *Id.* See also *supra* note 107 (noting that *Alaska Packers* expresses a somewhat similar sentiment in the choice-of-law context).

215. Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA L. REV. 293, 308–09 (1987) (discussing how justifications for personal jurisdiction have evolved post-*Pennoyer* while continuing to be flawed and incomplete); Perdue, *Beetle*, *supra* note 50, at 535–36 (describing the Supreme Court's grounding of personal jurisdiction in due process as "an attempt to delineate the scope of one aspect of legitimate state authority").

commentators, has been grounded in several possible (and perhaps overlapping) sources: the implicit state-benefits-for-obligations “bargain” the defendant takes on by availing itself of the state’s resources; the implied consent in defendant’s voluntary decision to affiliate with the forum; or a more abstract sense that some degree of connection with a forum state renders it appropriate for the defendant to be subject to that state’s policies.<sup>216</sup> Scholar Wendy Collins Perdue has critiqued these theories on various grounds, arguing, for example, that focusing on the defendant’s actions as a source of legitimacy “cloaks governmental power with a veil of consent in a way that is destructive of individual dignity,”<sup>217</sup> but also suggesting the futility of the entire project, noting that “if a coherent doctrine of personal jurisdiction depends on the development and acceptance of a coherent philosophy of political legitimacy, then we are in for a long fight.”<sup>218</sup>

Finally, personal jurisdiction might be intertwined with federalism concerns in the sense that restricting the reach of state courts helps to prevent unfair favoritism toward the forum state or its residents. That is, personal jurisdiction might, like various dormant Commerce Clause doctrines, serve as a constitutional mechanism that prevents the inappropriate projection of state self-interest—for example, by shielding out-of-state defendants from protectionism or bias<sup>219</sup> or simply by decreasing what Justice Alito has called the “intolerable unpredictability” of litigation for businesses operating across multiple jurisdictions.<sup>220</sup>

Stewart E. Sterk has argued along these lines that personal jurisdiction has “distinct . . . advantages over limits on choice of law” in protecting a defendant’s rights.<sup>221</sup> A primary such advantage, in his view, is that personal jurisdiction concerns not merely the application of particular decisional rules but the “entire legal environment” of a particular state, including statutes of limitations, rules about discovery, or “allocating burdens of proof in particular ways.”<sup>222</sup> As

216. *See id.* at 539–46 (summarizing these views).

217. *Id.* at 543.

218. *Id.* at 546.

219. *See id.* at 550–60 (describing arguments for personal jurisdiction based on the Commerce Clause-related concerns of undue burdens on intrastate commerce and discrimination against out-of-staters).

220. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 161 (2023) (Alito, J., concurring in part and concurring in the judgment) (“Aside from the operational burdens it places on out-of-state companies, Pennsylvania’s scheme injects intolerable unpredictability into doing business across state borders.”).

221. Sterk, *supra* note 4, at 1175.

222. *Id.* at 1175–76.

a result, Sterk notes, “[c]onstraints on personal jurisdiction—but not direct constraints on choice of law—protect against all the vagaries of trial in potentially unfriendly states,” such as “judges selected by plaintiff-friendly voters or governors” or “forum antipathy to foreigners or foreign corporations.”<sup>223</sup> Indeed, one such procedural vagary includes the application of another state’s law itself; as Sterk notes, in a hypothetical world where choice-of-law limits were more stringent and personal jurisdiction requirements looser, courts would be more frequently called upon to interpret another state’s law, raising the danger that they would “inadvertently or intentionally . . . subvert the regulatory policies of the state whose sovereign interests the Court had deemed worthy of protection.”<sup>224</sup>

Although written before the decision in *Bristol-Myers Squibb*, this line of argument appears to anticipate the reasoning and result in that case in some respects, and it seems eminently plausible that the majority was driven by concerns similar to the ones Sterk raises, which might be particularly important to the Court in the mass litigation context. As has been frequently noted, *Bristol-Myers Squibb* caps off a line of corporate-friendly personal jurisdiction decisions;<sup>225</sup> its practical effect is to make a defendant corporation’s principal place of business or its place of incorporation (where general jurisdiction would likely be present) the exclusive venues in most situations for large, multistate actions against it.<sup>226</sup> Such an outcome might be driven by the Court’s beliefs both that a defendant corporation might receive fairer, more predictable treatment in its home bases *and* that, from a perspective of federalism, it might be more logical if high-stakes litigation were heard in a forum more closely connected to the defendant.<sup>227</sup>

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223. *Id.* at 1176.

224. *Id.* at 1177.

225. *See infra* note 227.

226. *See Bristol-Myers Squibb*, 582 U.S. at 268.

227. Of course, many commentators as well as Justice Sotomayor in dissent have argued strenuously against this sympathetic treatment for corporations, noting that it may come at an unwarranted cost to plaintiffs’ ability to proceed. *See, e.g., Bristol-Myers Squibb*, 582 U.S. at 269 (Sotomayor, J., dissenting) (noting that the result “will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone” and “will result in piecemeal litigation and the bifurcation of claims”); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1256 (2018) (“Plaintiffs who have similar claims stemming from a defendant’s nationwide course of conduct (like a nationally marketed defective product) and wish to sue together will now face a more limited set of options.”). But whether normatively desirable or not, this is at least a plausible linkage between personal jurisdiction and federalism.

At the same time, although it is easy to imagine that the considerations Sterk raises were part of the Court's motivation for reaching the result it did in *Bristol-Myers Squibb*, it is also striking that the Court never mentions them specifically. In *Bristol-Myers Squibb*, similar to other federalism-invoking cases, the Court hand-waves toward "the practical problems resulting from litigating in the forum" but insists that it is also centrally concerned with "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."<sup>228</sup> Thus, although Sterk's arguments would seem more than adequate to explain both the result in *Bristol-Myers Squibb* and the Court's persistence in invoking federalism, they do not explain the Court's stubborn insistence that it is not just these practical burdens and biases but also some ineffable state sovereignty-balancing interest that is at stake.

*B. Another Theory: Personal Jurisdiction as a Response to a Doctrinal Void*

Although building on all these previously mentioned theories, this Article advances a somewhat different argument for why the Court has so persistently linked personal jurisdiction with federalism. Under this view, personal jurisdiction has come to fill a doctrinal void: the absence in case law of a meaningful theory of when state courts should be permitted to impose the forum's own policies—whether through choice of law or other outcome-affecting mechanisms—on events or conduct with some extraterritorial element. Personal jurisdiction occupies this space in part in a theoretical sense, supplying at least some of what is under today's doctrine an otherwise-missing rationale for why a court's decision to apply forum policies to people or conduct outside its borders is justified. This implicit rationale would appear to rest on ideas similar to those the Court has invoked in the choice-of-law context and that are perhaps most clearly explained in *Ford*—that is, that it is appropriate for the forum to apply its own policies to out-of-state conduct when the forum has "significant interests at stake" that center on the protection of its residents.<sup>229</sup> At the same time that minimum contacts doctrine provides this guiding maxim as to when a state *should* be able to apply its own law, it also, as Perdue and others have observed,<sup>230</sup> provides a mechanism for implementing this principle in practice, requiring connections between the

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228. *Bristol-Myers Squibb*, 582 U.S. at 263.

229. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 368.

230. *See supra* note 50.

forum and the dispute that serve to reduce opportunities for a state court to apply forum law too broadly.

There is little indication that the Supreme Court has directly or explicitly relied on personal jurisdiction doctrine to fulfill this role. Indeed, as one commentator has observed, the federalism interests the Court has invoked recently are of a “curious kind” that “the Justices have shown no interest in explaining how they understand and wish to apply.”<sup>231</sup> The Court, however, *has* acknowledged the limitations and ambiguities of relying on other doctrines that have some role in limiting the possibilities of regulatory clashes between states.<sup>232</sup> Thus, this Part argues, the Court appears cognizant of both the link between forum and substantive outcome and the absence of alternative mechanisms for restraining the excessive projection of state regulatory policy through litigation.

### 1. The Link Between Personal Jurisdiction and Forum Law

In advancing the argument that personal jurisdiction fills a doctrinal gap in guarding against the exorbitant application of forum law, it is first worth reiterating two points: First, personal jurisdiction and choice of law are not necessarily connected; on the international stage (and, historically, in the United States), they have been regarded as two distinct issues. Second, despite this, states’ exercise of personal jurisdiction in the United States is in fact closely linked in several ways to the application of forum law.

To the first of these points, it should be stressed that permitting a court to exercise jurisdiction and permitting it to apply its own law are, in theory, separate inquiries. Principles of private international law recognize a distinction between prescriptive or legislative jurisdiction—a sovereign’s ability to prescribe rules of conduct, whether through legislation, judicial decisions, or otherwise<sup>233</sup>—and judicial or adjudicative jurisdiction, which is the ability to subject

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231. See Campbell, *supra* note 85, at 140 (2020).

232. See, e.g., Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 376 (2023) (acknowledging “vigorous and thoughtful critiques” of Court’s invocation of the dormant Commerce Clause as limit on extraterritorial economic regulation and suggesting that many difficult issues remain undecided (quoting *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 515 (2019))); *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 155 (2023) (Alito, J., concurring in part and concurring in the judgment) (describing use of personal jurisdiction to address federalism concerns as an example of how the Due Process Clause has “become a refuge of sorts for constitutional principles that are not ‘procedural’ but would otherwise be homeless as the result of having been exiled from the provisions in which they may have originally been intended to reside”).

233. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 401 (A.L.I. 2018).

people or property to legal process.<sup>234</sup> The jurisdictional rules of many countries reflect this distinction. In European Union law, for example, the rules addressing prescriptive<sup>235</sup> and judicial<sup>236</sup> jurisdiction are fairly crisply separated; in both cases, further, they provide straightforward formulas rather than a complex weighing of contacts and factors.<sup>237</sup> For example, a tort will, in nearly all cases, be governed either by the law of the country where the damage occurred or, in applicable cases, the law of the tortfeasor and victim's joint domicile.<sup>238</sup> A tort suit may be brought, by contrast, in the "place where the harmful event occurred or may occur."<sup>239</sup> Although these rules will likely in most cases point to the same jurisdiction, they are governed by two separate conventions and presumably reflect somewhat different considerations. Further, under this scheme, forum choice should not, in theory, affect the law that governs the dispute. Even if the defendant is subject to personal jurisdiction in more than one nation, that is, the relevant rules dictate that all potential fora should, at least in most cases, apply the same law.<sup>240</sup>

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234. *See id.*

235. Regulation (EC) No. 593/2008 of the European Parliament and the Council on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6 ("Rome I") [hereinafter Rome I]; Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations, 2007 O.J. (L 199) 40 ("Rome II") [hereinafter Rome II].

236. *See generally* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, 2012 O.J. (L 351) (the "Recast Brussels Regulation").

237. Notably, the European Union is far from anomalous on the international stage in this regard. As Ray Worthy Campbell notes, China and many other civil-law countries permit jurisdiction in tort cases wherever the tortious act took place, which may encompass both "the places where the tort is committed and the places where the result of the tort occurs." *See* Campbell, *supra* note 85, at 137–38 (2020).

238. Rome II, *supra* note 235, Ch. II, Art. 4. The rule contains an exception if the dispute presents a "manifestly closer connection with another country," as when the tort is closely connected to a preexisting contractual relationship centered in another country. *Id.*

239. *See* Recast Brussels Regulation, *supra* note 236, § 2, art. 7(2).

240. This separation of choice-of-law and personal jurisdiction rules is also characteristic of other common-law, federalist countries like Australia and Canada. In Australia, courts of a particular Australian state generally obtain personal jurisdiction over a defendant from another Australian state via service pursuant to the Service and Execution of Process Act. *See* Michael Douglas, *New Rules for Extra-Territorial Jurisdiction in Western Australia*, CONFLICT OF LAWS.NET (Mar. 27, 2024), <https://conflictoflaws.net/2024/new-rules-for-extra-territorial-jurisdiction-in-western-australia> [<https://perma.cc/2HQ8-J9BX>] ("If within Australia, the rules are effected by the *Service and Execution of Process Act 1992* (Cth) as modified by the rules of the forum court."). Until recently, Western Australia was alone among Australian

Historically, these two concepts were also treated separately in the United States. As this Article has argued, early restrictions on personal jurisdiction derived from certain ideas about state sovereignty and its limits, but courts applying them normally did not grapple with or even consider the question of how far the operation of specific state regulatory standards, as opposed to the abstract reach of state power, should extend.<sup>241</sup> The Supreme Court ultimately did turn its attention to the regulatory-reach issue, but it did so much later and in lines of doctrine that were, at least initially, wholly disconnected from personal-jurisdiction cases.<sup>242</sup>

In contrast, current U.S. personal jurisdiction and choice-of-law rules vary from both international models and domestic historical ones in two ways that together have caused these areas of doctrine to become closely linked. The first is that, at least when personal jurisdiction is based on minimum contacts, both areas of doctrine have evolved to be informed by similar—indeed, close to identical—considerations.<sup>243</sup>

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states in maintaining somewhat stricter standards, but it now follows practice in the rest of Australia. *See id.*; *see also Service, Appearance and Extradition*, WESTLAW PRACTICAL LAW (database updated Sep. 2025) (“Generally [in Australia], service is the basis of the court’s personal jurisdiction over the respondent”) (citing *Laurie v Carroll* [1958] 98 CLR 310, 323 (Austl.)). Choice of law is generally governed by rules that are uniform throughout Australia, such as *lex loci delicti* in intranational torts. *See* Robert Pietriche, *The Ascendancy of the Lex Loci Delicti: The Problematic Role of Theory in Australian Choice of Tort Law Rules*, 16 MELB. J. INT’L L. 86, 97 (2015) (“[T]he *lex loci delicti* was considered the appropriate rule for intranational torts in the modern Australian context.”). Canada appears to be the only country other than the United States where personal jurisdiction is subject to constitutional limits. *See* Audrey Feldman, Note, *Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations*, 89 N.Y.U. L. REV. 2190, 2195 n. 25 (2014) (“Canada is apparently the only other country in which personal jurisdiction has a constitutional component.”). Standards are nonetheless both less demanding than those in the U.S. and governed by a wholly different analysis than Canadian choice of law. Personal jurisdiction over defendants from outside the forum province requires a “real and substantial connection” to the forum, a test that calls for a “more fluid analysis” that is “potentially looser than the ‘minimum contacts’ standard.” Caroline Davidson, *Tort au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law*, 38 VAND. J. TRANSNAT’L L. 1403, 1437 (2005). By contrast, choice of law in Canada also is governed by *lex loci delicti* and similarly uniform rules, particularly in purely domestic cases. *Id.* at 1439.

241. *See supra* notes 73–76 and accompanying text (explaining that early discussions about intrusions on state sovereignty were abstract in nature and not concerned with the inappropriate extension of state regulatory policies).

242. *See* Florey, *Landscape*, *supra* note 29, at 1169–72 (discussing line of cases extending extraterritorial reach of state law).

243. In the choice-of-law realm, this is a fairly recent development; the current standard was not even articulated until 1981 and was not adopted by a majority until several years later. *See id.* at 1180–81.

Current limits on both are rooted, at least in part, in the Fourteenth Amendment Due Process Clause.<sup>244</sup> Further, both have come to rely on contacts with the state as the measure of constitutionality. Personal jurisdiction requires that the defendant have “minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice”;<sup>245</sup> meanwhile, valid choice of law must rest on a “significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”<sup>246</sup>

Although from the bare recitation of these standards, “significant” contacts might seem to require more extensive interaction with the forum than “minimum” ones, this has not proved true in practice, given that the Court’s application of the choice-of-law standard “is a relatively modest hurdle” outside of the class action context.<sup>247</sup> Indeed, in most cases, personal jurisdiction rules are *stricter* than those for choice of law. In other words, the existence of valid personal jurisdiction in most cases also implies that the forum has the constitutional power to apply its own law. This is in part because the choice-of-law test takes into account the plaintiff’s contacts as well as the defendant’s—and, because plaintiffs often prefer to sue in their home forum or one to which they have other ties, those contacts may go a long way toward satisfying the standard in themselves.<sup>248</sup> Thus, when personal jurisdiction over the defendant is founded on minimum contacts<sup>249</sup>—and in many cases even when it is not—it is almost

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244. Although the Full Faith and Credit Clause is nominally also a source of limits on choice of law, it has in practice ceased to play any independent role. *See id.* at 1142 (noting that the Full Faith and Credit Clause has “lost most of [its] force in recent years.”).

245. *See Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted).

246. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

247. *See Florey, Personal*, *supra* note 50, at 1228.

248. *See Scott Dodson, Why Do In-State Plaintiffs Invoke Diversity Jurisdiction?*, 49 L. & Soc. INQUIRY 1283, 1301 (2024) (suggesting that plaintiffs may prefer to sue in their home state “for reasons of geographic convenience and ease of finding local counsel.”).

249. One exception to this principle is in the class action context. Courts have personal jurisdiction over members of a plaintiff class even if they have not themselves had any part in the decision to file in a particular location. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). Because of this, if there is some basis for personal jurisdiction over the defendant, a class action may be brought in a forum that has very little connection to the subject matter of a dispute and that is consequently not permitted to apply its own law. *See id.* at 821. Recent Supreme Court cases have reduced the chance of this scenario occurring by limiting the fora in which class action defendants are subject to jurisdiction. *See, e.g., Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 263–65 (2017) (holding that a state cannot

unthinkable, at least in individual litigation, that that court's application of forum law would be deemed invalid under the relevant standard.<sup>250</sup>

It is further worth noting that even these minimal restrictions do not apply to the application of forum procedural law. Rather, it is the general practice for states to apply their own procedures, even when using another jurisdiction's substantive law as the decisional rule in the case.<sup>251</sup> The Court has never suggested that this practice is subject to even the modest standards that restrain the application of the forum's substantive law. Indeed, it has indicated the opposite: that states enjoy virtually unlimited freedom both to characterize given legal rules as procedural and to apply them to any claim they wish.<sup>252</sup> Yet procedural law can also, of course, be an instrument of policy; a state can, for example, require a screening process for medical malpractice claims in order to insulate doctors from liability<sup>253</sup> or, on the other end of the ideological spectrum,

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assert specific jurisdiction where there is no relationship between forum, plaintiffs, and the "specific claims at issue").

250. In theory, of course, a court's decision to apply not the law of the forum but the law of another state could violate the "significant contact or significant aggregation of contacts" standard. In practice, however, the cases applying the standard—including both Supreme Court cases to consider the issue—deal with the presumably more common problem of exorbitant application of forum law. *See Shuttles*, 472 U.S. at 818; *Hague*, 449 U.S. at 306 ("Interpreting Wisconsin law to disallow stacking, the [Minnesota District Court] concluded that Minnesota's choice-of-law rules required the application of Minnesota law permitting stacking.").

251. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 6, intro. note (A.L.I. 1971) ("Commonly, it is said that the forum will apply its own local law to matters of procedure and the otherwise applicable law to matters of substance.").

252. *See Sun Oil Co. v. Wortman*, 486 U.S. 723, 727–30 (1988) (holding that neither the Full Faith and Credit nor the Due Process Clause prevents a state from either characterizing its own statute of limitations as procedural rather than substantive or applying it to claims otherwise governed by the law of a different state).

253. In *Vest v. St. Albans Psychiatric Hosp., Inc.*, 387 S.E.2d 282, 282–84 (1989), for example, the West Virginia Supreme Court of Appeals declined to apply a Virginia requirement that medical malpractice claims be screened by a review panel to an injury sustained in Virginia by a West Virginia resident. The court's stated ground for decision was that, as the forum, West Virginia should apply its own procedures, not Virginia's. *Id.* Notably, however, even while resting on this reasoning, the court appeared to recognize the substantive goals of the Virginia requirement, recognizing that one of its aims was to "change the average and aggregate value of tort judgments by making plaintiffs bring their claims in a particular way" and that a consequence of its decision might be to "short-circuit a valuable social experiment in Virginia . . ." *Id.* at 286.

liberalize class action requirements to allow consumers more power vis-à-vis corporations.<sup>254</sup>

A second distinctive feature of the current U.S. landscape is that, in addition to enjoying wide latitude to apply forum law in many circumstances, states also vary considerably in which choice-of-law principles they have adopted.<sup>255</sup> Thus, in many cases, forum choice is determinative of—or at least exerts a great degree of influence on—the law applied, sometimes in ways that may advantage one litigant over another. The connection between forum and substantive law does not necessarily mean that courts will apply forum law in all circumstances, but it does mean that forum choice has a profound influence on the law applied in a way that is generally not true outside the United States.

Although the Court has at times denied any connection between personal jurisdiction and choice of law,<sup>256</sup> personal jurisdiction doctrine has seemed at times to take this connection between forum and substantive law into account. As one commentator has noted, Supreme Court cases finding that no personal jurisdiction existed “have almost uniformly been cases in which application of forum law posed an unjustified threat to the regulatory scheme of another jurisdiction[.]”<sup>257</sup>

Further, certain of the Court’s comments about personal jurisdiction and federalism appear to recognize the links among the forum, the law applied, and the outcome. Recall that in *McIntyre*’s plurality opinion, Justice Kennedy described the relevant personal jurisdiction inquiry as “whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”<sup>258</sup> This characterization seems to rest on the view that state courts are not simply neutral venues applying the law of other jurisdictions

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254. See *Developments in the Law: Class Actions* 89 HARV. L. REV. 1318, 1328, n.42 (1976) (“Many recent state class action statutes are drawn specifically with regulatory, often consumer protection, purposes in mind.”).

255. See Florey, *Personal*, *supra* note 50, at 1238 (“State courts apply at least seven different conflicts methodologies, and even courts that nominally use the same one often in practice interpret it in different ways and with a great degree of judicial discretion.”) (citation omitted).

256. See Stanley E. Cox, *Personal Jurisdiction for Alleged Intentional or Negligent Effects, Matched to Forum Regulatory Interest*, 19 LEWIS & CLARK L. REV. 725, 727 (2015) (noting that the Court “has rejected efforts to link the . . . concepts” of personal jurisdiction and the constitutional scope of forum law).

257. See Sterk, *supra* note 4, at 1165.

258. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884.

where appropriate but also act as instruments of their own state's social policy and regulation. Likewise, partially concurring in *Mallory*, Justice Alito characterized a world of loosened personal jurisdiction requirements as one in which businesses would be called upon to "manage the patchwork of liability regimes, damages caps, and local rules in each state."<sup>259</sup> Because "liability regimes" and "damages caps" are closely linked to the forum state's policy goals, Justice Alito's concern again appears founded on the reasonable—but unstated and unexplored—assumption that expanding the fora in which defendants are subject to suit will similarly multiply the defendant's exposure to differing state laws.

The tendency to equate personal jurisdiction and the application of forum law also weighs in the other direction, favoring personal jurisdiction over a defendant who has assented to the application of forum law. Courts have tended to count a choice-of-law clause selecting the law of a particular state as a factor supporting the existence of personal jurisdiction in that forum.<sup>260</sup> Although courts often justified this practice on the basis that such a clause reflects the defendant's "deliberate affiliation with the forum,"<sup>261</sup> it is not much of a stretch to imagine that it is also informed by the belief that, given that a forum with personal jurisdiction over the defendant is probably more apt to apply its own law than that of another state, such an exercise of jurisdiction is fairer if the defendant has chosen the forum's law to govern its activities to begin with.

Especially because choice-of-law rules and outcomes vary by forum, the equation between choice of forum and choice of law is in many ways justified. In state courts, forum law is almost always the rule for procedural matters and the default in substantive ones; generally, a court will apply a different state's law only if a litigant raises

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259. *Mallory*, 600 U.S. at 161–62 (Alito, J., concurring in part and concurring in the judgment).

260. The Court first endorsed the consideration of this factor in *Burger King Corp. v. Rudzewicz*, in which the Court found that a choice-of-law clause "reinforced [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." 471 U.S. 462, 482 (1985). Lower courts continue to incorporate choice-of-law clauses as a factor, although not always a dispositive one, in personal jurisdiction analysis. See, e.g., *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 23 (2d Cir. 2004) ("A choice of law clause is a significant factor in a personal jurisdiction analysis because the parties, by so choosing, invoke the benefits and protections of [the forum]."); *Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship*, 600 S.E.2d 881, 887 (N.C. Ct. App. 2004), *aff'd*, 608 S.E.2d 751 (N.C. 2005) (mem.) ("While choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist.") (citation omitted).

261. *Burger King v. Rudzewicz*, 471 U.S. 462, 482 (1985).

the issue and persuades the court to do so.<sup>262</sup> In addition to these built-in procedural weights toward forum law, many courts' choice-of-law systems have some preference, either explicit or de facto, for forum law in situations of inveterate conflicts with other states' decisional rules.<sup>263</sup> In such a choice-of-law process, state courts have little, if any, constitutional obligation to consider independently the interests of other states in deciding which law will apply.<sup>264</sup> Finally, many have argued that—particularly in a common-law system—even when a court applies the law of another state, the other state's law is “domesticated” in the sense that it is filtered through a different state's understanding and procedures in way that may significantly change its meaning.<sup>265</sup>

Although the extent of forum law bias is debated,<sup>266</sup> most conflicts scholars agree that it exists to some degree.<sup>267</sup> Some courts

262. See Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Under Federal Rule of Civil Procedure 23(B)(3)*, 2004 MICH. ST. L. REV. 799, 802 (“State choice-of-law rules generally authorize courts to apply the law of the forum, unless the party seeking application of non-forum law demonstrates that forum law should not be applied.”). Notably, a preference for forum law often drives decisions about where to file. See Rutherglen, *supra* note 50, at 3 (“In many cases, forum law is exactly what a nonresident defendant is seeking to avoid and exactly what the plaintiff hopes to obtain.”).

263. See Luke Meier, *Simplifying Choice-of-Law Interest Analysis*, 74 OKLA. L. REV. 337, 343 (2022) (“Many jurisdictions have employed such a tiebreaker (either explicitly or implicitly), usually defaulting to either forum law (Currie's preference) or to the law that would be selected under the First Restatement's traditional approach.”).

264. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion) (requiring, as a prerequisite for application of forum law, contacts that “creat[e] [forum] state interests” without reference to interests that other jurisdictions might possess). *But see id.* at 322–24 (Stevens, J., concurring in the judgment) (arguing for additional consideration, under Full Faith and Credit Clause, of whether “choice of forum law . . . threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State”).

265. See Katherine Florey, *Honoring Statutory Restraint in Conflicts Analysis*, 137 HARV. L. REV. F. 271, 285–86 (2024) (discussing “local law” conflicts theories and noting that, in practice, states have few constraints on how they interpret sister-state law).

266. Contrast William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1405, 1432–35 (2020) (arguing that state courts' extraterritorial applications of state law are “generally unobjectionable” and that “state conflicts rules [...] give priority to the laws of other jurisdictions in appropriate cases”), with Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495 (2011) (citing view among several scholars that modern choice-of-law methods create a “strong bias” toward forum law). See also John T. Parry, *Some Realism About Choice-of-Law Statutes and the Common Law: The Oregon Example*, 27 LEWIS & CLARK L. REV. 197, 201 n.12 (2023) (citing evidence that both supports and tends to disconfirm, the idea that courts favor forum law).

267. Whytock, *supra* note 266, at 495.

have even acknowledged and embraced this preference, characterizing themselves as “instruments of state policy” tasked with favoring state law in close cases.<sup>268</sup> And even when courts apply the law of another state, procedural differences can of course affect results. In particular, choice-of-law rules often differ substantially from state to state *and* frequently encode forum-law preferences.<sup>269</sup> This means both that each state will put its distinctive stamp on choice-of-law issues and that, all things being equal, states are likely to put special weight on the forum’s own policies and interests in the process.

## 2. The Failure of Other Doctrines to Restrain State Overreach in Litigation

That forum choice may affect results, however, does not fully account for the Court’s choice to focus on personal jurisdiction as a central means of ensuring that states do not overreach in regulating conduct in which they lack a legitimate interest. Indeed, because the international norm is to regard judicial and prescriptive jurisdiction as distinct<sup>270</sup>—and because structural issues of state regulatory overlap would seem to have little to do with core due process concerns<sup>271</sup>—personal jurisdiction is in many ways an improbable locus for these issues. The connection between minimum contacts and state regulatory scope may make more sense, however, when seen in the context of the Court’s failure to develop a more general account of the relationships among state-court litigation, sovereignty, and the extraterritorial projection of state regulation in the post-territorial-formalist world. For the *Pennoyer* Court, it was self-evident that states had no power to compel absent out-of-state residents to appear in their courts because borders marked the limits of their sovereignty.<sup>272</sup> Today, although we have discarded this formalist view, we still recognize a relationship between adjudication of cases and state power. The nature of this relationship, however, and what the proper limits on it should be remain blurry. In other words, though a strain of concern about the potential for litigation to encroach on other states’ spheres of influence runs through personal jurisdiction doctrine, the Court has not clarified where this intrusion exists.

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268. *See, e.g.*, *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964).

269. *See Florey, Personal, supra* note 50, at 1223, n.135, 1238 (noting that choice-of-law systems tend to be “biased at least to some degree in favor of forum law” but that the “choice-of-law landscape is almost unimaginably complex”).

270. *See supra* notes 233–42 and accompanying text.

271. *See* sources cited *supra* note 4.

272. *See supra* Section II.A.

This lack of specificity about the goals of restricting courts' application of forum law contrasts, to some extent, with the way the Court regards state *legislation* that reaches beyond what the Court sees as the state's area of proper concern. Although there exists a great deal of fuzziness about how the relevant principles should be applied, the Court has suggested fairly consistently in recent years that state laws are invalid if they "directly regulate[]" conduct in other states,<sup>273</sup> discriminate against out-of-state businesses,<sup>274</sup> or impose a burden on interstate commerce that, even if not motivated by a discriminatory purpose, clearly exceeds their local benefit.<sup>275</sup> To be sure, these principles have come under fire for their vagueness and subjectivity.<sup>276</sup> But the evils they are designed to address seem fairly clear. States unfettered by such restrictions might choose to interfere with conduct outside their proper sphere of influence, with the risk that they might improperly reach into other states' affairs, encroach upon other polities' democratic choices, and subject individual actors to inconsistent regulation.<sup>277</sup> Another category of risks involves favoritism: States might take action to advance their residents' interests at the expense of others, either through directly advantaging them relative to citizens of other states or by heedlessly ignoring the

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273. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 n.1 (2023) (emphasis omitted) (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)).

274. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997) ("[S]everal cases that have purported to apply the undue burden test . . . arguably turned in whole or in part on the discriminatory character of the challenged state regulations . . .").

275. *See Nat'l Pork*, 598 U.S. at 391 (Sotomayor, J., concurring in part and concurring in the judgment) (affirming the "balancing and tailoring principles" first distilled in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and "most frequently deployed to detect the presence or absence of latent economic protectionism"). *But see id.* at 377 (plurality opinion) (rejecting view of *Pike* balancing test as unconnected from core antidiscrimination concerns under dormant Commerce Clause).

276. *See, e.g.,* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 62 (2012) (criticizing *Pike* balancing as a "subjective exercise"); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part) (expressing disapproval of the "vague and open-ended tests that are the current content of our negative Commerce Clause jurisprudence").

277. *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 335–37 (1989) (discussing dangers of extraterritorial regulation, including interference with the "autonomy of the individual States within their respective spheres" and subjecting businesses to "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1616–17 (2005).

consequences that locally beneficial legislation may have for out-of-state entities.<sup>278</sup>

Although doctrines limiting territorial overreach are generally limited to state legislation, litigation and the judgments that arise from it can, of course, have similar effects. A court may, for example, impose liability on an out-of-state entity for failing to comply with in-state standards<sup>279</sup> or issue an injunction requiring it to do so.<sup>280</sup> In most cases, such judgments will be formally binding only on particular parties, but they will nonetheless have influence on similarly situated actors. In other cases—class actions, other mass litigation, or broad injunctions that affect large entities—litigation may have still more sweeping effects beyond state borders.<sup>281</sup>

Such effects can further create problems mirroring those present when states attempt to regulate extraterritorially through legislation. For example, unpredictable choice-of-law decisions, like overlapping legislative efforts by different states, may result in a lack of certainty about which standards will apply to primary conduct.<sup>282</sup> Excessive reliance on forum law by one state also undermines the ability of other states to enjoy an “autonomous sphere in which to make policy free of interference from other sovereigns”—again, in a manner similar to that of overreaching state statutes.<sup>283</sup> Finally, state courts can apply forum law in a parochial manner to provide benefits to state residents.<sup>284</sup>

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278. See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (explaining how the dormant Commerce Clause restricts various sorts of state protectionism).

279. See, e.g., *Bernhard v. Harrah's Club*, 546 P.2d 719, 725–76 (Cal. 1976) (en banc) (applying California's dram-shop act to a Nevada tavern keeper whose conduct could have foreseeably had negative effects in California).

280. See, e.g., *Kearney v. Salomon Smith Barney*, 137 P.3d 914 (Cal. 2006) (permitting class action to enjoin Georgia-based brokerage from recording the phone calls of Californians to proceed); see also Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1104–08 (2009) [hereinafter Florey, *Reflections*] (citing several examples of injunctions with extraterritorial effect).

281. *Id.* at 1104–08 (noting extraterritoriality concerns of mass litigation and injunctions).

282. See John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey*, 71 AM. J. COMP. L. 251, 254 (2023) (noting that West Virginia's use of a *lex loci delicti* rule “makes it impossible for a rental car company to foresee which law governs its entrustment decisions”); Florey, *Reflections*, *supra* note 280, at 1115 (arguing that excessive extraterritorial extension of law creates uncertainty about the lawfulness of particular conduct).

283. Florey, *Reflections*, *supra* note 280, at 1115.

284. See Parry, *supra* note 266, at 201 n.12 (noting evidence that such favoritism occurs).

Notably, however, the extraterritorial implications of choice-of-law decisions constitute a severely undertheorized area of doctrine. Historically, a combination of forces—including the lack of variation in state common law that often prevailed prior to the twentieth century, the early uniformity of the choice-of-law principles applied across states, and a scholarly obsession with constructing theoretical justifications for applying foreign law rather than specifying when courts should be obliged to do so—served to mute potential concerns about the overapplication of the forum’s own law.<sup>285</sup> The imposition of any constitutional limits at all on choice of law is a recent development, and the Court has in the past several decades largely backed away from meaningful restraints outside the class action context,<sup>286</sup> signaling its desire to leave the area primarily to the discretion of state courts.<sup>287</sup> Although state choice-of-law decisions are subject to nominal limits, these limits are extremely lenient in most cases and mostly redundant to personal jurisdiction protections.<sup>288</sup> The rationale behind these modest restrictions, further, is less than clear,<sup>289</sup> and they clearly occupy a separate line of doctrine from the Court’s extraterritoriality jurisprudence, which it has never attempted to adapt to the choice-of-law context.<sup>290</sup> Other constitutional provisions, such as the Privileges and Immunities Clause<sup>291</sup>

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285. See Spillenger, *supra* note 27, at 1259–60 (“[A]ntebellum jurists rarely expressed concern over the possibility [of] . . . giving extraterritorial effect to [forum] law; to them, the evils worked by extraterritoriality consisted, if anything, in compelling the forum to give effect to legal rights and relationships created elsewhere.”); Florey, *Resituating Territoriality*, *supra* note 17, 166–67.

286. See Florey, *Reflections*, *supra* note 280, at 1058 (describing the Court’s ruling in *Allstate Ins. Co. v. Hague*, 499 U.S. 302 (1981), as permitting state courts to “apply whatever law they please so long as the state possesses a ‘significant aggregation of contacts’”). The standard, has, however, been applied more stringently to choice-of-law decisions in class actions. See *id.* at 1078.

287. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) (explaining that “the legislative jurisdictions of the States overlap” such that “frequently . . . a court can lawfully apply either the law of one State or the contrary law of another”); see also Florey, *Reflections*, *supra* note 280, at 1080 (noting that *Sun Oil* arguably can be understood to make the *Hague* standard even more lenient).

288. See *id.* at 1058–59 (noting that, where a court has successfully established personal jurisdiction based on minimum contacts, it almost always has the power under *Hague* to apply its own law).

289. See *id.* at 1080–81 (noting that the “animating concerns” of the *Hague* standard are vague and fail to grapple with extraterritoriality considerations).

290. See *id.* at 1062 (discussing precedents that “suggest . . . a more general extraterritoriality prohibition lurk[ing] somewhere in the Constitution, having nothing to do with” the Court’s choice-of-law cases).

291. See John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 182–83 (1981) (describing arguments that choice-of-law

and the dormant Commerce Clause,<sup>292</sup> have been proposed as limits on state choice of law,<sup>293</sup> but so far the Supreme Court has not embraced these possibilities.

State courts, likewise, rarely make explicit judgments about extraterritorial effects when applying their choice-of-law principles. Although a significant number of states apply presumptions against extraterritoriality to state legislation,<sup>294</sup> such presumptions, as William S. Dodge has noted, often do little beyond what is accomplished by state conflicts rules and tend to be applied inconsistently.<sup>295</sup> Further, such rules lack application, either in theory or in practice, to common-law claims,<sup>296</sup> and they, of course, do not address the issues involved in the application of the forum's policy-driven procedures at all.<sup>297</sup>

To be sure, despite the general lack of constitutional or interpretive guideposts in this area, state courts exercise restraint in many circumstances,<sup>298</sup> and some factors often considered in internal state choice-of-law analysis, such as consideration for the interests of other states, may be an effective substitute in many situations for explicit extraterritoriality analysis. Nonetheless, state-court choice-of-law decisions have two important limitations: First, whatever limitations they rely on are voluntary rather than constitutionally mandated, and as such are somewhat precarious; and second, because they generally fail

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decisions that favor forum residents might violate the Fourteenth Amendment Privileges and Immunities Clause).

292. See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 (2001) (proposing an approach that “reconciles the extraterritoriality prong of the dormant Commerce Clause with the scores of choice-of-law decisions that have cross-border effects, as well as with constitutional limitations on choice of law”).

293. To be sure, some commentators have also suggested that personal jurisdiction doctrine draw on these additional constitutional provisions. See Todd Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 694 & nn.170–71 (2019) (collecting additional commentators who have rooted contacts requirements in interstate federalism or dormant Commerce Clause); see Erbsen, *supra* note 180, at 471 (noting scholarship on potential relevance of Privileges and Immunities Clause and Full Faith and Credit Clause to personal jurisdiction).

294. See Dodge, *supra* note 266, at 1405 (noting that, as of 2020, twenty states apply a presumption against extraterritoriality in interpreting the reach of state statutes).

295. See *id.* at 1430 (noting that state presumptions against extraterritoriality often “do little work”).

296. See *id.* at 1411–12 (stating that despite variations in state presumptions against extraterritoriality, none extends to common-law claims).

297. See *supra* notes 251–54 and accompanying text.

298. See Dodge, *supra* note 266, at 1432 (arguing that state conflicts rules serve as a meaningful limit on overextension of forum law).

to directly grapple with extraterritorial effects as such, they are of limited use to other courts attempting to reason through the issue.

In contrast to choice-of-law limits, personal jurisdiction has long been a topic of intense activity by the Supreme Court and of interest from the broader legal community. Moreover, the doctrine has long been tied to fears of state overreaching, although more modern iterations, to be sure, balance such concerns against the need for state citizens to be able to hold out-of-state wrongdoers accountable.<sup>299</sup> Even the metaphor of the “long-arm statute” by which states assert minimum contacts-based jurisdiction evokes a literal reaching across state borders that suggests some relationship between the doctrine and extraterritoriality. No equivalent concept exists in choice-of-law terminology; indeed, if anything, conflicts scholars have often stressed from various perspectives the purely domestic aspects of choice-of-law decisions.<sup>300</sup> Thus, personal jurisdiction doctrine has perhaps become a locus for extraterritoriality-like considerations simply because, in some sense, it occupies the same neighborhood of concerns, such as protecting defendants from unfair surprise and preventing state courts from engaging in outright favoritism. Arguing that constitutional principles other than the Due Process Clause might be pressed into service to limit state courts’ jurisdiction, Justice Alito recognized this sort of due process mission creep, arguing that the Fourteenth Amendment Due Process Clause “has become a refuge of sorts for constitutional principles that are not ‘procedural’ but would otherwise be homeless as the result of having been exiled from the provisions in which they may have originally been intended to reside.”<sup>301</sup>

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299. See *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985) (finding it “presumptively not unreasonable” to hold a defendant to account in the courts of a state where the defendant has conducted activities).

300. Several influential choice-of-law theorists, for example, have argued that all law applied by a particular state court is in a sense domestic, even if it may mimic the content of foreign law when choice-of-law principles so demand. See Carlos M. Vázquez, *Non-Extraterritoriality*, 137 HARV. L. REV. 1290, 1353–54 (2024) (summarizing this so-called “local law” theory, endorsed by Judge Learned Hand and Professor Walter Wheeler Cook, among others). On a related note, some courts have embraced Robert Leflar’s concept of the “justice-administering state”—the idea that courts have an independent concern with providing a fair resolution to the parties before them apart from any other identifiable state interests that may be present in the case. See Robert L. Felix, *Leflar in the Courts*, 52 ARK. L. REV. 35, 44, 85–86 (1999) (describing a few courts’ reception of Leflar’s “notion of the forum as a ‘justice-dispensing court,’” which “requires relating the governmental interests of the forum to the other choice-influencing considerations”).

301. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 155 (Alito, J., concurring in part and concurring in the judgment).

These factors go some way toward explaining why personal jurisdiction doctrine has developed to address at least a part of the extraterritoriality problem. Because courts appear somewhat more likely to apply forum law than a sister state's law, and because even the application of foreign law may be domestically inflected in some way, there is some logic in at least partially conflating a forum's exercise of jurisdiction with the application of its law. And because personal jurisdiction doctrine is far better developed than choice-of-law restrictions, the concerns raised by excessive application of forum law have to some extent been shoehorned into the doctrine.

### 3. The Functional Role of Personal Jurisdiction Limits

Further, even as the Court has failed to explicitly connect doctrinal dots between personal jurisdiction and forum law application, it is fairly undeniable that, as several scholars have recognized,<sup>302</sup> personal jurisdiction plays an important *functional* role in limiting occasions where state courts might be tempted to overextend their own law. One aspect of this is that minimum contacts performs a simple screening function: a state exercising jurisdiction based on minimum contacts will almost universally have the constitutional power under *Hague* to apply its own law, at least apart from class litigation.<sup>303</sup>

Personal jurisdiction limits, moreover, do more than simply assure that the minimal constitutional limits on choice of law are not exceeded. They also provide meaningfully greater protection against improper extension of forum law than choice-of-law limits would on their own.<sup>304</sup> In large part, this is because choice-of-law limits allow consideration of the plaintiff's contacts with the forum state, while personal jurisdiction focuses nearly entirely on the defendant's contacts.<sup>305</sup> If one conceives of choice-of-law limits as an effort to ensure that the forum state has some legitimate interest in applying its law, the focus on both defendant and plaintiff contacts perhaps makes sense. But if the concern is avoiding improper intrusion into other states' regulatory spheres, ensuring that the plaintiff has ties to the

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302. See La Belle, *supra* note 47, at 834–35 (observing the tension between structural federalism and the individual-rights focus of the Due Process Clause).

303. Florey, *Reflections*, *supra* note 280, at 1058–59.

304. See Sterk, *supra* note 4, at 1175–76 (articulating reasons why constraints on personal jurisdiction provide “advantages over limits on choice of law”).

305. The specific jurisdiction test includes a reasonableness check that considers such factors as the plaintiff's and forum state's interests, but the test can be used only to defeat personal jurisdiction and is rarely decisive in cases involving domestic defendants. See Florey, *Personal*, *supra* note 50, at 1235–36 (describing the reasonableness analysis).

forum state fails to serve as a meaningful restraint, given that the plaintiff may well have chosen the forum precisely in the hope that it will apply its law exorbitantly.<sup>306</sup> Personal jurisdiction limits, therefore, effectively combat plaintiff-initiated overextension of forum law in a way that choice-of-law limits do not.<sup>307</sup>

Class actions provide an interesting counterexample that paradoxically illustrates the utility of personal jurisdiction as this sort of functional backstop. For two reasons, the screening function of personal jurisdiction doctrine works less well when class actions are involved. First, class plaintiffs frequently bring actions against defendants based on general rather than specific jurisdiction,<sup>308</sup> meaning that there is no necessary connection between the subject of the class action and the forum. Second, class members, who may hail from multiple jurisdictions, do not choose the forum, and so considerations of convenience and familiarity that may ordinarily militate in favor of a close-to-home-and-injury location choice for plaintiffs are not present; as a result, possibilities for pure forum-shopping are multiplied.

It is thus intriguing that class actions are the one area in which constitutional choice-of-law restrictions have had real teeth. In *Hague*, the Court affirmed Minnesota's application of forum law in individual litigation where the defendant's only contact with the forum was that, as a national corporation, it did business there<sup>309</sup> (the plaintiff had additional, if minor, contacts).<sup>310</sup> In a subsequent case,

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306. See *Mallory*, 600 U.S. at 153–54 (Alito, J., concurring in part and concurring in the judgment) (“If having to defend this suit in Pennsylvania seems unfair to Norfolk Southern, it is only because it is hard to see Mallory’s decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs.”).

307. To be sure, this observation is in apparent tension with the idea that the application of forum law is justified when the state has legitimate interests in the dispute, and that one important measure of the legitimacy of those interests is that state residents (who would generally be plaintiffs in this scenario) are affected. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 268 (2017) (“[P]laintiffs who are residents of a particular State . . . could probably sue together in their home States.”). It might still be argued, however, that focusing on the defendant’s connections with the state provides a more objective and balanced way of measuring those interests that is less subject to plaintiff manipulation.

308. See *Rhodes & Robertson*, *supra* note 88, at 228 (noting that “nationwide class actions . . . often depend on the existence of general jurisdiction”).

309. See *Allstate Ins. v. Hague*, 449 U.S. 302, 317–18 (1981) (plurality opinion) (“By virtue of its presence, Allstate can hardly claim . . . surprise that the state courts might apply forum law to litigation in which the company is involved.”).

310. The plaintiff’s deceased husband had worked in Minnesota, *id.* at 313–14, and the plaintiff had moved from Wisconsin to Minnesota by the time the suit was filed, *id.* at 305.

*Phillips Petroleum v. Shutts*, the defendant similarly did significant business in Kansas, and the Court accordingly concluded that Kansas actually did have legitimate interests in regulating the defendant's conduct.<sup>311</sup> Notably, however, because *Shutts* was a class action, the Court reached a different result, holding that the Kansas Supreme Court had improperly applied forum law to "abrogate the rights of parties beyond its borders"<sup>312</sup> that would exist under the laws of other states that had stronger connections to the dispute.

It is striking that in the course of deciding the case, the Court held that the Kansas state court did, in fact, have personal jurisdiction over the absent class members. Such jurisdiction was not, however, based on minimum contacts;<sup>313</sup> the majority of class members had no ties to Kansas whatsoever.<sup>314</sup> The decision thus highlights that, without the assurance contacts-based jurisdiction provides of a strong connection between the defendant and the specific claims against it, state courts have less of a check on their ability to apply forum law in a way that the Court finds problematic. Although the Court's recent decisions contracting the scope of general jurisdiction may, by sharply limiting the fora in which class actions may be brought,<sup>315</sup> reduce the possibility of a *Shutts*-like scenario arising, the Court's treatment of choice of law in the class action context nonetheless illustrates the way in which personal jurisdiction and the application of forum law are linked.

That personal jurisdiction is the primary restriction on state courts excessively extending forum law does not, of course, in itself do much to fill the gap in our theoretical understanding of the issue, especially because the Court's articulations of what is really at stake are so vague and incomplete. But it does reduce the probability of

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311. See 472 U.S. 797, 819 (1986) ("Petitioner owns property and conducts substantial business in the State, so Kansas certainly has an interest in regulating petitioner's conduct in Kansas.")

312. *Id.* at 822.

313. See *id.* at 811 ("In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant."). The Court reasoned that the lack of burden on class-action plaintiffs and the provisions for their protection in class-action rules rendered such personal jurisdiction fair. See *id.* at 810–12 ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter").

314. See *id.* at 814–15 ("over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit").

315. See *supra* note 182 and accompanying text.

clashes between state regulatory regimes that would otherwise, in the absence of guiding doctrinal principles, be difficult to resolve. Further, acknowledging this reality helps to make some sense of the Court's federalism rhetoric. Limits on state personal jurisdiction do accomplish, at least to some extent, many of the purposes the Court has claimed for them: they work to ensure that states remain "coequal sovereigns in a federal system";<sup>316</sup> they help maintain the "federal balance" and protect state policy choices from "unlawful intrusion by other States";<sup>317</sup> and they maintain "territorial limitations," albeit flexible ones, on the exercise of state power.<sup>318</sup> It is just that, for the most part, the doctrine does so, not because it has been crafted to serve those purposes, but incidentally and fortuitously.

## V.

### IMPLICATIONS FOR PERSONAL JURISDICTION DOCTRINE

In some respects, it is easy to see why personal jurisdiction has been pressed into service as a way of maintaining a balance of state power. Although there are clearly differences in the risks of overextending personal jurisdiction versus exorbitant application of forum law, there are also large areas of overlap. Limits on both personal jurisdiction and choice of law derive from the Due Process Clause, and both, among other commonalities, have procedural, defendant-protective elements. In particular, both are concerned at least in part with shielding the defendant from unfair burdens, whether that is litigation in a distant forum or application of an unexpected law.

If not necessarily desirable, it is also at least unsurprising that, of the two sources of limits, personal jurisdiction doctrine is the more robust in addressing concerns about state overreaching. State choice-of-law is a complex landscape in which the Supreme Court has been reluctant to involve itself,<sup>319</sup> given the variety of choice-of-law methodologies states apply and the multifarious contexts in which choice-of-law issues occur. By contrast, personal jurisdiction issues occur at the outset of the case and are less intertwined with the merits; further, constitutional limits on personal jurisdiction apply more or less identically from state to state. And personal jurisdiction's focus on the defendant's deliberate contacts is, in some ways,

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316. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292.

317. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

318. *See Bristol-Myers*, 582 U.S. at 263.

319. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–28 (1988) (expressing a skeptical attitude toward constitutional challenges to state choice-of-law decisions, noting that "it is frequently the case . . . that a court can lawfully apply either the law of one State or the contrary law of another").

peculiarly suited to restraining excessive application of forum law.<sup>320</sup> By emphasizing contacts, personal jurisdiction ensures a connection between the dispute and the forum state that is likely sufficient to give the forum state some interest in regulating the defendant's conduct; by emphasizing the contacts of the defendant in particular, the doctrine restricts the ability of plaintiffs to use a friendly home forum as a means of extending forum law and policy.

That personal jurisdiction is at all suited to these tasks is, as noted, fortuitous; there is little evidence that the *International Shoe* Court, in crafting the minimum contacts standard, designed it to fit these somewhat different needs.<sup>321</sup> Yet the Court's persistent, if vague, efforts to draw a connection between personal jurisdiction and horizontal federalism suggests that the idea is lodged in some way in the Court's subconscious and perhaps has influenced the development of the doctrine.

At the same time, relying on personal jurisdiction as a tacit limit on the choice of forum law promotes a conceptual muddle that is not helpful to either doctrine. Although it is certainly possible that the overreaching application of a particular state's law may cause unfair surprise to the defendant, many of the core considerations that extraterritoriality raises are more general and structural. Above and beyond the question whether application of forum law is fair to a specific defendant in a particular case, extraterritoriality raises questions about which activities states have the right to regulate and where sovereign citizens should look to as a source of legal rules to structure their primary behavior.<sup>322</sup> As a result, the Due Process Clause, as scholars and judges have repeatedly recognized, is an awkward site for such concerns.<sup>323</sup>

Even beyond this objection—which, of course, might be remedied simply by the Court having a change of heart and deciding that the dormant Commerce Clause or Privileges and Immunities Clause also has some relevance in the personal jurisdiction context—it can be argued that injecting extraterritoriality into personal jurisdiction as a covert, secondary concern has prevented the Court from grappling with the issue more directly. Personal jurisdiction and choice-of-law limits may have commonalities, but the Court has neither connected them nor explained how they

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320. See *supra* notes 305–07 and accompanying text.

321. See *supra* note 104.

322. See Florey, *Reflections*, *supra* note 280, at 1064 (identifying how sovereigns regulating the same behavior can lead to inconsistency and uncertainty for citizens “wish[ing] to conform their conduct to the law”).

323. See Stein, *supra* note 65, at 694–95.

complement each other. As Allan Erbsen notes, this is part of a larger tendency on the part of the Court to treat restraints on state overreaching as “discrete silos of doctrine.”<sup>324</sup> Doing so has led to a patchwork of doctrines that focus on different scenarios in which extraterritoriality issues arise and, in the process, obscure similarities across various contexts.

Finally, personal jurisdiction is not always based on minimum contacts. If the court’s power over a case is rooted in the defendant’s having been served with process within the forum state or its domicile there, the dispute may have no relationship to the forum whatsoever. In certain of these scenarios—such as a class action founded on general jurisdiction—even the modest *Hague* limits may have some force. In others, particularly cases brought by individual litigants in state court, checks on choice-of-law decisions are minimal. Of course, abundant examples exist of state courts exercising restraint and sound judgment despite this lack of oversight. But there are also instances of state courts doing the opposite, a temptation that may multiply if interstate judicial relations become more strained.<sup>325</sup>

In addition to personal jurisdiction’s limitations as an anti-extraterritoriality device, the injection of concerns about state overreach into personal jurisdiction has also had negative effects on the doctrine itself, which has been abundantly criticized for lacking coherence and focus.<sup>326</sup> Precisely how to fix personal jurisdiction doctrine is beyond the scope of this discussion; scholars have advanced numerous and sometimes opposite proposals, from

324. Erbsen, *supra* note 180, at 473.

325. See Florey, *Landscape*, *supra* note 29, at 1138 (arguing that the increasingly partisan nature of state regulatory differences is likely to provoke more interstate clashes).

326. See, e.g., Steven E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1305-06, 1346 (2014) (contending that “[w]e’ve gotten used to a world in which personal jurisdiction doctrine is lousy” and describing scholarly consensus on the “confusion” in personal jurisdiction doctrine and noting that its problems have “real costs outside the courtroom” in terms of forum-shopping); David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 B.Y.U. L. REV. 1511, 1525-26 (2019) (describing the intersection of federalism and current personal jurisdiction doctrine as a “tangle” that is “difficult to parse”); Jacobs, *supra* note 20, at 1631 (critiquing justifications for current personal jurisdiction doctrine as incoherent and self-contradictory); Rutherglen, *supra* note 50, at 1 (lamenting the “deleterious consequences in practice by forcing together the disparate elements of sovereignty and individual rights . . .”); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 869 (2012) (noting the “doctrinal confusion” that attends the law of personal jurisdiction).

reorienting the doctrine to focus on state territorial sovereignty<sup>327</sup> to downplaying horizontal federalism concerns to concentrate primarily on fairness.<sup>328</sup> To the extent that personal jurisdiction is an imperfect vehicle for addressing extraterritoriality concerns, there are surely strong arguments for spinning off the area into a different line of doctrine (either an existing one, such as current limits on choice of law, or a new one, as reflected in Justice Alito's proposal that the dormant Commerce Clause should take on this role<sup>329</sup>). Such a change would be a radical one that, frankly, seems unlikely in the face of the Court's longtime preservation of the current scheme, although individual justices have occasionally indicated interest in significant reform.<sup>330</sup>

The most likely scenario, however, is that personal jurisdiction doctrine muddles along with few fundamental changes. In that event, the doctrine could be greatly improved simply by acknowledging personal jurisdiction's connections to the overapplication of forum law. Such a move would bring clarity to the Court's increasingly oracular pronouncements on the role of federalism in the doctrine. It would also promote more reasoned exploration of the issue by courts at all levels, enabling courts to reflect on how personal jurisdiction interacts with other extraterritoriality doctrines. It could, perhaps, even help to foster restraint by state-law

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327. See Jacobs, *supra* note 20, at 1647 ("Returning to the Territorial Model would finally give personal jurisdiction the doctrinal clarity, theoretical consistency, and democratic and constitutional legitimacy it has been lacking.").

328. See La Belle, *supra* note 47, at 787 (arguing that fairness should be part of every jurisdictional analysis). See also Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 559 (1995) (advocating a system of clearer bright-line rules for the circumstances under which a court may exercise personal jurisdiction).

329. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 150 (Alito, J., concurring in part and concurring in the judgment) ("A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created. At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called dormant Commerce Clause.").

330. See *id.* (Alito, J., concurring in part and concurring in the judgment) ("I am not convinced . . . that the Constitution permits a State to impose such a submission-to-jurisdiction requirement" that "a large out-of-state corporation with substantial operations in a State compl[y] with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there."); *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 382 (Gorsuch, J., concurring) (arguing that the minimum contacts framework "just doesn't work quite as well as it once did" and should potentially be revisited).

judges in applying forum law by increasing their attention to the issue.

## VI. CONCLUSION

Interstate personal jurisdiction protections have come to serve as a shield against extraterritoriality for reasons that seem at least substantially a function of historical accident. A variety of forces have contributed to this development: the lingering influence of *Pennoyer's* rhetoric of territoriality and state sovereignty, the absence of a clear theoretical justification for the minimum contacts framework, and the Supreme Court's decision to largely absent itself from state choice-of-law decisions. Although the Court has alluded to minimum contacts' extraterritoriality-policing function frequently in recent years and endorsed it with particular force in *Fuld v. PLO*, it has failed to explain or justify this aspect of personal jurisdiction doctrine with any clarity, leading to further inconsistency and confusion. Nonetheless, because no other area of U.S. law incorporates a strong theoretical or practical understanding of when states should and should not be allowed to project their regulatory policies on conduct outside their borders,<sup>331</sup> the roles that personal jurisdiction has come to play are important ones that may not be easy to replace. To the extent that personal jurisdiction continues to fulfill this function, the doctrine could benefit from bringing this role explicitly to the fore and attempting to meld its state-overreach concerns both with other extraterritoriality limits and with personal jurisdiction doctrine's other purposes.

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331. Of course, ironically, the use of personal jurisdiction as a first-line protection against regulatory overreaching may have contributed to the underdevelopment of doctrines that address the issue more directly.



# BIG DATA: GUIISING AND FUNCTIONALLY CREEPING TOWARD CIVIL DEATH

RAYMOND TRENT CROMARTIE\*

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## I.

### INTRODUCTION

Civil death, a concept that was once borrowed from English common law (the antecedent to our own legal system), has steadily eroded since the 1800s.<sup>1</sup> At its core, civil death was a punishment that extinguished the civil rights of any individual found responsible for a crime or other wrongdoing.<sup>2</sup> Once attached, this stigma impacted an individual’s ability to maintain property, pursue legal claims, perform any legal function, and vote, among many other things.<sup>3</sup>

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\* To my friends, family, and loved ones, thank you. Without your support, I would not be here today.

1. See generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1793–1815 (2012) (“By the turn of the nineteenth century, civil death faced increasingly withering criticism.”).

2. See *id.* at 1790 (“Civil death extinguished most civil rights of a person convicted of a crime and largely put that person outside the law’s protection.”); see also Harry David Saunders, *Civil Death—A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 989 (1970) (describing an 1888 New York court decision that held a convict could no longer perform legal functions).

3. See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 n. 13 (2002) (“The term ‘civil death’ refers to the condition in which a convicted offender loses all political, civil, and legal rights.”).

Although the reliance upon civil death steadily declined in the 1900s and has seemingly disappeared in our legal system, it can be argued that it has simply undergone metamorphosis and modernization. Where colonial legal processes publicly sentenced individuals to a civil death, our current system, through the use of unrecognized technological processes to further public safety, now exacerbates the impact of existing collateral consequences. Such consequences have generally been defined as secondary impacts of a criminal conviction or civil judgment.<sup>4</sup> The result of this is an environment that may facilitate a civil death for anyone found responsible of criminal or civil stigma. While collateral consequences may not be inherently tied to a conviction or judgment,<sup>5</sup> they certainly arise after the legal finding and can have a substantial impact on one's ability to live and pursue basic civil rights.<sup>6</sup> Depending upon the nature of a conviction, judgment, or finding of responsibility, a collateral consequence may affect one's ability to obtain employment, vote, purchase a firearm, maintain housing, qualify for government benefits, and pursue an education, among many other things.<sup>7</sup>

The current effect of collateral consequences is amplified by the fact that law enforcement in our society now maintains digital forms of recordkeeping or data processing that allows an untold number of individuals and entities to access databanks that may house information about millions of citizens. Such data stores may even include information about individuals who have no criminal record or other history of wrongdoing, potentially resulting in a negative stigma being attached to someone without any due process or other constitutional safeguards triggering. As discussed in greater detail below, the nature and substance of the aforementioned information collected and stored by law enforcement entities can have significant, long-lasting impacts on individuals, depending upon what information is collected, how it is used, and who is using it.

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4. See Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 327 (2015) ("Collateral consequences are the purportedly non-punitive, noncriminal consequences that can flow automatically or as a matter of discretion from a criminal conviction.").

5. As addressed below, the use of big data can impose collateral consequences on individuals even if they have no police contact or criminal or civil record. See *infra* Part II.

6. See Roberts, *supra* note 4, at 327 ("These consequences affect a person's employment and housing prospects, parental rights, educational opportunities, freedom of movement, and just about every other aspect of daily life.").

7. *What are Collateral Consequences?*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://nicc.nationalreentryresourcecenter.org/> [<https://perma.cc/2VN7-U246>] (last visited Sep. 4, 2025).

Criminal recordkeeping and collateral consequences have been present in the United States for decades and have been a focus of civil discourse for just as long.<sup>8</sup> While one side touts the use of criminal recordkeeping as a hallmark of public safety and efficiency,<sup>9</sup> other advocates highlight the significant negative impact of collateral consequences. The effect and severity of any consequence has been heightened by the rapid transition from paper recordkeeping to digital, as well as the corresponding development of related technology.<sup>10</sup> Where court systems or other government entities were once the only place to harbor information regarding an individual's criminal or civil background, records are now being acquired through ever-expanding means and uploaded into massive databases or other technological processes that can be readily accessed by an unknown number of parties.<sup>11</sup> For example, since this move to digital storage, private companies and individuals have capitalized on the opportunity by amassing and selling private information, thereby increasing exposure for anyone whose information is housed within these databases.<sup>12</sup> Compounding this issue is the free flow of information exchange in today's society, which occurs in milliseconds and at a global scale. Oftentimes, once an individual's information is placed

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8. As a preliminary matter, the term "criminal record" traditionally refers to information that government actors maintain about an individual's criminal background or history of wrongdoing. For purposes of this Article, I expand that definition to refer to any piece of information that law enforcement has collected and stored in big data because it informs how law enforcement entities and other actors perceive individuals and how law enforcement performs its functions.

9. See Cynthia Diane Stephens, *Keeping an Arrest from Resulting in a Life Sentence*, MICH. BAR J., Nov. 2008, at 29, 31 ("The most potent argument for broad access to criminal history data is to preserve public safety. The right to a safe and peaceful environment is a core value for a civilized society, and employers cannot allow known dangers in the workplace.").

10. See Roberts, *supra* note 4, at 341 ("Once information is released, it is disseminated into the digital world in so many potential venues that a person can never fully 'expunge' anything.").

11. See *id.* ("While an expunged or sealed conviction will not show up in a public search of an official court database, a background checking company may have gathered the data before the expungement and failed to update it afterwards.").

12. See Caleb Brennan, *Background Check Industry Profits Off 'Digital Punishment,' Despite Flawed Data*, THE APPEAL (Apr. 17, 2023), <https://theappeal.org/criminal-background-checks-industry-for-profit/> [https://perma.cc/S44N-DVSB] ("Over the past two decades, the widespread public availability of criminal records and court documents has helped fuel a global, for-profit background check industry worth billions. . . . But their assessments are often deeply flawed, in part because background check companies tend to rely on the cheapest and most easily accessible data, which is also the most prone to inaccuracies. The growth of this industry has given rise to new forms of 'digital punishment' . . .").

on the Internet or within a database, it may be indefinitely available and may never be fully expunged.<sup>13</sup> These large data stores and rapid technological recordkeeping processes are generally known as “big data,” a term referring to incredibly large indexing systems that house information, and these systems continue to grow exponentially as more data is input over time.<sup>14</sup> However, for purposes of this Article, I use the term “big data” to focus on how information flows, rather than the size of these data stores.

I recently learned of a civil protection matter where an individual was seeking a restraining order against her ex-partner, who had been alleged to be abusive. Through their own research, counsel for the petitioner, the party seeking the protection order, discovered a privately maintained database on the Internet that contained certain criminal records on individuals who had been accused of domestic violence. Unbeknownst to the respondent, the party facing the protection order, the database contained an expunged record from a prior criminal matter that was never removed or updated in the system. Counsel for petitioner sought to introduce this data at trial and, after lengthy argument, the court ultimately admitted it into evidence.<sup>15</sup> The primary issue in this scenario is that an *expunged* criminal record was publicly available on the Internet for anyone to review. The respondent in this matter had no idea the information existed publicly and was not aware of that fact until he was a party to a legal proceeding. Ultimately, the expunged record led to the respondent losing at trial and a permanent protection order being entered. As discussed in greater detail below, these scenarios are becoming increasingly frequent and are a clear example of how big data can have long-lasting impacts on one’s life if we do not exercise due care. Due to an inaccurate, privately operated database, an expungement that may

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13. See Meg Leta Ambrose, Nicole Friess & Jill Van Matre, *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA HIGH TECH. L.J. 99, 104 (2012) (“Advances in computer storage, content distribution, and information filtering have created ubiquitous information networks that threaten one’s ability to make mistakes without . . . a mark on one’s permanent record, aggregated and presented to anyone by Google.”); see also *id.* at 111 (“Assuming information remains indefinitely accessible to a search engine, ‘forgiving’ anyone, including oneself, may be incredibly problematic. The perpetual memory of the Internet hinders forgetting, thereby stifling forgiveness. ‘Online, the past remains fresh. The pixels do not fade with time as our memories do.’”).

14. See generally Bernard Marr, *What is Big Data?*, BERNARD MARR & Co., <https://bernardmarr.com/what-is-big-data/> [<https://perma.cc/Z28S-AXY5>] (last visited Sept. 4, 2025).

15. Since litigants in civil protection disputes are protected in Colorado, the identity of the parties must remain confidential.

have been part of a plea deal was essentially nullified because the operator of the database failed to update their information.

This Article emerges from a rapidly developing area of law, data privacy and data sharing, focusing heavily on well-known concepts such as collateral consequences stemming from criminal record-keeping, as well as due process and other constitutional protections.<sup>16</sup> Specifically, this Article examines how our society has developed several legal processes that have kept, and will continue to keep, civil death alive by attaching criminal<sup>17</sup> or negative civil stigma to individuals without adequate safeguards.<sup>18</sup> More specifically, I will discuss how these legal processes are now lowering the burden for government actors to attach negative stigma, criminal or civil, to individuals simply because we, as a society, are failing to recognize that our existing legal processes are quickly becoming antiquated given the rapid development of technology and our reliance upon technology to inform legally driven initiatives. If we, as a society, do not make an effort to consider the potential ramifications of permitting significant technological influence in the legal realm, we are opening a door that will expose individuals to unforeseen and potentially unintended punitive measures.

In essence, this Article highlights the importance of enacting adequate safeguards to ensure proper monitoring and control of any information stored in big data. This Article argues that inadequate safeguards in our existing legal processes may establish new, or exacerbate existing, collateral consequences such that citizens are no longer able to meaningfully participate or reintegrate into society following conviction, judgment, or a finding of responsibility. In a sense, we are witnessing how the modernization of the civil death as the impact of any collateral consequence is exacerbated by highly advanced and accessible technologies maintained by law enforcement or related recordkeeping entities. This Article focuses on three specific and representative examples of legal processes that

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16. See U.S. CONST. amend. V; *id.* amend. XIV, § 1 (guaranteeing that no person will be deprived of liberty or property without due process of law).

17. For purposes of this Article, “criminal stigma” refers to the “labeling and tagging processes . . . [that] identify[] an individual as criminal in the eyes of [the publics]” or otherwise suggest the potential for criminality or wrongdoing. *Mark of Cain – The Stigma Theory of Crime and Social Deviance*, U.S. DEP’T JUST. OFF. JUST. PROGRAMS, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/mark-cain-stigma-theory-crime-and-social-deviance> [<https://perma.cc/9BP8-JPVQ>] (last visited Nov. 3, 2025).

18. Each of these processes is underappreciated by the public at large because the United States government, as well as its actors, have not facilitated open and transparent discussion of these legal processes.

are quietly depriving individuals of adequate procedural protections while attaching criminal or negative civil stigma. This Article further analyzes how these processes serve as information streams that flow into and contribute to much larger data reservoirs (i.e., big data), which further exacerbate potential collateral consequences and increases the exposure of individuals whose information is housed in said information stores.

First, I will address a process called “titling” in the United States military.<sup>19</sup> Titling, in its current form, is a process that has only been around since 2018. It involves procedures that permit military law enforcement to list an individual as the subject of an ongoing criminal investigation at a very early stage, often prior to adequate evidence being collected and without the benefit of a hearing or legal counsel.<sup>20</sup> After a service member is titled, that individual’s identifying information is then placed into a federal law enforcement database, the Defense Central Index of Investigations (“DCII”), and is stored for up to 40 years, depending on the branch of service.<sup>21</sup> Even if charges are not formally filed or the person is ultimately absolved of any wrongdoing, the individual’s information remains in the database simply because the service member was initially listed as the subject of an investigation (i.e., titled).<sup>22</sup> In order to expunge said

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19. See ReAnne R. Wentz, “Equality of Treatment”: How Service Members of Color are Disproportionately Impacted by the Military Law Enforcement’s Titling Process, 230 MIL. L. REV. 307, 311 (2023) (“Titling is a process unique to the military, in which the law enforcement agent will place the name of an individual in the subject block of a Law Enforcement Report (LER). Placing a name in the subject block occurs ‘as soon as the investigation determines there is credible information that the subject committed a criminal offense.’”).

20. See *Law Enforcement’s Revenge in Military Justice*, L. OFF. JOCELYN C. STEWART, <https://www.ucmj-defender.com/law-enforcements-revenge-in-military-justice/> [<https://perma.cc/XC8W-CADX>] (last visited Sept. 8, 2025) (“Titling is not a judicial decision. In fact, being titled as the subject of an investigation does not mean you were charged with a crime at all . . . [It] is not a decision to put a person into formal charging or the judicial (or even nonjudicial) process.”).

21. OFF. OF INSPECTOR GEN. OF THE U.S. DEP’T OF DEF., DOD INSTRUCTION 5505.07: TITLING AND INDEXING BY DoD LAW ENFORCEMENT ACTIVITIES, 3 (Aug. 8, 2023), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550507p.pdf> [<https://perma.cc/3R3J-NL4N>]; U.S. DEPT. OF ARMY, PRIVACY ACT, A0195-2b USACIDC (Aug. 16, 2011), <https://pclt.defense.gov/DIRECTORATES/Privacy-and-Civil-Liberties-Directorate/Privacy/SORNSIndex/Article/4012057/a0195-2b-us-acidc/> [<https://perma.cc/F5UD-7QV9>].

22. See Wentz, *supra* note 19, at 311–13 (noting that titling information is retained in the DCII until the titled individual takes action to have it expunged for lack of probable cause); see also L. OFF. JOCELYN C. STEWART, *supra* note 20 (“The titling decision remains in a centralized database . . .”); OFF. OF INSPECTOR GEN. OF THE U.S. DEP’T OF DEF., *supra* note 21, at 3 (“Once the subject of a criminal

information from the DCII, the service member, if the individual is even aware of this process,<sup>23</sup> must establish that (1) no probable cause or insufficient evidence existed to determine whether a crime occurred or (2) no probable cause or insufficient evidence existed to determine whether the person committed the crime, which, based on my independent research, is an almost insurmountable burden.<sup>24</sup> This is but one process through which law enforcement may attach negative stigma to an individual even if the person is ultimately found completely innocent or has their charges dropped. Undoubtedly, this process will expose individuals to unnecessary collateral consequences, potentially without any finding of wrongdoing, after their information is entered into big data (here, the DCII and potentially other databases). Depending upon who has access to a database housing the service member's information, the effect of any collateral consequence may vary greatly in scope and impact.

The next legal process I will address concerns an area of law that has been around for decades—Title IX—but has undergone rapid change recently and has become a seesaw political issue. I briefly begin by tracing the evolution of Title IX to show its significant expansion in scope, with the most drastic change occurring in 2011 following the Obama administration's issuance of the Dear Colleague Letter (hereinafter referred to as "the Letter"). This change reshaped the nature and scope of Title IX and redefined how sex-based discrimination is viewed and addressed on college campuses around the country.<sup>25</sup> Through the Letter, as well as subsequent amendments from the Trump and Biden administrations, post-secondary educational institutions now investigate and litigate Title IX misconduct matters through on-campus administrative

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investigation is indexed in DCII, the information will remain in DCII, even if they are found not guilty, unless the DoD LEA head or designated expungement official grants expungement . . .").

23. As discussed below, the military has no obligation to advise service members of the titling process or its potential effects.

24. See U.S. DEP'T OF THE ARMY, JUDGE ADVOC. GEN. CORPS, "I'VE BEEN TITLED!" WHAT DOES THAT MEAN AND HOW DO I FIX IT?, [https://home.army.mil/jackson/4417/4559/9054/Titling\\_and\\_Request\\_for\\_Amendment\\_to\\_DACID\\_Records.pdf](https://home.army.mil/jackson/4417/4559/9054/Titling_and_Request_for_Amendment_to_DACID_Records.pdf) [<https://perma.cc/6PAV-VSJ3>] (last visited Dec. 3, 2025).

25. See RUSSELLYNN ALI, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/XC6P-W8JW>] ("This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence . . . [and] by discussing the proactive efforts schools can take to prevent sexual harassment and violence . . .").

disciplinary hearings.<sup>26</sup> Although my first article focused on this issue more broadly, this piece focuses on transcript notations placed on an individual's academic record either during the pendency of a disciplinary proceeding or following a finding of responsibility, which serves as a permanent, quasi-criminal record that follows the individual even if they transfer schools.<sup>27</sup> More specifically, this Article demonstrates that the placement of such a notation, such as a representation that the individual faced or is facing allegations involving sexual misconduct or other violent acts, such as robbery or battery, attaches significant criminal stigma without basic constitutional protections. In the criminal realm, a defendant will be afforded a host of due process and other constitutional protections prior to having such stigma permanently attached. As a matter of public safety, post-secondary institutions have a legal obligation to report any allegations involving crimes of violence, or related findings of responsibility, to the public and federal government.<sup>28</sup> As such, it is likely that this information is being stored in big data and may result in far-reaching, devastating collateral consequences for those responding to allegations or found responsible in Title IX proceedings, such as public perception, the ability to obtain certain employment, or even the opportunity to obtain a degree.

Finally, this Article directly addresses technology that law enforcement, including state, federal, and local agencies, utilize and rely upon when conducting daily business, such as assigning patrol routes, identifying high crime areas, investigating individuals, and even attaching stigma to those who are perceived to be at risk of conducting criminal activity (i.e., predicting crime, rather than reacting to it). For example, in 2012 the Los Angeles Police Department

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26. See Naomi Mann, *Classrooms into Courtrooms*, 59 Hous. L. Rev. 363, 367–68 (2021) (“[The Department of Education’s] 2020 Rule created a quasi-criminal courtroom system for Title IX investigatory proceedings, including disciplinary proceedings . . .”).

27. See generally Raymond Trent Cromartie, *Aequitas: Seeking Equilibrium in Title IX*, 49 U. DAYTON L. REV. 53, 53–58, 68 nn.70–80 (2023) (analyzing evolving Title IX procedures and the long-term impact of disciplinary records on accused students).

28. See U.S. DEP’T OF EDUC., CLERY ACT APPENDIX FOR FSA HANDBOOK 1 (2020), <https://www.ed.gov/sites/ed/files/admins/lead/safety/cleryappendixfinal.pdf> [<https://perma.cc/2KML-U8HH>] (“The Clery Act requires that all postsecondary institutions participating in title IV student financial assistance programs disclose campus crime statistics and other security information . . . [and] statistics, policies and programs related to dating violence, domestic violence, sexual assault, and stalking . . .”); *The Jeanne Clery Act*, CLERY CTR., <https://www.clerycenter.org/the-clery-act> [<https://perma.cc/P2X5-YDZX>] (last visited Sept. 9, 2025) (discussing Clery Act requirements to disseminate annual public security reports with statistics of campus crime).

(“LAPD”) was one of the first agencies to begin utilizing a system designed by PredPol, a predictive policing company that allows law enforcement to store criminal data and run algorithms “to identify areas where future crime is most likely to occur.”<sup>29</sup> Although law enforcement databases have long stored information regarding arrests or convictions, certain technology may, for example, harbor information about people who are simply stopped by police, among other things.<sup>30</sup> These systems not only rely upon preexisting data digitized from historical paper records, they also develop and learn as human actors add potentially biased information to the database or modify algorithms that facilitate the “proper” functioning of said technology.<sup>31</sup>

Since the technology relies on historical data and ongoing human input, I argue that it may be subject to developing prejudices or facilitating archaic racial norms depending upon the information that is fed into the system. It is well known that the LAPD has a strained history with its city and has been the subject of racial controversy, so it is not unreasonable to believe that the information digitized from that era may negatively affect how a supposed “unbiased” technology may predict crime or potential criminal actors.<sup>32</sup> For example, “black data,” as one scholar observed, is data housed within database algorithms that attaches “permanent digital suspicion and targets poor communities of color.”<sup>33</sup> This amplification

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29. Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOCIO. REV. 977, 989 (2017).

30. *Id.* at 992, 996 (“[T]he inter-institutional integration of data and proliferation of dragnet surveillance practices—including the use of data on individuals with no direct police contact and data gathered from institutions typically not associated with crime control—represent fundamental transformations with the very nature of surveillance.”).

31. *See id.* at 1003–04 (“[B]ig data participates in and reflects existing social structures. Far from eliminating human discretion and bias, big data represents a new form of capital that is both a social product and a social resource . . . . Characterizing predictive models as ‘just math,’ and fetishizing computation as an objective process, obscures the social side of algorithmic decision-making. Individuals’ interpretation of data occurs in preexisting institutional, legal, and social settings . . . .”).

32. *See id.* at 998 (“These social dynamics inform the historical crime data that are fed into the predictive policing algorithm. However, once they are inputted as data, the predictions appear impartial; human judgment is hidden in the black box . . . under a patina of objectivity.”); *see also* IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (Oct. 2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf> [<https://perma.cc/844B-US3U>].

33. ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING 3–4 (NYU Press 2017); *see also* Thomas P. Crocker, *Ubiquitous Privacy*, 66 OKLA. L. REV. 791, 791 (2014).

of existing racial animus, combined with the possibility of improper input from human actors, can attach criminal stigma to someone even if they have not committed a crime, thereby manifesting civil death by depriving that individual of due process prior to being so categorized. This potential impact is even more concerning given that law enforcement databases are often interconnected,<sup>34</sup> which further expands the scope of any disparate impact or collateral consequence. In essence, big data is functionally creeping.<sup>35</sup>

In exploring potential solutions to this issue, this Article ultimately proposes a two-prong approach. First, as briefly discussed above, we need to reexamine existing administrative and legal processes to ensure the current protections and procedural safeguards are adequate in light of big data's overwhelming influence in said proceedings, as well as the far-reaching impacts of any criminal record once it is housed in big data. Second, I assess safeguards already enforced by the General Data Protection Regulation ("GDPR"), data privacy legislation enacted by the European Union in 2016,<sup>36</sup> as well as legislation recently introduced in the United States, to emphasize the importance of robust oversight and auditing mechanisms for all law enforcement or other related databases.

This Article will advocate for additional safeguards that should be considered, and potentially implemented, in existing administrative and legal processes prior to placing any individual information in big data maintained and accessed by law enforcement or any related entities/individuals, as well as propose certain oversight and auditing procedures we should consider as technology continues to develop and influence our existing legal processes. For example, the Fourth Amendment of the United States Constitution generally protects individuals from unreasonable searches and seizures.<sup>37</sup> Prior to the introduction of technology, Fourth Amendment violations generally focused on physical searches of individuals or property.

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34. See generally Jennifer Daskal, *Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues*, 8 J. NAT'L SEC. L. & POL'Y 473, 501 (2016) ("Blocking provisions [against cross-border requests for data] in U.S. law are causing a backlash—resulting in countries seeking to unilaterally bypass these restrictions and/or demand that data be stored locally so as to avoid the U.S.-based legal restrictions on the sharing of sought-after data.").

35. See Bert-Jaap Koops, *The Concept of Function Creep*, 13 L., INNOVATION, & TECH. 29, 36 (2021) (defining functional creep as "the use of technology for new purposes beyond its originally intended purposes" and "the expansion of a . . . system or technology into areas for which it was not originally intended")

36. Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119) 53 (EU).

37. U.S. CONST. amend. IV.

However, as technology has progressed, courts across the country began analyzing purported Fourth Amendment violations through a technological lens. In particular, two cases decided by the United States Supreme Court in the 1970s held that individuals are not entitled to an expectation of privacy when they voluntarily provide the relevant information to third-parties.<sup>38</sup> Since these ruling were issued, law enforcement and other government actors have heavily relied upon this principle to further countless investigations. Cases like *Smith* and *Miller* highlight the importance of courts and legal advocates recognizing the potential influence of technology upon individual rights.

Allowing the existing legal processes to proceed without adequate protections or other safeguards and then placing the aggrieved individual into big data will not only exacerbate collateral consequences, it will likely compromise public safety as an increasing number of people who have criminal or civil stigma attached to them struggle to find housing, employment, government benefits, and many other basic needs. The purpose of considering additional safeguards in existing legal processes is to curb the impact of big data until we have comprehensive, over-arching legislation that will address the long term. The longer we allow our antiquated legal processes to remain stagnant and fail to keep up with the rapid development of technology, the further we facilitate the modernization and re-introduction of civil death.

Where Part I of this Article provided a brief introduction to the concept of criminal recordkeeping and its transition to the digital realm, Part II will primarily focus on and explore the history of criminal recordkeeping and its impacts in the United States, as well as how advocates perceive the issue. Part III will then analyze and discuss the three processes that attach negative stigma to an individual without adequate safeguards, beginning with titling in the military, moving onto Title IX transcript notations, and concluding with law enforcement technologies. Finally, Parts IV and V will discuss existing data legislation, including the GDPR, provide brief background of legislation, analyze relevant provisions, and conclude by proposing safeguards that should be considered in the United States prior to storing an individual's information in big data. Through this Article,

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38. See *Smith v. Maryland*, 442 U.S. 735, 744 (1979) (“[P]etitioner voluntarily conveyed numerical information to the phone company . . . . In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed.”); see also *United States v. Miller*, 425 U.S. 435, 443 (1976) (“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party . . .”).

I will demonstrate that our society must strike a balance between promoting public safety and protecting individual rights and interests while implementing big data. By establishing adequate safeguards in existing legal processes and ensuring robust oversight of data-driven technology, we will hopefully mitigate adverse impacts or collateral consequences that may stem from the use of such technology.

## II.

### CRIMINAL RECORDKEEPING BACKGROUND AND IMPACTS

Prior to delving deeper into big data and the aforementioned legal processes that may contribute to said information stores, it is important to recognize the progression of criminal recordkeeping in the United States. The cataloging and indexing of information related to an individual's history of wrongdoing, whether criminal or civil, has an extensive past in our country. As mentioned above, our current legal system was heavily influenced by English common law and maintains its roots in the same.<sup>39</sup> Arguably, criminal recordkeeping began well before the founding of the United States through rather primitive forms of denoting wrongdoers from the general population, including branding with hot iron and local knowledge.<sup>40</sup> Although branding as a form of recordkeeping essentially disappeared by the eighteenth century, societies still sought a means to catalog and identify offenders.<sup>41</sup> Regardless of the progression of recordkeeping abroad, the American colonial system of criminal recordkeeping began to come into its own following the defeat of the British in the American Revolutionary War. Where the vast majority of colonial criminal or civil code was based largely in religion, with each colony maintaining its own legal system, constitution, and set of laws, post-colonial America, over time, began to develop a more robust system of criminal justice that centered on morality instead of religious tenets.<sup>42</sup>

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39. See Chin, *supra* note 1, at 1790, 1793 (positing that the English common law punishment of civil death has reemerged in a new form within the United States criminal legal system).

40. See TERRY THOMAS, CRIMINAL RECORDS: A DATABASE FOR THE CRIMINAL JUSTICE SYSTEM AND BEYOND 5–6 (2007) (“In the sixteenth century, branding had been a rudimentary means of letting the authorities know if they were dealing with a second-time offender.”).

41. See *id.* (detailing early forms of criminal recordkeeping in the United States).

42. See COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY (Donald S. Lutz ed., 1998) (illustrating the role of religion in colonial American law); see also Jud Scott, *Civil Death in California: A Concept Overdue for Its Grave*, 15 SANTA CLARA L. REV. 427, 430 (1975) (explaining that the Enlightenment

Following the founding of the United States in the late eighteenth century and the enactment of the United States Constitution, our legal system continued to expand and evolve, especially as the population and territory of the fledgling nation rapidly swelled. In fact, until the 1850s, criminal records primarily comprised of “rap sheets,” originally referring to a simple note or other document prepared and maintained by local police, which notated basic information about an offender and substantively varied greatly among police departments.<sup>43</sup> Up until the 1960s, criminal records in the United States were kept in paper form, which generally required anyone seeking to obtain said information to physically present themselves at the court or agency where the documentation was housed to request it.<sup>44</sup> The eventual transition from paper to digital records was motivated by several factors including, but not limited to: (1) America’s expansive territory, encompassing fifty states spanning almost four million square miles, which facilitated multi-jurisdictional offenders evading capture; (2) the development and availability of new technology; and (3) concerns related to efficient recordkeeping processes, especially when it came to information exchange among law enforcement and manually updating records.<sup>45</sup> The terms rap sheet and criminal record eventually became synonymous and expanded in scope thereafter, gradually encompassing more and more information, such as fingerprints and other biometrics, on individual offenders.<sup>46</sup>

In 1967, arguably the greatest expansion in criminal recordkeeping within the United States occurred. During that year, the Federal Bureau of Investigation’s (“FBI”) Criminal Justice Information Services Division was established.<sup>47</sup> In years past, the FBI maintained hard copies of criminal records, including fingerprints and other

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Era shifted focus from severe punishment for transgressions to crime prevention and rehabilitation).

43. OFF. OF TECH. ASSESSMENT, AN ASSESSMENT OF ALTERNATIVES FOR A NATIONAL COMPUTERIZED CRIMINAL HISTORY SYSTEM 21–22 (1982).

44. *Id.* at 31–32.

45. *Id.* at 31–36.

46. See *Criminal Record*, THESAURUS.COM, <https://www.thesaurus.com/browse/criminal-record> [<https://perma.cc/8NGP-B7LG>] (last visited Sept. 9, 2025); see generally *100 Years of Fingerprints and Criminal History Records*, FED. BUREAU INVESTIGATION (July 10, 2024), <https://www.fbi.gov/news/stories/fbi-marks-100-years-of-fingerprints-and-criminal-history-records> [<https://perma.cc/L7NL-ZR6Y>].

47. See *NCIC Turns 50: Centralized Database Continues to Prove Its Value in Fighting Crime*, FED. BUREAU INVESTIGATION (Jan. 27, 2017), <https://www.fbi.gov/news/stories/ncic-turns-50> [<https://perma.cc/75WG-BPQE>] (noting that the Criminal Justice Information Services Division was formerly known as the Identification Division); see also U.S. DEP’T OF JUST., LAW ENFORCEMENT RECORDS MANAGEMENT SYSTEMS,

biometric data. However, following a proposal to then-FBI Director J. Edgar Hoover, it began implementing a robust computer system that would act as a central repository for preexisting and future criminal records.<sup>48</sup> The primary purpose of this database was to create a centralized system that would house information from each state and disseminate the same to law enforcement agencies nationwide and abroad.<sup>49</sup> Following a collaborative effort among the FBI, United States Department of Commerce, and International Association of Chiefs of Police, an advisory board comprised of state and local police established specific policies and procedures for developing the criminal database.<sup>50</sup> After years of development, the National Crime Information Center (“NCIC”) was formally launched on January 27, 1967.<sup>51</sup> Moving forward, the NCIC would house information related to felonies, misdemeanors, arrests, and criminal dispositions, among other things.<sup>52</sup>

While the progression to digital storage methods appeared to be initially positive on its face, public sentiment began to shift as the legitimacy of information stored in the NCIC, and similar databases developed later, came into question. For example, since its establishment, inaccurate or outdated information stored in the NCIC has resulted in false arrests or detainments, and even abuses in how the technology is implemented.<sup>53</sup> As referenced above, law enforcement in the United States has a long and complicated history of violence against the population, especially against underrepresented communities.<sup>54</sup> In fact, more than 1,300 people were

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<https://ucr.fbi.gov/law-enforcement-records-management-system> [https://perma.cc/TP6H-AVEL] (last visited Dec. 2, 2025).

48. See FED. BUREAU INVESTIGATION, *supra* note 47.

49. See 28 C.F.R. §§ 20.1, 20.20–.21, 20.36 (2025) (referring repeatedly to the NCIC and similar databases as “central repositor[ies]”).

50. See FED. BUREAU INVESTIGATION, *supra* note 47.

51. *Id.*

52. See *id.*; see also Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas> [https://perma.cc/3CXC-HDZN].

53. See Alex Kane, *Terrorist Watchlist Errors Spread to Criminal Rap Sheets*, THE INTERCEPT (Mar. 15, 2016), <https://theintercept.com/2016/03/15/terrorist-watchlist-errors-spread-to-criminal-rap-sheets/> [https://perma.cc/G48N-DGAA] (describing how the broad dissemination of highly inaccurate watchlists leads to false arrests and prejudicial treatment by courts and law enforcement, particularly for Muslim individuals).

54. See *Mapping Police Violence*, CAMPAIGN ZERO, <https://mappingpoliceviolence.org> [https://perma.cc/C829-2SYP] (last visited Sep. 16, 2025) (“Black people are 2.8[ times] more likely to be killed by police than white people in the U.S.”).

killed in 2024 as a result of police violence.<sup>55</sup> In the 1970s, our approach to crime and public safety was overhauled following a press conference by President Richard Nixon where he declared a war on drugs and crime.<sup>56</sup> Unfortunately, the adverse impacts of President Nixon's now infamous speech are still being felt today through the lingering effects of mass incarceration.<sup>57</sup> As a study conducted by the Department of Justice found, the number of Americans who have a college degree is similar to the number of Americans who have a criminal record.<sup>58</sup> While crime rates have generally decreased since the 1990s, this trend reversed for some violent crimes starting in 2020, and it may still take decades to balance the damage caused by President Nixon's policies.<sup>59</sup> America's sudden shift toward aggressive prosecution of crime and the imposition of drastic sentences resulted in mass incarceration and conviction, which served as a catalyst for collateral consequences as more and more citizens were being exposed to legal proceedings and the associated stigma.<sup>60</sup>

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55. *Id.* This data includes incidents classified as suicide by police and involving off-duty officers. See *Mapping Police Violence: Data and Methodology*, CAMPAIGN ZERO (Sept. 20, 2025), <https://mappingpoliceviolence.org/methodology> [<https://perma.cc/D478-JEMZ>].

56. See Brian Mann, *After 50 Years of the War on Drugs, 'What Good Is It Doing for Us?'* NPR (June 17, 2021), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us> [<https://perma.cc/4EDV-3YZT>] (referencing President Nixon's June 17, 1971 speech as the symbolic start of the modern drug war).

57. See James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/6FT5-EQCG>] ("The U.S. incarcerates more people than any nation in the world, including China. And the U.S. is also the leader in the prison population rate . . . Nixon started this trend, declaring a 'war on drugs' and justifying it with speeches about being 'tough on crime.'"); see also Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS (Dec. 2, 2014), <https://www.americanprogress.org/article/one-strike-and-youre-out/> [<https://perma.cc/A55U-9ADG>] ("[R]esearch shows that mass incarceration and its effects have been significant drivers of racial inequality in the United States, particularly during the past three to four decades.").

58. See Friedman, *supra* note 52.

59. See John Gramlich, *What the Data Says About Crime in the U.S.*, PEW RSCH. CTR. (Apr. 24, 2024), <https://www.pewresearch.org/short-reads/2024/04/24/what-the-data-says-about-crime-in-the-us/> [<https://perma.cc/326J-3JXA>] (noting that the rates of violent crime and property crime fell 50–70%, depending on the data source, from 1993 to 2022, but the murder rate increased sharply during the COVID-19 pandemic).

60. See *id.* Although the two primary sources of criminal data are the FBI and the Bureau of Justice Statistics ('BJS'), the data is not entirely complete as these entities rely upon information reported to them by other law enforcement entities spread

This amassing of criminal records laid the foundation for our now technically-driven processes as that documentation and information is still being housed in databases and relied upon by those who have access to said information.<sup>61</sup>

Currently, criminal records are housed at several levels within the United States and originate from an untold number of sources. In fact, since the establishment of the NCIC, each state has developed and maintained its own criminal recordkeeping databases.<sup>62</sup> For example, at the federal level, in addition to the NCIC, the United States government has established and maintains: (1) the Interstate Identification Index (“III”), a digital index of information acquired by law enforcement from a suspect and housed within the NCIC<sup>63</sup>; (2) the National Instant Criminal Background Check System (“NICS”), which is primarily used for FBI screening of potential purchasers of firearms<sup>64</sup>; (3) the Integrated Automated Fingerprint Identification System (“IAFIS”), a national database that stores biometric data and other criminal history<sup>65</sup>; (4) the National Driver Register and Problem Driver Point System, a system that stores information related to motor vehicle offenses including, but not limited to, suspended and revoked licenses, convictions related to driving under the influence of substances, falsifying records, and motor vehicle accidents resulting in injury or death<sup>66</sup>;

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throughout the country. According to data, the FBI and BJS only obtained statistics from 83% of participating law enforcement entities in 2022.

61. See Friedman, *supra* note 52.

62. See *State Identification Bureau Listing*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/identity-history-summary-checks/state-identification-bureau-listing> [<https://perma.cc/3KGH-JJDF>] (last visited Oct. 7, 2025) (listing the state identification bureaus in the fifty U.S. states plus Washington D.C., Puerto Rico, Guam, and the U.S. Virgin Islands).

63. See 28 C.F.R. § 20.36 (describing participation in the III System).

64. See *About NICS*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics> [<https://perma.cc/HV2F-8MMC>] (last visited Sep. 18, 2025) (the III system, “was established as a result of the Brady Handgun Violence Prevention Act of 1993 [ ]” which requires federally licensed firearm dealers to perform a search in the national background check system to determine if a person can legally buy or own a gun).

65. CRIM. JUST. INFO. SERVS. DIV., *The Integrated Automated Fingerprint Identification System*, FED. BUREAU INVESTIGATION, [https://ucr.fbi.gov/fingerprints\\_biometrics/biometric-center-of-excellence/files/iafis\\_0808\\_one-pager825](https://ucr.fbi.gov/fingerprints_biometrics/biometric-center-of-excellence/files/iafis_0808_one-pager825) [<https://perma.cc/X2GT-6346>] (last visited Oct. 7, 2025).

66. See *The National Driver Register (NDR) and Problem Driver Pointer System (PDPS)*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/research-data/national-driver-register-ndr> [<https://perma.cc/2TNF-LDF9>] (last visited Sept. 2, 2025) (“[T]he Problem Driver Point System . . . contains information on individuals whose privilege to operate a motor vehicle has been revoked, suspended, canceled or denied

(5) Secure Flight, a “risk-based passenger prescreening program that enhances security by identifying low and high-risk passengers before they arrive at [an] airport by matching their names against trusted traveler lists and watchlists”<sup>67</sup>; and (6) importantly, Nlets, or the International Justice & Public Safety Network and formerly the National Law Enforcement Telecommunications Systems, which is an interface that allows users to access databases maintained by each state, essentially forming a nationwide network of interconnected law enforcement databases.<sup>68</sup> As mentioned above, the development and use of the aforementioned systems, among others, has been the subject of heated debate. Where one side hails law enforcement databases and technologies as a pillar of public safety and efficiency, others question the rapid expansion and ethical implementation of such processes, as well as the undoubted exacerbation of existing collateral consequences.<sup>69</sup>

The arguments from advocates of a robust criminal recordkeeping system are straightforward. They assert that such recordkeeping processes permit the efficient storage and exchange of information among law enforcement while promoting public safety, thus serving as an invaluable tool for law enforcement.<sup>70</sup> As advocate scholars have noted, “[p]ublic safety benefits significantly outweigh any burden that some collateral consequences place on an ex-offender’s ability to reintegrate into society.”<sup>71</sup> The argument surrounding

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or who have been convicted of serious traffic-related offenses.”); *see also* NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., THE NATIONAL DRIVER REGISTER (2006), <https://www.nhtsa.gov/sites/nhtsa.gov/files/ndr.pdf> [<https://perma.cc/5GXZ-RL53>].

67. *DHS Announces Extension of REAL ID Full Enforcement Deadline*, DEP’T HOMELAND SEC. (Dec. 5, 2022), <https://www.dhs.gov/archive/news/2022/12/05/dhs-announces-extension-real-id-full-enforcement-deadline> [<https://perma.cc/D7P8-TDGJ>].

68. *What We Do*, NLETS, <https://nlets.org/about/what-we-do> [<https://perma.cc/W8N8-4BHZ>] (last visited Sept. 2, 2025).

69. *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2552 n.345 (2020) (contrasting a scholarly work claiming public safety is best served by access to criminal history data with another arguing that safety is increased when those with past convictions can productively participate in society).

70. *See* Wentz, *supra* note 19, at 325 (“[L]aw enforcement agencies . . . believe that . . . indexing . . . merely ‘create[s] an administrative index of investigations, searchable by subject name or other identifying data’ and maintain that [it] is a vital tool for investigators.” (fourth alteration in original)).

71. John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, HERITAGE FOUND. 2 (2017), <https://www.heritage.org/crime-and-justice/report/collateral-consequences-protecting-public-safety-or-encouraging-recidivism> [<https://perma.cc/D9KN-HHNB>]; *see also* Roberts, *supra* note 4, at 334 (discussing “commonly-held” view that “giving the public full access to information about individuals’ criminal history advances public safety.”)

public safety also focuses on insulating employers from individuals with a criminal record. In fact, a survey performed by the Society of Human Resource Management found that 52% of employers who performed background checks primarily check an applicant's background to limit potential legal liability, while only 49% and 17% performed a check to foster a safer work environment and assess the character of an applicant, respectively.<sup>72</sup> The process of exploring an individual's background for employment purposes is well understood. For example, failing to exercise due diligence in the hiring, supervision, and retention of an employee or representative may result in significant monetary and legal exposure for an employer if injury occurs to another person or property as a direct and proximate result of the worker's acts or omissions made in furtherance of their employment.<sup>73</sup> This is a prime example of one of the many ways big data can further public safety without unnecessarily sacrificing individual rights and opportunities.

Opponents of extensive criminal recordkeeping counter the overarching public safety concern by arguing that collateral consequences<sup>74</sup> actually present a greater threat to public safety than one

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72. See Friedman, *supra* note 52. For example, if a delivery company hires a truck driver who has a history of driving under the influence and that employee subsequently injures or kills someone while driving intoxicated on the job, the employer could face civil claims that may vicariously impute the employee's negligence upon the employer. Another example may be any occupation where an individual is placed in a position of responsibility over others, such as an elementary school teacher. Undoubtedly, it is within the employer's and the public's best interest to ensure that individual does not have a history of child abuse or other issues that may endanger the children. See generally *Respondeat Superior*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.").

73. See STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, AMERICAN LAW OF TORTS § 4:3 (Monica C. M. Leahy ed., 2025) ("The doctrine of respondeat superior imputes vicarious liability from an employee to an employer when the employee's acts are within the scope of the authority conferred.").

74. Collateral consequences may impact employment, transportation, licensure, education, immigration status, child custody, voting rights, one's ability to purchase a firearm, housing, entitlement to benefits, reputation, and even legal standing. See, e.g., LEGIS. ANALYSIS AND PUB. POL'Y ASSOC., COLLATERAL CONSEQUENCES OF CRIMINAL JUSTICE INVOLVEMENT 1 (2024), <https://legislativeanalysis.org/wp-content/uploads/2024/10/Collateral-Consequences.pdf> [<https://perma.cc/V72M-8ZQD>] ("[Collateral] consequences include but are not limited to: (1) the loss of the rights to vote, serve on a jury, or possess a firearm; (2) barriers in obtaining housing, employment, higher education, professional licensure, and federal and state government benefits; and (3) barriers in obtaining credit and loans, including student loans."); FED. R. EVID. 608 and 609 (permitting the introduction of a prior criminal conviction for purposes of impeachment and attacking a witness's credibility, subject to certain exceptions); U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL: 8 U.S.C.

might imagine.<sup>75</sup> Many states, recognizing that collateral sources increase the likelihood that an ex-offender may commit another crime due to instability, currently maintain “clean slate” and/or “ban the box” legislation that recognizes collateral consequences and seeks to mitigate their impact.<sup>76</sup> The opposition’s focus upon collateral consequences is not only a result of conditions surrounding post-conviction or post-judgment life, but also stems from potential inaccuracies that may exist in law enforcement databases.<sup>77</sup> Depending upon nature and substance, the existence of any inaccurate information within a criminal record or database may unnecessarily expose an individual to collateral consequences. This concern is heightened by the fact that we exist in a digital age where information introduced into a technological realm, like the Internet or a database,

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1326, <https://www.justice.gov/archives/jm/criminal-resource-manual-1912-8-us-1326-reentry-after-deportation-removal> [<https://perma.cc/25SF-A692>] (last visited Dec. 2, 2025); Bobby Dale Barina, *How Can a Criminal Conviction Affect Child Custody?*, BARINA LAW GROUP (Dec. 27, 2022), <https://www.bobbybarinalaw.com/how-can-a-criminal-conviction-affect-child-custody/> [<https://perma.cc/BB94-WBQX>].

75. See Christi M. Smith, *The Pathway to Prosperity: How Clean Slate Legislation Enhances Public Safety and Stimulates the Economy*, R STREET, at 2, 8 (Mar. 14, 2023), <https://www.rstreet.org/research/the-pathway-to-prosperity-how-clean-slate-legislation-enhances-public-safety-and-stimulates-the-economy/> [<https://perma.cc/HK9S-4RRJ>] (“Record-based discrimination is extremely costly to taxpayers and the overall economy, resulting in an estimated \$78–\$87 billion loss in the national gross domestic product . . . Collateral consequences . . . are extremely costly to all Americans, jeopardizing public safety and the national economy. The rate of recidivism for people on community supervision and the increased likelihood of rearrest among this population is largely attributed to the criminogenic nature of prison and the lack of access to a social safety net upon release.”).

76. See *id.* at 15 (defining clean slate legislation as “a policy model that uses technology to automate arrest- and conviction-record clearance if a person stays crime-free for a specified period of time.”); Beth Avery and Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Advance Employment Opportunities for People with Past Convictions*, NAT’L EMP. L. PROJECT, at 2 (Oct. 1, 2021), <https://www.nelp.org/insights-research/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/7H5T-R8LW>] (identifying ban the box legislation as “policies [that] provide applicants a fair chance at employment by removing conviction and arrest history questions from job applications and delaying background checks until later in the hiring process.”)

77. See Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. 1771, 1773–74 (“One analysis of 200 New York state rap sheets identified an 80% error rate. A federal analysis found that a criminal-background-checking system used for governmental workers incorrectly reported criminal history records for employees 42% of the time . . . Inaccurate reports constitute the bulk of complaints filed with the Bureau of Consumer Financial Protection; 191,000 such complaints were filed in 2020 alone.”).

may never disappear, especially considering private companies are exploiting information for profit. As one scholar noted:

Criminal justice agencies maintain and work to update their own online databases, but th[is] publicly available data [has] often already leaked onto unregulated, unofficial websites. A routine, informal Internet search might reveal a criminal history posted on a neighborhood crime watch blog or a background check company might reveal part of a criminal record . . . .<sup>78</sup>

Understandably, the fear is that individual rights are being eroded by technology while it enhances the ability of government actors to pursue legal claims against individuals. Essentially, the cards are being stacked against individual citizens.

Historically, much like our criminal justice system and law enforcement generally, collateral consequences disparately affect minorities and other underrepresented communities. In fact, a 2009 study found that Black men who have a criminal record were twice as likely as their White counterparts to be viewed negatively by potential employers.<sup>79</sup> Additionally, Blacks and Latinos are more likely to have inaccuracies in their criminal records.<sup>80</sup> These findings are more troubling given that Blacks generally report that they are treated less fairly than Whites when interacting with law enforcement<sup>81</sup> and

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78. Sarah Esther Lageson, *Digital Punishment's Tangled Web*, 15 CONTEXTS 22, 24 (2016) <https://contexts.org/articles/digital-punishments-tangled-web/> [<https://perma.cc/VAS8-VD8W>].

79. See Roberts, *supra* note 4, at 331 (“[B]lack men with a record who applied [to an entry-level job] were twice as likely as white men to be saddled with this ‘criminal record penalty.’”) (citing Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. SOC. SCI. 195, 199 (2009)).

80. See MARTIN WELLS ET AL., CRIMINAL RECORD INACCURACIES AND THE IMPACT OF RECORD EDUCATION INTERVENTION ON EMPLOYMENT-RELATED OUTCOMES 16–17 (2020), <https://ecommons.cornell.edu/server/api/core/bitstreams/06046ce4-114f-4252-b3a1-8bec84529540/content> [<https://perma.cc/8RNW-UFRX>] (“To summarize, we find that respondents who identified as African American or Black are disproportionately likely to have inaccuracies on their criminal records. They have higher rates of inaccuracies than Latinos and whites, while Latinos have higher rates of inaccuracies than Whites.”).

81. See John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), <https://www.pewresearch.org/short-reads/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [<https://perma.cc/4RKD-E4EN>] (“84% of [B]lack adults said that, in dealing with police, [Black people] are generally treated less fairly than whites. . . . 63% [of White people] said the same.”).

navigating the criminal justice system in general.<sup>82</sup> Accordingly, the dynamics between races and law enforcement in the United States is a central issue when analyzing the utility of criminal databases and similar recordkeeping processes as a facilitator of public safety.

Prior to proceeding, I will provide a brief real-life example of how inaccurate information housed in big data may impact an individual in unforeseen ways simply because it exists on the Internet or in a database. I currently assist with teaching the civil litigation clinic at the University of Denver as a graduate fellow. In our clinic, our student attorneys represent indigent or underrepresented individuals in a variety of civil matters, and the students do so under Colorado's Student Practice Act, a law that permits them to practice under a barred attorney's license as if they are lead counsel. Although I did not supervise the matter personally, our clinic recently represented an individual seeking a civil protection order against her ex-partner in county court and sought to make the order permanent. As the students prepared for trial, they discovered a privately maintained online database that contained outdated information related to the respondent and had potential relevance in the current dispute. Notably, the students noticed that the online database contained information related to a now expunged criminal record associated with the respondent. After heated argument at trial, the court ultimately permitted introduction of the evidence, which eventually contributed to a permanent civil protection order being entered against the respondent. While we were able to obtain justice for our client, the respondent was not aware of the online database and thought that his expungement would have been effective at the time he entered a plea or completed his sentence. However, due to a privately owned database that contained inaccurate information, the respondent again faced detrimental impact from a legal proceeding that he thought was concluded. The risk of big data in this example is clear. The legitimacy of certain legal and administrative processes is at risk since they may eventually be usurped by unregulated and inaccurate information contained in big data.

### III. DISCUSSION

As mentioned above, this Part will focus on three unique, arguably deficient, legal processes that exist in the United States and

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82. *See id.* (“[A]round nine-in-ten [B]lack adults (87%) said blacks are generally treated less fairly by the criminal justice system than whites, a view shared by a much smaller majority of white adults (61%).”).

attach criminal stigma to an individual without adequate constitutional protections or other safeguards. The first is titling in the United States military, a process that is exclusive to service members but generally extends far beyond their time in the military.<sup>83</sup> The next process that will be addressed is the use of transcript notations during Title IX disciplinary proceedings on college campuses, regardless of the allegations a respondent is facing.<sup>84</sup> Finally, this Part will analyze criminal recordkeeping databases and technologies maintained by law enforcement or similar entities, and how those systems are now rapidly expanding and developing in unforeseen and unintended ways (i.e., functionally creeping). Specifically, I will discuss technology evolving from a process once focused on documenting and indexing information on criminal offenders that has since progressed to one largely focused on predicting crime. In fact, current technology now houses information related to not only individuals who are criminal offenders, but also people who have committed no crime, thereby potentially attaching negative stigma without any due process or other notice.<sup>85</sup>

#### A. *Titling in the United States Military*

As a preliminary matter, it is important to recognize that the United States military is governed by the Uniform Code of Military Justice (“UCMJ”), a federal law enacted in 1951 that applies to every single member of the United States Military and excludes private citizens.<sup>86</sup> Since the UCMJ is separate and distinct from the civilian criminal justice system, this Article only addresses relevant differences between the civilian and military justice systems and will only focus on the titling process, which is not implemented in the civilian realm. Still, the titling process is a prime example of how our society allows individual rights to be eroded in the name of public safety.

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83. The discussion about titling in the military will not be limited to a certain branch and will only address major differences in any branch-specific titling process.

84. This Article will only focus on Title IX proceedings at the post-secondary level and will not delve into other areas where Title IX is litigated, such as lower levels of education (i.e., high school, elementary school, etc.)

85. See Nicol Turner Lee & Caitlin Chin-Rothmann, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS INST. (Apr. 12, 2022), <https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/> [https://perma.cc/ETP7-FMYJ] (“[L]aw enforcement agencies often rely upon tools developed within the private sector, and, in certain cases, can access massive amounts of data either stored on private cloud servers or hardware . . . or available in public places like social media or online forums.”).

86. See 10 U.S.C. § 802 (encompassing active-duty personnel, reservists, members of the National Guard, some civilians in support roles, and cadets).

The UCMJ has developed over the years and began implementing titling prior to 1992, when significant changes were enacted.<sup>87</sup>

Under the pre-1992 titling standard, the [Criminal Investigation Division (CID)] temporarily indexed information [about servicemembers] in the DCII . . . upon completion of the initial [investigative report]. The CID did not complete permanent indexing until . . . probable cause existed to believe that an offense was committed and that the “suspect” committed that offense.<sup>88</sup>

The current standard for titling is much lower. Formally defined:

Titling is a process . . . in which the law enforcement agent will place the name of an individual in the subject block of a Law Enforcement Report (“LER”)<sup>89</sup> . . . ‘as soon as the investigation determines there is credible information that the subject committed a criminal offense.’<sup>90</sup>

Credible information “can be as little as an alleged victim’s first statement to military police [and] doesn’t mean he or she actually committed any crime.”<sup>91</sup> Should probable cause be established later in the military investigation, the DCII entry will be updated to “founded,” and the entry forwarded to the FBI’s NCIC.<sup>92</sup> As one scholar noted, a “founded” designation sometimes occurs well before an investigator legally establishes probable cause, a standard that must be met in both civilian and military criminal investigations

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87. See Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW., Aug. 1998, at 1, 6–8 (detailing the titling standards pre-1992 and explaining the 1992 changes to the standard).

88. *Id.* at 6.

89. Formerly known as “Reports of Investigation” and defined as “[a]n official record of all pertinent information and facts obtained in a . . . law enforcement report or criminal investigation.” Wentz, *supra* note 19, at 311 n.17; U.S. DEP’T OF THE ARMY, ARMY REGULATION 195-2: CRIMINAL INVESTIGATION ACTIVITIES 45 (2020).

90. Wentz, *supra* note 19, at 311; see also OFF. OF INSPECTOR GEN. OF THE U.S. DEP’T OF DEF., *supra* note 21, at 7 (defining “credible information” as “[i]nformation disclosed or obtained by a [criminal investigator] that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained [investigator] to *presume the facts or facts in question are true.*” (emphasis added)).

91. *Titling Removal Actions*, MIL. JUST. ATT’YS, <https://www.militaryjusticeattorneys.com/practice-areas/administrative-appeals-rebuttals/titling-actions/> [<https://perma.cc/SB2E-L5C8>] (last visited Sept. 9, 2025).

92. See U.S. DEP’T OF THE ARMY, ARMY REGULATION 190-45: MILITARY POLICE: LAW ENFORCEMENT REPORTING 28–30 (2016) (describing “founded offenses” as those supported by probable cause that a servicemember was the “subject” of the offense and mandating the reporting of such offenses in the DCII and to the NCIC).

prior to arresting an individual or searching their property.<sup>93</sup> Although a definition of probable cause is not explicitly provided within the United States Constitution, the Fourth<sup>94</sup> and Fourteenth<sup>95</sup> Amendments have been interpreted by courts to generally require facts and circumstances that, “at the moment the arrest [or search] was made, . . . [were] within [the] knowledge [of law enforcement]” based upon “reasonably trustworthy information . . . sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense.”<sup>96</sup> In essence, titling is purely an investigative decision, not a legal one, especially since there is very little involvement by any counsel at this stage of the investigation.<sup>97</sup> As discussed in greater detail below, this lower standard (i.e., designating allegations as “founded”) does nothing but significantly increase the exposure for current and former service members, especially given the fact that an untold number of individuals and entities have access to the information stored in the DCII and NCIC.<sup>98</sup>

Once a military investigator determines there is credible information, a service member is formally titled and his or her information<sup>99</sup> is then entered into the DCII, as well as other law enforcement databases, for up to 40 years.<sup>100</sup> Unfortunately, once a service member is entered into the DCII, the individual’s fate is largely sealed as the burden of removing oneself from these databases is

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93. See Wentz, *supra* note 19, at 311–12 (noting that titling and indexing uses a standard lower than probable cause).

94. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.”).

95. U.S. CONST. amend. XIV (providing the same due process protections against state governments and generally granting citizens “equal protection of the laws.”).

96. See *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

97. See Wentz, *supra* note 19, at 311 (noting that an individual is titled as soon as there is credible information that they have committed an offense).

98. See Ham, *supra* note 87, at 4–5 (“As of 1994 . . . the DCII contained over twenty-nine million indices on approximately nineteen million individuals, and it was growing at a rate of about two million indices per year. . . . Access to information in the DCII is widespread. The DCII receives an average of 35,000 requests per day. Twenty-seven agencies are authorized access and input to the DCII, with a total of 1179 terminals.”).

99. Information may include not only the person’s biographical data (name, date of birth, social security number, etc.), but also DNA and any information contained within the investigative report at the time of titling. See U.S. DEPT. OF ARMY, *supra* note 21, at 8.

100. See Wentz, *supra* note 19; see also U.S. DEPT. OF ARMY, *supra* note 21.

nigh insurmountable, assuming the service member is even aware he or she is titled.<sup>101</sup> In fact, the United States military is not required to provide an affirmative advisement on titling, so service members and veterans who are entered in the system may not recognize this process until an adverse impact is triggered by an inquiry.<sup>102</sup> Again, service members can be titled even if charges are never formally brought or the person is found completely innocent.<sup>103</sup> Yet, Department of Defense policy clearly indicates that titling is not intended to “imply

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101. See Rachel Fobar, *They’ve Never Been Arrested. Why Does the FBI List Thousands of Service Members as Potential Criminals?*, WAR HORSE (Oct. 23, 2025), <https://thewarhorse.org/service-member-flagged-military-titling/> [https://perma.cc/S8RW-R9AS] (“They’ve created a system where you’re guilty until proven innocent,’ [said a former Army colonel who specializes in defending service members]. ‘If the [Army Criminal Investigation Division] agent believes something, then you’re going to have this criminal history created, and it’s up to you to now prove that it didn’t happen.’ (second alteration in original)); see also Matt Hill, *Titling in the Military [In]Justice System*, SOFREP (Mar. 26, 2021), <https://sofrep.com/news/titling-in-the-military-injustice-system/> [https://perma.cc/5V9K-HZ4E] (“Many in the public arena aren’t aware of titling and have no knowledge of its current meaning or use . . . . [I]n the four years I served in the Marine Corps I never heard the word used even once.”).

102. Although I will not fully recite the facts and circumstances surrounding a sexual assault investigation where I was named the defendant during my time in the Army, my initial article provides a more thorough overview. Cromartie, *supra* note 27, at 58–60. In summary, while I was found not guilty of all sexual charges, I was found guilty of providing a false official statement during my initial interrogation. *Id.* As a result of the investigation, I was titled and entered into the DCII and likely other law enforcement databases; however, I was never advised of this fact and did not become aware of it until years later. In February 2023, I visited Buckley Air Force Base, located in Aurora, Colorado, to shop with my significant other. As is standard procedure, we initially presented at the base visitor center to obtain a guest pass by providing my driver’s license to the guard. After approximately 10–15 minutes, the gate guard returned and informed me that I was denied entry to the base. I quickly inquired as to the reasoning and was then informed that I had an open sexual assault investigation from 2013 (i.e., my criminal investigation from West Point, which was fully resolved in June 2013, was never administratively closed by the military). Although I pleaded my case and informed the guard of this substantial error, I was instructed to contact the United States Air Force and Army. Following months of administrative appeals, with the assistance of Senator John Hickenlooper’s office, my entry in the DCII was updated on July 25, 2023. Based on correspondence from the United States military, my information was corrected to accurately reflect the disposition of my case ten years after the fact. Letter from Michelle Kardelis, Chief, FOIA/PA Div., to Raymond Trent Cromartie (July 25, 2023) (on file with author). It is unclear how this inaccuracy may have negatively affected my life prior to my discovery as the titling process was not recognized by me until I faced a negative consequence.

103. See generally OFF. OF INSPECTOR GEN. OF THE U.S. DEP’T OF DEF., *supra* note 21, at 3 (“Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence . . . . Once the subject of a criminal investigation is

any degree of guilt or innocence,” which appears contrary to the practical impact.<sup>104</sup>

Any impact of titling is exacerbated by the fact that limited avenues for relief exist, which is largely due to the significant burden placed upon an individual seeking respite. Under the current version of the regulation, government expungement officials can only remove a titled individual’s information if:

(1) Probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred[;]

(2) Probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense[; or]

(3) Such other circumstances as the DoD LEA head or expungement official determines would be in the interest of justice . . . .<sup>105</sup>

The regulation further permits decision-makers to rely upon [t]he extent or lack of corroborating evidence against the covered person with respect to the offense[;] . . . [w]hether adverse administrative, judicial, or other such action was initiated against the covered person for the offense[;] . . . [and] [t]he type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.<sup>106</sup>

Based on a comprehensive review of appellate case decisions, appellants are rarely granted the relief they seek.<sup>107</sup> This is not surprising given the appellant must essentially argue against the methodology and reliability of any investigator’s findings and rebut a finding of probable cause.

Much like the other two processes discussed below, titling results in significant collateral consequences and negative stigma

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indexed in DCII, the information shall remain in DCII, even if they are found not guilty . . . .”).

104. *See id.*

105. *Id.* at 5.

106. *Id.*

107. *See generally* U.S. DEP’T OF DEF., BOARDS OF REVIEW READING ROOMS, <https://boards.law.af.mil/> [<https://perma.cc/7M5L-HFZS>] (last visited Sep. 8, 2025).

without due process or other adequate safeguards. Again, the impact of collateral consequences is primarily felt due to the indefinite scope of information dissemination via big data.<sup>108</sup> While an active service member may face unique consequences due to being titled during their military career, such as being “flagged”<sup>109</sup> or passed up for promotion, both current and former service members may experience the full extent of collateral consequences in their civilian capacity. For example, a veteran’s ability to purchase a firearm or obtain professional licensure might be affected depending upon the information stored in the DCII, NCIC, or other database.<sup>110</sup> Further compounding the potential impact of any collateral consequence is the fact that a study has shown DCII users “misunderstand the purpose of the [database] and [the] uses of the criminal investigative data contained therein, and that additional training of . . . DCII users is necessary.”<sup>111</sup> Meaning, service members may be erroneously titled and entered into the databases simply because the responsible personnel have not received adequate training and fail to appreciate the significance of a titling decision.

If the standard for entering a service member into the DCII is based largely on the perception of a trained investigator and the sufficiency of training has already been called into question by a

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108. The DCII, much like many other law enforcement databases, is interconnected with other information stores, creating a network of big data.

109. See *What It Means to be “Flagged” – For Military Justice*, L. OFF. JOCELYN C. STEWART, <https://www.ucmj-defender.com/what-it-means-to-be-flagged-for-military-justice/> [<https://perma.cc/7S67-A2HK>] (last visited Sept. 3, 2025) (“When a Soldier is flagged by the Army, it means that he [or she] is not eligible for certain favorable personnel actions. These actions include reenlistment, a permanent change of station . . . military awards and decorations, and military schools. It can also interfere with non-military activities that are based on service, such as using tuition assistance benefits . . . . A flag can be initiated by the commander for a variety of reasons, such as . . . being arrested or convicted of a crime, or being under investigation for misconduct.”). For example, during my criminal investigation, I was not permitted to leave the base overnight or attend events, among other things.

110. See *The Impact of a Military Record: Long-Term Consequences and Mitigation*, GRIFFIN L. FIRM (Oct. 6, 2024), <https://www.griffinlawdefense.com/blog/2024/october/the-impact-of-a-military-criminal-record-long-te/> [<https://perma.cc/H6DZ-MFYF>] (“A military criminal record can affect fundamental rights such as voting and firearm possession, complicate immigration status for non-citizens, and impact security clearances vital for certain jobs.”); Margaret Love, *NH Limits Denial of Licenses Based on Criminal Record*, COLLATERAL CONSEQUENCES RES. CTR. (July 10, 2018), <https://ccresourcecenter.org/2018/07/10/16794/> [<https://perma.cc/47FQ-4KCM>].

111. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE POLICY CONCERNING TITLING AND INDEXING OF INDIVIDUALS IN THE DEFENSE CLEARANCE AND INVESTIGATIONS INDEX 6 (2002), <https://apps.dtic.mil/sti/pdfs/ADA400229.pdf> [<https://perma.cc/X8YK-MUHM>].

government-funded study, then certainly we need to review titling procedures for internal compliance, as the detriment to service members is significant.<sup>112</sup> While the study's findings do not specify how DCII training was flawed or how users misunderstood the purpose and proper use of data within the process, the study's silence on these issues only furthers the notion that there is not enough government transparency in the titling process. Without adequate disclosure of DCII training methodology and oversight or enforcement procedures, the barrier for relief is almost unattainable as the avenues to argue against the investigator's findings are already extremely limited. Unfortunately, requests submitted via the Freedom of Information Act ("FOIA") will often result in a stymie from the government agency through an avalanche of privilege or confidentiality assertions.<sup>113</sup> As stated by a former government employee who handled such requests, "[t]hese [federal FOIA departments] have no incentive to cooperate, and every minute they spend on tracking down documents is time taken from their actual jobs."<sup>114</sup> In short, Americans "have good reason to mistrust . . . attempts by agencies to fulfill requests."<sup>115</sup>

Stated plainly, the current version of titling falls well below the protections set forth in the Constitution because the very act of cataloging personal information in a database prior to establishing

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112. *See id.* (noting that the Department of Defense "recommended several changes to DCII procedures to ensure that all users are initially, and periodically thereafter, informed of the DCII's purpose as well as the limitations concerning the content and use of criminal investigative data contained therein").

113. *See* Andrew McGill, *Why FOIA Is Broken, From a Government Worker's Perspective*, ATLANTIC (July 6, 2016), <https://www.theatlantic.com/politics/archive/2016/07/why-the-freedom-of-information-act-is-broken-from-a-government-employees-perspective/623621/> [<https://perma.cc/8EJB-9645>] ("I've worked for state agencies, where nothing is more dreaded than FOIA duty. No one in the agency has the time to comply or has the slightest interest in doing so, because it is a tedious and unrewarding interruption to one's 'real' work and a terrible time suck. Everyone regards the FOIA people as an enemy . . ."); *see also* STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REP. iii-iv (Comm. Print 2016), <https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf> [<https://perma.cc/CX5P-RP5Q>] (finding, generally, that (1) the executive branch "encourages an unlawful presumption in favor of secrecy when responding to [FOIA] requests; (2) "[a]gencies overuse and misapply exemptions, withholding information and records rightfully owed to FOIA requesters"; (3) "FOIA requesters face agency roadblocks and struggle to decipher unclear communications from agency FOIA offices"; and (4) "[a]gencies create and follow FOIA policies that appear to be designed to deter requesters from pursuing requests and create barriers to accessing records").

114. McGill, *supra* note 113.

115. STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 113, at iv.

probable cause may constitute an unreasonable search and seizure. First, the credible information standard, which allows a trained investigator to index someone in the DCII, is contrary to the probable cause standard safeguarded under the Fourth Amendment, which generally prohibits searches and seizures absent probable cause if there is a reasonable expectation of privacy.<sup>116</sup> Second, as discussed above, titling officials can still enter a service member into the DCII and establish probable cause at an unknown later date.<sup>117</sup> However, even while probable cause is pending, there is no mechanism to prevent adverse action or collateral consequences against the individual.<sup>118</sup> Absent probable cause, which was the former titling standard that had to be met in order to even index someone in the DCII,<sup>119</sup> the United States military arguably violates Fourth Amendment protections anytime a service member is entered into the database and information accessed by users. Generally, the Fourth Amendment applies to service members,<sup>120</sup> but only if there is an invasion of a legitimate expectation of privacy by the government.<sup>121</sup>

The applicability of the Fourth Amendment to service members, following an invasion of privacy, is supported by the United States Supreme Court's ruling in *United States v. Jones*, 565 U.S. 400 (2012), a case where law enforcement was found to have violated a suspect's Fourth Amendment rights after a GPS tracker was placed on his personal vehicle without a warrant. In that case, law enforcement tracked Mr. Antoine Jones for approximately a month

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116. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

117. See U.S. DEP'T OF ARMY, *supra* note 92, at 29 ("A person or entity will be reported as the subject of an offense on the LER when credible information exists that the person or entity has committed a criminal offense.").

118. See *id.* at 29–30 (noting that a service member will not be removed from the DCII if there was credible information linking them to an offense, even if subsequent investigation that the allegation was unfounded).

119. Ham, *supra* note 87, at 6.

120. See *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981) (concluding that "the Bill of Rights applies with full force to men and women in the military service unless any given protection is, expressly or by necessary implication, inapplicable" and, therefore, that the Fourth Amendment does shield the American service person") (citing *United States v. Middleton*, 10 M.J. 123, 126 (C.M.A. 1981)).

121. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("[C]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.") (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

and eventually arrested him in 2005 under suspicion of drug distribution.<sup>122</sup> The Supreme Court ultimately found the use of a warrantless tracking device constituted an unlawful search, and Justice Sotomayor's concurrence emphasized that Mr. Jones' property was usurped and his privacy invaded.<sup>123</sup> Five members of the Supreme Court classified the use of a warrantless GPS device as a search of Mr. Jones' property under the reasonable expectation of privacy doctrine, which is a two-part test that assesses whether there is a subjective and objective expectation of privacy.<sup>124</sup> In order to satisfy the test, the person must first have an actual subjective expectation of privacy and it must be established that society recognizes the expectation as objectively reasonable.<sup>125</sup>

While Military Rule of Evidence 314 permits the admission of evidence obtained from reasonable searches without probable cause, the standard has no bearing on a person's rights prior to the trial or court martial.<sup>126</sup> I argue that the placement of private information into the DCII or NCIC prior to probable cause being established, including any inquiry or search related to the entry, is an unreasonable search and that any detrimental impact stemming from the index constitutes an unreasonable seizure of property rights. Much like Mr. Jones' vehicle, his private property, was being tracked without a warrant, the United States military essentially utilizes the DCII and NCIC as a tracking device and houses sensitive information, without probable cause and warrant, in order to monitor service members.<sup>127</sup> Among other potential collateral consequences, an inquiry or search into the databases may qualify as unreasonable and may result in a seizure that restricts a service member's ability to travel (i.e., liberty), seek promotion or licensure (i.e., property interests), and even attend training schools or obtain benefits (i.e., educational and life

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122. *U.S. v. Jones*, 565 U.S. 400, 402-3 (2012).

123. *Id.* at 413-14 (Sotomayor, J., concurring) (stating that in installing a GPS device on respondent's vehicle without a valid warrant, "[t]he Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.").

124. *Id.* at 414 (Sotomayor, J., concurring); *id.* at 430 (Alito, J., concurring).

125. *Id.* at 414 (Sotomayor, J., concurring).

126. *See* MIL. R. EVID. 314(a) ("Evidence obtained from reasonable searches not requiring probable cause is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces.").

127. *See* *Carpenter v. U.S.*, 585 U.S. 296, 305 (2018) (noting that Fourth Amendment doctrine cannot leave citizens "at the mercy of advancing technology" to preserve the same degree of privacy that existed when the Fourth Amendment was adopted) (quoting *Kyllo v. U.S.*, 533 U.S. 27, 35 (2001)).

opportunities). It can be argued that, given the highly sensitive information that is potentially housed within the DCII and NCIC, there is an actual subjective expectation of privacy, especially when there is no finding of fault. There is also a general societal recognition that protecting private data is of utmost importance for the average citizen.

Overall, the titling process is a mechanism hidden from service members that may attach criminal stigma to someone without basic constitutional protections under the Fourth and Fifth Amendments. In its current form, it is a punitive system that does nothing but erode the rights and opportunities of current and former service members in perpetuity. Unfortunately, titling is not the only process currently attaching criminal stigma and depriving individuals of protected rights without basic constitutional protections.

### B. *Title IX Transcript Notations*

As discussed in detail in my initial publication, “Title IX of the 1972 Education Amendments prohibits sex discrimination in education programs and activities that receive federal financial assistance. While Title IX is an area of law that is now widely known, the scope of Title IX has metamorphosized over the years.”<sup>128</sup> However, Title IX compliance was not effective until “the passage of the 1987 Civil Rights Restoration Act, . . . [which] required all academic institutions receiving federal financial aid . . . to abide by the requirements of Title IX” in all areas, rather than just areas where federal funding was received.<sup>129</sup> Arguably, the greatest changes to Title IX began to occur following

the passage of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”) in 1990, . . . [which] fostered the disclosure of information related to crime occurring on or around college campuses. While the Clery Act did not explicitly define what crimes had to be reported, it evidenced a clear intent by the federal government to address criminal conduct on campus . . .<sup>130</sup>

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128. See Cromartie, *supra* note 27, at 60 (citing Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 304–12 (1972)).

129. *Id.* at 61; see also Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). This legislation was a concerted effort to reverse the effects of the Supreme Court ruling in *Grove City Coll. v. Bell*, 465 U.S. 555, 570–71 (1984), which held that only programs receiving federal financial assistance were required to abide by the requirements of Title IX.

130. See Cromartie, *supra* note 27, at 62 (first citing 20 U.S.C. § 1092; and then citing *Clery Act*, RAINN, <https://perma.cc/VJ96-F8C4> (last visited Oct. 11, 2025)).

On April 4, 2011, another drastic shift to the Title IX landscape occurred after President Barack Obama issued the first of several Dear Colleague Letters related to the handling of Title IX allegations on college campuses.<sup>131</sup> Since the issuance of the initial letter, postsecondary institutions increasingly investigated and litigated Title IX allegations.<sup>132</sup> However, Title IX has become a microcosm of political debate, as well as a source of private litigation, and seemingly changes with each new administration. While the most recent version of the Title IX regulations were enacted by the Biden administration on August 1, 2024, there is some uncertainty as to the finality of the proposed regulations as various states have initiated litigation to preclude enforcement of certain guidance.<sup>133</sup> Although litigation is ongoing, there does not appear to be a widespread dispute as to the general use of transcript notations in Title IX. However, with the reelection of President Donald Trump, further changes to Title IX may eventually occur.

Although transcript notations have been widely used by postsecondary institutions for decades, it was not until the Obama Administration's guidance that transcripts began to include notations arising out of Title IX disciplinary allegations.<sup>134</sup> Following the

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131. ALI, *supra* note 25.

132. See Jeremy Bauer-Wolf, *A Look at 13 Years of Title IX Policy*, HIGHER ED DIVE (Apr. 22, 2024), <https://www.highereddive.com/news/a-look-at-11-years-of-title-ix-policy/623810/> [<https://perma.cc/9HQL-DV62>] (“The 2011 [Dear Colleague] guidance is widely considered to be a catalyst for increased national attention on campus sexual violence.”).

133. See CARNEGIE MELLON UNIV., FACT SHEET: U.S. DEPARTMENT OF EDUCATION'S 2024 TITLE IX FINAL RULE OVERVIEW 5, <https://www.cmu.edu/title-ix/university-response/files/t9-final-rule-factsheet-2024.pdf> [<https://perma.cc/YLF8-9J65>] (last visited Sept. 10, 2025) (outlining the changes in the 2024 final rule); John W. Borkowski, Aleks Ostojic Rushing, & Noel Fisher, *Title IX Litigation Tracker: Where Do Things Stand Two Months After Implementation?*, HUSCH BLACKWELL (Oct. 1, 2024), <https://www.k-12legalinsights.com/2024/10/title-ix-litigation-tracker-where-do-things-stand-two-months-after-implementation/> [<https://perma.cc/ZWK7-ZME3>] (citing the list of cases filed by a coalition of states challenging the new regulations).

134. See THE AM. ASS'N OF COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS, TRANSCRIPT DISCIPLINARY NOTATIONS: GUIDANCE TO AACRAO MEMBERS 7 (2017), [https://www.aacrao.org/docs/default-source/signature-initiative-docs/disciplinary-notations/notations-guidance.pdf?sfvrsn=ecfe2557\\_0](https://www.aacrao.org/docs/default-source/signature-initiative-docs/disciplinary-notations/notations-guidance.pdf?sfvrsn=ecfe2557_0) [<https://perma.cc/5TMB-AR6R>] (“It has been common practice of registrars to record instances of suspension or dismissal due to low academic performance or substandard grade point averages . . . . Historically, many institutions even recorded notations of *academic* probation or warning on the official transcript.”); see also Bauer-Wolf, *supra* note 132 (detailing how “the Obama administration first sought to use Title IX to bolster efforts to prevent campus sexual misconduct”).

issuance of the Obama-era guidance, as well as a number of high profile cases where students transferred after being found responsible following a Title IX investigation, state legislatures around the nation began passing law that mandated the use of transcript notations.<sup>135</sup> The intent behind this legislation was largely to further the intent of the Clery Act by promoting public safety.<sup>136</sup> Essentially, Title IX transcript notations serve as a “quasi-criminal” record,<sup>137</sup> depending upon the nature of the allegations and [ultimate] disposition, that allows educational institutions, to document and track individuals who are found responsible of wrongdoing. The permanent nature and almost guaranteed adverse impact of a transcript notation has been the primary point of contention for those who oppose the notation process.<sup>138</sup> Essentially, opponents believe that such notations should not be utilized absent adequate protections and due process of law.<sup>139</sup> Depending upon school policies and pro-

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135. See *Transcript Notations*, ADVOC. FOR YOUTH <https://knowyourix.org/issues/transcript-notations/> [<https://perma.cc/58QE-XGD6>] (last visited Feb. 24, 2024); see also N.Y. EDUC. LAW § 6444(6) (McKinney 2025) (requiring that, following a finding of responsibility for a violent crime (robbery, murder, motor vehicle theft, sex offenses, burglary, arson, etc.), schools place a notation on the student’s transcript).

136. See ADVOC. FOR YOUTH, *supra* note 135 (“Supporters of these efforts typically cite regulatory and safety concerns, arguing that, without transcript notations, offenders will transfer from school to school undetected. Alternatively, some survivors [of sexual misconduct], who feel that their lives have been forever altered by their assaults, support mandatory transcript notations in an attempt to ensure that their assailants suffer punishment just as long lasting.”).

137. I refer to Title IX on-campus disciplinary processes generally as “quasi-criminal” in nature because the stigma attached to students who are found responsible can be significant. For example, if a student is found responsible for sexual harassment or assault and a notation is placed on his or her transcript, certainly there is criminal stigma attached to the individual. Further, Title IX disciplinary decisions are not bound by the burden of proof in criminal proceedings, which is beyond a reasonable doubt. In order to meet that burden in the criminal context, prosecutors must establish that there is no other reasonable explanation that can come from the evidence presented at trial. Instead, Title IX litigants are governed by lower civil standards of proof, such as preponderance of the evidence, which requires proving something more likely than not, or clear and convincing, which requires showing that the evidence is highly and substantially more likely than not to be true, depending on which iteration of Title IX regulations apply.

138. See Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH L. REV. 155, 175 (2017) (“[S]ome states like [ ] New York and Virginia . . . [have begun] to pass legislation requiring schools to note on a student’s transcript whether the student was suspended or expelled for sexual misconduct, [and they] may face severe restrictions, similar to being put on a sex offender list, that curtail [their] ability to gain a higher education degree.”).

139. See Fernand N. Dutille, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L. J. 243, 254 (2001) (“In the context of higher

cedures, as well as state and federal law, educational institutions may have varying approaches to transcript notations.<sup>140</sup>

As briefly mentioned above, the primary debate regarding transcript notations centers around weighing public safety with individual due process rights and property interests. Where supporters laud notations as a form of recordkeeping that enhances public safety, critics of the mechanism fear that such notations may prevent any aggrieved individual from meaningfully pursuing a degree or employment, among other things.<sup>141</sup> Specifically, where criminal defendants enjoy a whole host of due process and procedural protections when facing allegations involving any crime, respondents who are accused of wrongdoing involving allegations of violence under Title IX face an uphill battle when defending themselves in on-campus proceedings as they are not afforded basic constitutional safeguards.

For example, where criminal defendants cannot be convicted of a charge until prosecutors establish each element beyond a reasonable doubt,<sup>142</sup> Title IX respondents can be found responsible simply

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education, the threatened loss of an already-awarded degree presents the best case for procedural protection as ‘property’ under the Due Process Clause.”).

140. For example, Virginia Commonwealth University’s (“VCU”) policy states that any student who is suspended, expelled, or withdraws while under investigation for an offense involving sexual violence will have a *prominent notation* placed on their transcript, subject to later removal or expungement. *Transcript Notations*, VA. COMMONWEALTH UNIV., <https://dos.vcu.edu/student-resources-and-information/transcript-notations/> [https://perma.cc/V7H6-AED9] (last visited Sept. 10, 2025) (emphasis added). Pursuant to VCU’s policy, a prominent notation “shall be substantially in the following form: ‘[Suspended, Dismissed, or Withdrew while under investigation] for a violation of [insert name of institution’s code, rules, or set of standards].’”). *Id.*; see also *Policy and Procedure for Transcript Notations for Violent Crimes*, N.Y. MED. COLL., <https://www.nymc.edu/policies/administrative-policies/transcript-notations-for-violent-crimes/> [https://perma.cc/3YNH-MA8F] (last visited Sept. 10, 2025) (indicating that students “who are suspended or expelled following a finding of responsibility for crimes of violence” or who withdraw while charges are pending will have a notation placed on their transcript without avenues for appeal or expungement for those who withdraw or are expelled).

141. See *The Important Issue of Transcript Notations*, PARISI, COAN & SACCOCIO, PLLC (Mar. 1, 2018), <https://www.pandslawtitleix.com/blog/2018/march/the-important-issue-of-transcript-notations/> [https://perma.cc/J5CC-HCKY] (“In many cases these transcript notations can serve as a ‘scarlet letter’ of sexual assault or domestic/dating abuse and render it extremely difficult, if not impossible, for the marked individual to obtain desired employment or the continuation of his or her academic career.”).

142. In order to convict someone of a crime, the finder of fact (i.e., the judge or jury) must find that the evidence presented was so convincing that no reasonable person could differ. See *Beyond a Reasonable Doubt*, CORN. L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/beyond\\_a\\_reasonable\\_doubt](https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt) [https://perma.

based on a preponderance of the evidence,<sup>143</sup> which has been described as “fifty percent [plus] a feather,” a much lower standard, or by clear and convincing evidence.<sup>144</sup> Generally, criminal defendants are afforded greater protection due to the significant life, liberty, and property interests that may attach to any conviction. Where a criminal defendant may face incarceration, civil litigants, including those in Title IX proceedings, do not directly face such severe consequences. Yet, Title IX litigants, some of whom may face significant allegations, such as sexual assault, robbery, murder, or arson, among others, proceed without the same level of protection.

Although parties involved in the Title IX grievance process will never face imprisonment directly through that litigation,<sup>145</sup> the stigma that can be attached to someone found responsible for a Title IX allegation will be substantial, especially given that any finding of responsibility tied to crimes of violence must be reported pursuant to the Clery Act.<sup>146</sup> Additionally, the Title IX litigant still faces collateral consequences associated with any finding of responsibility, as well as potential parallel criminal proceedings. Further increasing the vulnerability of Title IX litigants is the potential for

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cc/F7H8-K64R] (last visited Sep. 10, 2025) (defining beyond a reasonable doubt as “the legal burden of proof required for a criminal conviction,” meaning that “the evidence must leave jurors firmly convinced of the defendant’s guilt”).

143. See 34 C.F.R. § 106.45 (2025) (permitting schools to use “the preponderance of the evidence standard of proof to determine whether sex discrimination occurred” in certain circumstances).

144. *Whitener v. Sec’y Health & Hum. Servs.*, No. 06-0477V, 2009 WL 3007380, at \*1 (Fed. Cl. Sept. 2, 2009); 34 C.F.R. § 106.45(h)(1) (“[T]he recipient must: (1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.”).

145. Meaning, Title IX respondents may still face criminal charges in a separate proceeding.

146. See 20 U.S.C. § 1092(f)(1). In relevant part, the Clery Act requires schools that receive federal funding to publish and circulate reports that disclose campus crime statistics. *Id.* Importantly, schools must report every criminal offense under the Act (homicide, murder, manslaughter, sexual assault, robbery, aggravated assault, burglary, hate crimes, motor vehicle theft, arson, hazing, Violence Against Women Act offenses, and drug, weapon, and liquor law violations) even if there is no ongoing investigation or finding of responsibility. See *The Jeanne Clery Act: Summary, Reporting Requirements, and Clery Center Resources*, CLERY CENTER (last visited Dec. 3, 2025), <https://www.clerycenter.org/the-clery-act> [<https://perma.cc/5RLC-U3HR>]. Schools simply need to believe a potential crime was disclosed “in good faith” prior to reporting. See U.S. DEP’T OF EDUC., *THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 4-10* (2016), <https://www.ed.gov/sites/ed/files/admins/lead/safety/handbook.pdf> [<https://perma.cc/RFW8-WVND>].

evidence and testimony introduced during the Title IX proceedings to be used in a parallel or subsequent criminal matter.<sup>147</sup> Another significant difference between criminal and Title IX proceedings is the requirement for a live trial or hearing. Where in the criminal realm defendants are entitled to a jury trial,<sup>148</sup> Title IX respondents are only afforded a live hearing before an individual decision-maker or a panel and may have to proceed virtually.<sup>149</sup> This mechanism is concerning for litigants as legal representation is not guaranteed and, if a litigant does not have an advisor present, the institution selects an individual to advise the individual.<sup>150</sup> Meaning, a party accused of robbery under Title IX, for example, may have to proceed to a virtual hearing where the respondent is not represented by an attorney and may have limited opportunity to assess or question the complaining party. Importantly, even if a party is found responsible for a Title IX violation, the individual will not be incarcerated unless an independent criminal investigation is initiated by government actors. For all intents and purposes, Title IX investigations are almost entirely internal.

Although Title IX proceedings are classified as administrative in nature, the stigma attached to an accused party can rise to the level of a criminal charge or conviction in the court of public opinion. Absent adequate procedural protections, Title IX litigants may not only experience disparate treatment associated with any stigma, they also may have their property rights impacted without due process.<sup>151</sup>

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147. During a Title IX proceeding, a respondent may refuse to testify and assert privilege under the Fifth Amendment, which, in part, affords every citizen protection against self-incrimination, in order to avoid potentially introducing testimony that may have a negative impact on criminal proceedings. Absent the advice of legal counsel, or another legally trained individual, a Title IX litigant may not recognize this privilege, how to assert it, or when to assert it. *See Student Misconduct*, MATTHEW G. JUBELT, <https://www.jubeltlaw.com/college-student-crimes> [<https://perma.cc/Q2RR-VZR7>] (last visited Dec. 3, 2025).

148. U.S. CONST. Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”).

149. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30053, 30069, 30370 (formerly codified at 34 C.F.R. § 106.45(b)(6)(i) and reinstated on Jan. 31, 2025), <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal> [<https://perma.cc/8C2D-QPS2>].

150. *Id.* at 30053, 30329 (formerly codified at 34 C.F.R. § 106.45(b)(5)(iv), (6)(i), and reinstated on Jan. 31, 2025).

151. *See* Mann, *supra* note 26, at 402 n.174 (“The Fourteenth Amendment’s due process clause applies only to state action, meaning that only state schools, and not private schools, are covered by its requirements.”) (citing *Plummer v. Univ.*

A few examples of property interests that may be jeopardized by the Title IX process may include, but are not limited to, the ability to pursue an education, employment, and now ownership of assets and intellectual property within the sports industry.<sup>152</sup> Under the Fifth and Fourteenth Amendments of the Constitution, federal and state governments cannot deprive any person of “life, liberty, or property, without due process of law.”<sup>153</sup> Arguably, an individual’s ability to pursue a degree in higher education, as well as one’s reputation, implicates the life, liberty, and property interests under the aforementioned amendments. When analyzing what level of protection is required in such proceedings, courts generally turn to a three-factor analysis that requires the legal authority to determine: (1) What is at stake for the person?; (2) How risky is it that the person will be wrongly punished and how likely is it that more safeguards would reduce the risk?; and (3) How costly and time-consuming would the new protections be for the government?<sup>154</sup>

While the first and second factors certainly weigh in favor of a more robust system of protections for Title IX litigants, the third factor would hinge upon the nature and extent of any additional protections. In fact, prior to enacting former versions of the Title IX regulations, the Department of Education acknowledged potential costs and burdens that would be placed upon schools should procedures that are more robust be enacted, as is the government’s responsibility when exploring proposed legislation.<sup>155</sup>

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of Hous., 860 F.3d 767, 773 (5th Cir. 2017) (explaining that “due process requires notice and some opportunity for hearing . . . at a tax-supported college” (alteration in original))).

152. If a Title IX litigant is also a prolific student athlete, he or she may be entitled to rights and proceeds based on the individual’s name, image, and likeness (“NIL”). Such NIL entitlements are likely subject to contracts with morality clauses that may be triggered by a Title IX accusation, thus potentially forfeiting a significant property interest.

153. *Id.* (citing U.S. CONST. amend. V, XIV).

154. *FIRE’s Guide to Due Process and Campus Justice*, FIRE, <https://www.thefire.org/research-learn/fires-guide-due-process-and-campus-justice> [<https://perma.cc/2Z3S-L2PT>] (last visited Sept. 3, 2025); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding due process requires consideration of (1) the private interest affected by the official action; (2) the risk of an “erroneous deprivation” and probable value of additional procedure; and (3) the government’s interest, including the fiscal and administrative burdens of additional procedures).

155. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33483 (Apr. 29, 2024) (codified at 34 C.F.R. § 106 and rescinded on Feb. 4, 2025) (“The Department recognizes commenters’ concerns that . . . aspects of the final regulations . . . will likely result in an increase in Title IX complaints for some recipients and possible additional administrative costs for some recipients.”).

Although the Biden administration ultimately decided to remove live hearing requirements and the right to legal counsel, among other protections, it characterized these mechanisms as overly burdensome for schools.<sup>156</sup> My contention is that the cost and burden associated with any additional Title IX procedural protections is far outweighed by potentially hindering an individual's ability to pursue a degree, find employment, and maintain a sound reputation. Depending upon the nature of the allegations, once someone is accused of misconduct, the individual's information may be reported to law enforcement or campus safety that may store the information in a database, further compounding an individual's ability to participate in society long after the conclusion of proceedings (this is entirely dependent upon how the reporting party decides to proceed).<sup>157</sup> This is yet another example of a legally grounded process that contributes sensitive information to big data without adequate protection for the individuals involved in the legal proceedings.

As an exemplar on this issue in the realm of Title IX, I highlight the case of *Neal v. Colorado State University-Pueblo*.<sup>158</sup> In December 2015, Mr. Neal, an aspiring orthopedic surgeon at the time, was suspended from his academic institution and stripped of his wrestling and football scholarships during a Title IX investigation involving allegations of nonconsensual sexual intercourse, impeding his ability to pursue and obtain his degree.<sup>159</sup> The investigation was initiated after a roommate of Mr. Neal's partner reported that their sexual conduct was nonconsensual, which was contrary to representations from Mr. Neal and his partner, and was otherwise unsupported by third-party testimony. Mr. Neal and his partner even informed investigators of the consensual nature of the relationship.<sup>160</sup> Following Mr. Neal's suspension, a slew of online articles were published and his reputation tainted.<sup>161</sup> Although Mr. Neal filed suit against the

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156. *Id.* at 33720, 33746–47.

157. See FERGUSON, *supra* note 33, at 3 (“Government agencies collect health, educational, and criminal records . . . Aggregating data centers sort and study the accumulated information in local and federally funded fusion centers.”).

158. See generally *Neal v. Colo. State Univ.-Pueblo*, No. 16-cv-00873-RM-CBS, 2017 WL 11696393 (D. Colo. Sep. 11, 2017).

159. Complaint at 6, 32, 75, *Neal v. Colo. State Univ.-Pueblo*, 2017 WL 11696393 (D. Colo. Apr. 18, 2017). (No. 1:16CV00873).

160. *Id.* at 19–22.

161. See *id.* at 6 (alleging reputational harm suffered by Mr. Neal, including loss of educational, athletic, and career opportunities as described in the Prayer for Relief); see also Emma Gannon, *Judge Sees Bias in College Action Against Alleged Rapist*, COURTHOUSE NEWS SERV. (Feb. 21, 2017), <https://www.courthousenews.com>.

university and eventually entered a favorable settlement, the impact of the investigation is still being felt by him years after its conclusion. In fact, Mr. Neal, who is a professional mixed martial arts fighter,<sup>162</sup> has lost scholarships and other opportunities simply because he was publicly accused of sexual misconduct and suspended by the university.<sup>163</sup> Mr. Neal lost these professional opportunities because others discovered the articles related to his investigation online and perceived his suspension, which was viewed by the federal district court as improper, from the institution as an issue.<sup>164</sup> Importantly, Mr. Neal was suspended following a deficient Title IX investigation, as deemed by the court, during which the university did not provide a description of the allegations he faced, precluded Mr. Neal from presenting character evidence or witnesses in his defense, and utilized a single investigator who disregarded relevant, exculpatory evidence, but accepted subjective, hearsay evidence as true, among other issues.<sup>165</sup> Mr. Neal's experience highlights the importance of reviewing existing legal processes to ensure they are procedurally sound prior to exposing an individual to significant, long-lasting stigma. Had Mr. Neal initially been afforded a fair and equitable Title IX investigation, he may not have been suspended and may not have faced consequences stemming from online content and occurring years after he was absolved of the allegations. Undoubtedly, the widespread dissemination of the allegations against Mr. Neal via digital media and news outlets certainly exacerbated the consequences he faced. In all likelihood, the allegations against Mr. Neal will exist in perpetuity on the Internet.

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com/judge-sees-bias-in-college-action-against-alleged-rapist/ [https://perma.cc/BM6D-HYEZ]; Robert Boczkiewicz, *CSU-Pueblo Files for Dismissal of Lawsuit*, PUEBLO CHIEFTAIN (July 15, 2016), https://www.chieftain.com/story/news/education/2016/07/15/csu-pueblo-files-for-dismissal/9217977007/ [https://perma.cc/MVD9-ZYK6].

162. Ben Fowlkes, *A False Sex-Assault Claim Killed Grant Neal's Football Career, but MMA Provided a New Life*, ATHLETIC (Aug. 22, 2019), https://www.nytimes.com/athletic/1155427/2019/08/22/a-false-sex-assault-claim-killed-grant-neals-football-career-but-mma-provided-a-new-life/ [https://perma.cc/EFG2-8PQD].

163. *See Former Football Player Sues School Under Title IX*, ESPN, https://www.espn.com/video/clip/\_/id/17341553 [https://perma.cc/D9UQ-CNDR] (last visited Sept. 10, 2025).

164. *Id.*

165. *Id.*; Robby Soave, *Interview: This Male Student Was Expelled for Raping His Girlfriend Even Though She Said He Did Nothing Wrong*, REASON (Feb. 27, 2017) https://reason.com/2017/02/27/interview-student-expelled-for-rape-even/ [https://perma.cc/R83S-3AU6].

### C. Law Enforcement Technology

Arguably, the most far-reaching, rapidly developing, and hotly contested area of big data is the use of predictive technology,<sup>166</sup> which can be classified as person-based<sup>167</sup> or place-based,<sup>168</sup> by law enforcement. This data-centered, predictive approach to policing primarily originated in the 1990s after the New York City Police Department began regularly reporting statistics via a system known as CompStat and analyzing the data to adjust practices.<sup>169</sup> Since that time, predictive technology and its use has only continued to expand as billions of dollars in government funding and support from interest groups, such as police unions, has spurred its growth.<sup>170</sup> Much like the prior two processes, the debate concerning law enforcement technology

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166. See Margaret Rouse, *Predictive Technology*, TECHOPEDIA (June 25, 2015), <https://www.techopedia.com/definition/14525/predictive-technology> [<https://perma.cc/L9Z7-S8ZF>] (“Predictive technology refers to a set of tools used for forecasting patterns in data while keeping in perspective the previous records/data.”).

167. See Vahur Verte, *Person-Based Predictive Policing Under the AI Act*, ROBOTICS & AI L. Soc’y (Apr. 20, 2024), <https://blog.ai-laws.org/person-based-predictive-policing-under-the-ai-act/> [<https://perma.cc/WMN9-VN97>] (“Person-based predictive [policing] rests on the insight that negative social networks of individuals . . . can encourage criminal activity. It utilizes big data capabilities to develop predictive profiles of individuals based on past criminal activity, current associations, and other factors that correlate with criminal propensity.”).

168. Tim Lau, *Predictive Policing Explained*, BRENNAN CTR. FOR JUST. (Apr. 1, 2020), <https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained> [<https://perma.cc/E37A-CLKK>] (“Place-based predictive policing, the most widely practiced method, typically uses preexisting crime data to identify places and times that have a high risk of crime.”).

169. James J. Willis, Stephen D. Mastrofski & David Weisburd, *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 L. & SOC’Y REV. 147, 148 (2007).

170. See Andrew Guthrie Ferguson, *DOJ Funding Pipeline Subsidizes Questionable Big Data Surveillance Technologies*, THE CONVERSATION (Feb. 7, 2024), <https://theconversation.com/doj-funding-pipeline-subsidizes-questionable-big-data-surveillance-technologies-222699> [<https://perma.cc/78HS-DNUP>] (highlighting the billions of dollars of federal funding given to law enforcement agencies to grow policing technology projects); see also Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOCIO. ASS’N 977, 981 (2017) (detailing how the federal government has heavily funded surveillance technology in local agencies); Patrick Yoes, Nat’l President Fraternal Ord. of Police, Testimony on Public Safety Communications in the United States, at 4 (Sept. 9, 2025), <https://fop.net/wp-content/uploads/2025/09/testimony-20250909-subcomm-hearing-firstnet.pdf> [<https://perma.cc/XF7T-56P9>] (“[I]ntegrating artificial intelligence (AI) . . . should enable even more sophisticated tools for public safety such as predictive analytics for threat detection and augmented reality for training.”); see also Daniel DiSalvo, *Interest Groups, Local Politics, and Police Unions*, 11 INT. GRPS. & ADVOC. 263, 267–68 (2022) (“[Police unions] should be seen as key interest groups, as their leaders inevitably have influence on reforms touching on public safety and exercise power inside and outside of

and its use is primarily a balance between public safety and individual privacy rights. However, where an individual in military titling and Title IX proceedings is generally suspected of committing wrongdoing prior to being entered into big data, such may not be the case with technology maintained by law enforcement.

In fact, as briefly referenced above, the extent to which law enforcement collects information on citizens who have not committed a crime continues to increase as technology develops and avenues for data collection expand.<sup>171</sup> Where law enforcement entities once largely relied upon their own observations and investigative findings to populate records, police now have the ability to purchase consumer data from private companies, which permits law enforcement to cast a wide net that encompasses information associated with individuals who harbor no criminal record or suspicion.<sup>172</sup> Given the extent to which we rely upon technology on a daily basis, an individual's digital footprint<sup>173</sup> can be significant and, depending upon the data that is mined by law enforcement, could tell police your shopping habits, personal preferences, dietary restrictions, routines, or locations you frequent.<sup>174</sup>

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city government . . . Evidence suggests that police unions have the resources to be important organizations shaping electoral politics.”).

171. Currently, law enforcement utilizes a variety of information collecting devices, including, but not limited to, facial recognition, license plate readers, fingerprinting, aerial and social medial surveillance, etc. These data collection tools are subject to malfunction or less-than-optimum functioning, which can result in inaccurate data being entered into databases.

172. See Joshua L. Simmons, *Buying You: The Government's Use of Fourth-Parties to Launder Data about "The People,"* 2009 COLUM. BUS. L. REV. 950, 951–54 (indicating that government actors purchase consumer information associated with social media accounts, emails, phone numbers, etc.).

173. Defined as the data remaining each time we electronically transact, post on social media, or use our cell phones, among many other things.

174. See FERGUSON, *supra* note 33, at 7–8 (“Currently . . . widespread surveillance remains in the hands of for-profit companies, for the purpose of offering consumers convenience and choice. But law enforcement is interested too.” (first citing John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA TODAY (Dec. 8, 2013); and then citing Nicolas P. Terry, *Protecting Patient Privacy in the Era of Big Data*, 81 UMKC L. REV. 385, 391 (2012))); see also *id.* at 9 (“The World Privacy Forum—a watchdog group on personal privacy—estimates that there are 4,000 different databases collecting information on us.” (citing Herb Weisbaum, *Big Data Knows You're Pregnant (and That's Not All)*, CNBC (Apr. 9, 2014), <https://www.cnbc.com/2014/04/09/big-data-knows-youre-pregnant-and-thats-not-all.html> [<https://perma.cc/XT24-39LG>])); see also *id.* at 12–13 (“The United States Senate Commerce Committee detailed how big data companies like Acxiom claim to have information on over 700 million consumers worldwide with over 3,000 data segments for nearly every U.S. consumer. Another company, Datalogix, claims to have data on almost every U.S. household.” (first citing FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 8

All of this data, along with information presumptively stemming from regular law enforcement business, such as arrest records, convictions, warrants, etc., is housed in databases maintained at the local, state, and federal levels by dozens of government agencies, including, but not limited to, the Bureau of Alcohol, Tobacco, and Firearms (“ATF”),<sup>175</sup> Department of Homeland Security (“DHS”),<sup>176</sup> and National Security Agency (“NSA”).<sup>177</sup> Once information is entered into a law enforcement database, regardless of the source, it is then received by a regional information sharing system, which promotes interconnectivity and collaboration among law enforcement databases and agencies.<sup>178</sup> Although law enforcement entities may take varying approaches to their analysis of data, one thing is clear: Law enforcement is at least partially relying upon information obtained via private processes to further their investigation and policing practices.<sup>179</sup>

Unfortunately, the existing privacy laws in the United States, such as the Health Insurance Portability and Accountability Act (“HIPAA”)<sup>180</sup> or Financial Privacy Act (“FPA”),<sup>181</sup> do little to prevent law enforcement from exploiting private user data in other ways, which raises concerns about a more overarching practice by law enforcement: the collection of information for one purpose, such as consumer preference through online cookies, and the use of it

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(2014); and then citing MAJORITY STAFF OF S. COMM. ON COMMERCE, SCI., & TRANSP., 113TH CONG., A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES 5-8 (Comm. Print 2013)).

175. *National Tracing Center*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/national-tracing-center> [https://perma.cc/EBQ9-NY8J] (last visited Sept. 10, 2025).

176. *DHS/ICE/PIA – 015 Enforcement Integrated Database*, DEP’T HOMELAND SEC., <https://www.dhs.gov/publication/dhsicepia-015h-enforcement-integrated-database-eid-criminal-history-information-sharing> [https://perma.cc/RLW9-2A4S] (last visited Sept. 10, 2025).

177. See Siobhan Gorman, *NSA’s Domestic Spying Grows as Agency Sweeps Up Data*, WALL ST. J. (Mar. 10, 2008), <https://www.wsj.com/articles/SB120511973377523845> [https://perma.cc/6AGU-48P5] (explaining how NSA gains access to large amounts of data from private companies).

178. See *About the RISS Program: A Proven Resource for Law Enforcement*, REG’L INFO. SHARING SYS., <https://www.riss.net/about-us/> [https://perma.cc/HCM9-262K] (last visited Sept. 10, 2025) (discussing how the Regional Information Sharing Systems (RISS) Program “provid[es] adaptive solutions and services that facilitate information sharing, support criminal investigations, and promote officer safety and wellness.”).

179. See *infra* notes 192–94.

180. See 45 C.F.R. § 164.512(f) (2025) (outlining circumstances in which “a covered entity may disclose protected health information for a law enforcement purpose”).

181. See 12 U.S.C. §§ 3401–23 (2025) (permitting financial records to be disclosed for law enforcement purposes in various circumstances).

for a separate, potentially completely unintended purpose, such as predicting crime.<sup>182</sup> In fact, studies have already shown that law enforcement technology sometimes relies upon inaccurate data, leading to false arrests and other detrimental impacts, especially upon communities of color.<sup>183</sup> For example, FBI records have been shown to contain thousands of inaccuracies.<sup>184</sup> Yet, the accuracy and scope of information relied upon by law enforcement databases is not the only pitfall of the process.

The lack of transparency by law enforcement in terms of how their technology operates, what information they rely upon, the source of populating information, who is cataloged within the systems, and what oversight or safeguards are in place to ensure proper operation of the technology, are all issues fueling the debate around predictive technology. While still in its infancy, predictive technology in law enforcement has already resulted in flawed outcomes that have damaged public perception of the processes.

For example, the City of Chicago once relied upon crime data to generate a “heat list,” which cataloged thousands of individuals who were viewed as potential future violent offenders.<sup>185</sup> Once identified on the heat list, police would visit an individual’s home and notify them of their inclusion. Although Chicago police purportedly relied upon a variety of data to populate its heat list, the predictive technology sometimes identified individuals with no criminal record or police contact as at-risk individuals.<sup>186</sup> Ultimately, the use of heat

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182. See Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 901–05 (2008) (discussing “the Executive’s apparent practice of identifying and then courting private actors, persuading, coaxing, and sometimes deceiving them to enter ‘informal’ intelligence-gathering” partnerships).

183. See Tim Cushing, *How Predictive Policing Got a Chicago Man Shot Twice*, TECHDIRT (June 3, 2021), <https://www.techdirt.com/2021/06/03/how-predictive-policing-got-chicago-man-shot-twice/> [<https://perma.cc/PQH2-9C98>] (discussing the story of Chicago resident who was placed on a “heat list” and became the victim of gun violence because his interactions with police officers gave him a “snitch reputation”).

184. See U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 26 n.20 (2006), [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag\\_bgchecks\\_report.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag_bgchecks_report.pdf) [<https://perma.cc/L4AJ-H36H>].

185. Monica Davey, *Chicago Police Try to Predict Who May Shoot or Be Shot*, N.Y. TIMES (May 23, 2016), <https://www.nytimes.com/2016/05/24/us/armed-with-data-chicago-police-try-to-predict-who-may-shoot-or-be-shot.html> [<https://perma.cc/GP3E-PBF6>]; see also Cushing, *supra* note 183.

186. See FERGUSON, *supra* note 33, at 34 (“As a young man in Chicago, due to your friends, associates, and prior connection to violence, you have been predicted to be the . . . perpetrator of a shooting.”).

lists was discontinued in 2019 due to sporadic results and imprecise methodology<sup>187</sup>; however, Chicago police still utilize other place-based predictive technology, which, as discussed below, carries with it its own issues.<sup>188</sup> Chicago's lack of transparency surrounding the formulation of heat lists is a common approach by most law enforcement entities that use technology. Often, law enforcement relies upon private third parties to provide the technology and code, which is protected as privileged, proprietary, or otherwise confidential information under intellectual property law.<sup>189</sup> Thus, the disclosure of algorithms or other processes used in furtherance of predictive technology may prove to be largely elusive and unattainable, even when utilizing FOIA or similar state record request procedures.

This general lack of adequate disclosure and transparency further complicates public trust in place-based predictions as historical data may increase the risk of technology targeting communities of color more than other populations, further exacerbating preexisting, racially grounded information.<sup>190</sup> As one scholar observed, "if the data is biased to begin with and based on human judgment, then

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187. *See id.*; Jessica Saunders, Priscillia Hunt & John S. Hollywood, *Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot*, 12 J. EXPERIMENTAL CRIMINOLOGY 347, 363–66 (2016).

188. *See* Matt Straud, *Heat Listed*, THE VERGE (May 24, 2021), <https://www.theverge.com/c/22444020/chicago-pd-predictive-policing-heat-list> [<https://perma.cc/4E36-T9ZT>] (discussing how Chicago's predictive policing program led to a man being shot twice).

189. *See* Rachael King, *IBM Analytics Help Memphis Cops Get "Smart,"* BLOOMBERG BUSINESSWEEK (Dec. 5, 2011), <http://www.businessweek.com/technology/ibm-analytics-help-memphis-cops-get-smart-12052011.html> [<https://perma.cc/8M9N-6S46>] (discussing cities' planned investments in policing technology and the consequent benefits for private companies).

190. *See* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 4 (2023), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114\\_Demographic-Differences.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf) [<https://perma.cc/VBT8-W83Z>] ("Black males received sentences 13.4 percent longer, and Hispanic males received sentences 11.2 percent longer, than White males."); *see also* *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/BVF3-VLLG>] (last visited Sept. 4, 2025) ("A Black person is five times more likely to be stopped without just cause than a white person. . . . On average, Black Americans are exposed to four police killings of other unarmed Black Americans in the same state each year."); Sylvia Moreno, *Race a Factor in Texas Stops*, WASH. POST (Feb. 24, 2005), <https://www.washingtonpost.com/archive/politics/2005/02/25/race-a-factor-in-texas-stops/b0317d23-7bf4-4cfc-b043-54d79d70e570/> [<https://perma.cc/ZB3F-MNQE>] ("[P]olice throughout Texas stop and search [B]lack and Latino drivers at higher rates than whites but . . . officers are more likely to find drugs, guns and other contraband on whites . . . [O]verall, the statistics show a pattern of racial profiling.").

the results the algorithm is going to spit out will reflect those biases.”<sup>191</sup> “In fact, those discriminatory data patterns will train the algorithms for future predictions, further obscuring the underlying bias. Race distorts judgment.”<sup>192</sup> Predictive technology utilized in Florida from 2013–2014 has already been shown to have harbored racial bias after a study revealed Black criminal defendants were assessed to be high risk nearly twice as often as Whites purely based on the composition of data fed into the technology.<sup>193</sup> Results were skewed even after isolating “the effect of race from criminal history and recidivism, as well as from defendants’ age and gender.”<sup>194</sup> The central issue with such technology is that “in many U.S. cities, issues of race are bound up with issues of place. By law, practice, and custom, neighborhoods have been segregated by race and class.”<sup>195</sup>

Regardless of the type of predictive technology utilized by law enforcement, there is one flaw that remains constant: human input. Both person- and place-based predictive technologies rely upon some sort of human interaction, in terms of data input or maintenance, in order to function.<sup>196</sup> While it is clear that humans must interact with data, maintain systems, analyze information, and run search queries, every human naturally harbors implicit biases<sup>197</sup> and other, potentially unrecognized, sentiments towards certain populations. Although human oversight is vital to ensuring proper functioning of technology, injecting human considerations, or any other information an individual believes to be relevant, into a digital process that is supposed to be impartial contaminates the analysis with

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191. Bryan Llenas, *Brave New World of ‘Predictive Policing’ Raises Specter of High-Tech Racial Profiling*, FOX NEWS (Jan. 11, 2017), <https://www.foxnews.com/world/brave-new-world-of-predictive-policing-raises-specter-of-high-tech-racial-profiling> [<https://perma.cc/A88Y-RP2X>].

192. FERGUSON, *supra* note 33 at 49.

193. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/W3SY-LNHC>].

194. *Id.*

195. FERGUSON, *supra* note 33, at 75.

196. See Irving Wladawsky-Berger, *Why Human Input Matters to Generative AI*, MEDIUM (Oct. 4, 2023), <https://medium.com/mit-initiative-on-the-digital-economy/why-human-input-matters-to-generative-ai-0ed1507fceb2> [<https://perma.cc/9VDB-TSG3>] (““Generative AI models need to train on human-produced data to function. When trained on model-generated content, new models exhibit irreversible defects.”).

197. See Harini S. Shah & Julie Bohlen, *Implicit Bias*, STATPEARLS (Mar. 4, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK589697/> [<https://perma.cc/S9G7-S3RX>] (describing implicit bias as “the subconscious feelings, attitudes, prejudices, and stereotypes an individual has developed due to prior influences and imprints throughout their lives”).

potential animus.<sup>198</sup> Complicating the potential fallout from any improper human input is the fact that “[i]ndividuals are unaware that subconscious perceptions, instead of facts and observations, affect their decision-making.”<sup>199</sup> While proponents of predictive technology argue the process actually mitigates any human error or perception, prior studies have shown that error still occurs within these digital processes because of how law enforcement classifies or characterizes inputs and information when operating databases.<sup>200</sup> As one federal circuit court judge succinctly stated, “[g]arbage in, garbage out. Everyone knows that much about computers: you give them bad data, they give you bad results.”<sup>201</sup>

Inaccuracies in such complex technology are bound to occur. We see error messages on a daily basis as we interact with much simpler media, such as social media platforms, routine Internet searches, and government-sponsored applications (such as utilities, student loans, or healthcare media). However, without a process to control quality and auditing and oversight mechanisms to address technological and human issues, error will continue to occur and impact lives. Given the interaction between humans and predictive systems, oversight and auditing must be performed regularly on not only the technology, but also its human operators. The FBI has already fallen prey to inadequate oversight after it was determined that their facial recognition technology, which contained facial images of seventeen million individual Americans, was not adequately evaluated for accuracy, leading to public outrage, false identification of potential

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198. See David C. Vladeck, *Consumer Protection in an Era of Big Data Analytics*, 42 OHIO N.U. L. REV. 493, 495 (2016) (“Algorithms may also be imperfect decisional tools. Algorithms themselves are designed by humans, leaving open the possibility that unrecognized human bias may taint the process. And algorithms are no better than the data they process, and we know that much of that data may be unreliable, outdated, or reflect bias.”).

199. Shah & Bohlen, *supra* note 197.

200. See DAVID N. KELLEY & SHARON L. MCCARTHY, THE REPORT OF THE CRIME REPORTING REVIEW COMMITTEE TO COMMISSIONER RAYMOND W. KELLY CONCERNING COMPSTAT AUDITING 5–6 (2013), [https://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/crime\\_reporting\\_review\\_committee\\_final\\_report\\_2013.pdf](https://www.nyc.gov/html/nypd/downloads/pdf/public_information/crime_reporting_review_committee_final_report_2013.pdf) [<https://perma.cc/NN6R-YF6K>] (“Reports in 2010, now substantiated, of the efforts of commanding officers . . . to downgrade and suppress the reporting of crime . . . cast further doubt in . . . the accuracy of the NYPD’s numbers . . . . Police unions also have alleged widespread manipulation of crime statistics . . . . Precinct commanders purportedly induce, by threats or incentives, their subordinate[s] . . . to downgrade crime or not to take or file complaint reports in order to avoid criticism at CompStat meetings.”).

201. *U.S. v. Esquivel-Rios*, 725 F.3d 1231, 1234 (10th Cir. 2013).

offenders, and an overall diminishment in trust.<sup>202</sup> This lapse is especially concerning after considering the immense system of interconnected security cameras and other data surveillance devices within the United States that are capable of facial recognition.<sup>203</sup> Ultimately, in pursuit of public safety measures, we must ask, “can correlation replace causation when the underlying data remains imperfect?”<sup>204</sup>

The due process implications are clear, and predictive technology, as well as surveillance that captures information on individuals without a warrant and feeds it into databases, is a violation of the Fourth Amendment prohibition against search and seizure. As referenced above, data is frequently collected by law enforcement without probable cause and, at times, absent any suspicion of wrongdoing, which sometimes leads to unforeseen and unwarranted consequences. The issue reduces to a simple question: how much of our private and constitutional rights are we willing to concede in the pursuit of public safety? Under current law enforcement surveillance practices, which permit surveillance of citizens in public and the use of predictive technology, information and data from individuals without any history of criminal activity or interaction with law enforcement may be collected and used by law enforcement in the name of safety.<sup>205</sup> The lack of notice to individuals whose information

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202. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-267, FACE RECOGNITION TECHNOLOGY: FBI SHOULD BETTER ENSURE PRIVACY AND ACCURACY 10 & n.23, 25–26 (2016), <https://www.gao.gov/assets/gao-16-267.pdf> [<https://perma.cc/7LS4-23Q9>] (“FBI officials stated that they have not assessed how often NGI-IPS face recognition searches erroneously match a person to the database (the false positive rate).”); see also Jake Laperruque, *Unmasking the Realities of Facial Recognition*, PROJECT ON GOV'T OVERSIGHT (Dec. 5, 2018), <https://www.pogo.org/analysis/unmasking-the-realities-of-facial-recognition> [<https://perma.cc/UJ84-7Z9S>].

203. See *3 of the US Cities Under the Heaviest Video Surveillance*, KUSTOM SIGNALS, INC., <https://kustomsignals.com/blog/3-of-the-us-cities-under-the-heaviest-video-surveillance> [<https://perma.cc/N788-KUW9>] (last visited Sept. 11, 2025) (“Currently there are approximately 2,626 cameras around New York City connected to the NYPD’s network and more than 18,000 interconnected cameras in the city. . . . In addition to . . . cameras, [Chicago] also [has] thermal and license plate recognition . . . cameras, and cameras on police and fire boats, helicopters, SUVs, trailers and command vans, among others.”).

204. FERGUSON, *supra* note 33, at 119.

205. See Jenifer Warren, *Task Force on Policing Releases Comprehensive Collection of Data on U.S. Law Enforcement*, COUNCIL ON CRIM. JUST. (Feb. 11, 2021), <https://counciloncj.org/task-force-on-policing-releases-comprehensive-collection-of-data-on-u-s-law-enforcement/> [<https://perma.cc/688W-4Z25>]; Bennett Cyphers, *Inside Fog Data Science, the Secretive Company Selling Mass Surveillance to Local Police*, ELEC. FRONTIER FOUND. (Aug. 31, 2023), <https://www.eff.org/deeplinks/2022/08/inside-fog-data-science-secretive-company-selling-mass-surveillance-local-police> [<https://perma.cc/6CFX-Z8NS>] (“[R]ecords . . . indicate that Fog [Data Science,

is included in any law enforcement system, as well as the lack of general transparency with the public in terms of surveillance practices, further complicate the matter in that avenues for relief, such as expungement or appeal, are guised and hidden. If we do not recognize the issue, how can we address it via appellate or other restorative processes?

Given the uncertainty of how big data may progress and how law enforcement may continue to use the technology, the constitutional and privacy implications are somewhat uncertain. However, it is clear that constitutional standards enacted prior to big data are not keeping up with the rapid development of technology, leading to more and more due process and constitutional violations. For example, the Fourth Amendment of the United States Constitution, in part, authorizes law enforcement actors who subjectively and reasonably believe criminal activity is afoot to stop an individual they suspect is facilitating illegal activity.<sup>206</sup> “Reasonable suspicion” is the term that was adopted long ago to solidify this standard.<sup>207</sup> Through the *Sokolow* ruling, law enforcement was given leeway to stop and search individuals without a warrant, so long as certain prerequisites were met.<sup>208</sup> As discussed more in depth below, the flexibility associated with the “reasonable suspicion” standard, combined with the wealth of data relied upon by law enforcement, creates a situation where law enforcement can potentially justify improper acts through data. The logic furthered by law enforcement is that data and analytics are devoid of human influence, which somewhat shifts fault or liability from the member of law enforcement to the technological processes. This logic, however, is heavily contested as some civil rights advocates view law enforcement databases or other technological investi-

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a commercial data broker,] has past or ongoing contractual relationships with at least 18 local, state, and federal law enforcement clients . . . . Fog states that it does not collect personally identifying information . . . . But Fog allows police to track the location of a device over long stretches of time—several months with a single query—and Fog touts the use of its service for ‘pattern of life’ analyses that reveal where the device owner sleeps, works, studies, worships, and associates. This can tie an ‘anonymous’ device to a specific, named individual.”

206. See *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002) (“[T]he Fourth Amendment is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity ‘may be afoot’ . . . .” (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989))).

207. See *Sokolow*, 490 U.S. at 12 (1989) (Marshall, J., dissenting) (“[A] suspicion is not reasonable unless officers have based it on ‘specific and articulable facts.’” (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968))).

208. See *id.* at 7 (majority opinion) (“[P]olice can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” (quoting *Terry*, 392 U.S. at 30)).

gative methods as human-driven.<sup>209</sup> Much like everything else that is man-made, maintenance and/or some human input is required for these databases to properly function. For example, devices as small as smart phones regularly require a software update initiated by data engineers to ensure proper functioning.

The primary issue is that law enforcement actors now have ease of access to a plethora of information related to an individual prior to even setting foot on the scene of a potential crime. Through big data and predictive technology, law enforcement, who, prior to the implementation and use of such technology were required to largely rely upon individual observations and circumstances existing at the scene, now may obtain a comprehensive profile of an individual prior to setting foot on scene. The use of tablets or similar devices provides law enforcement with a means to access an untold wealth of information about an individual with a few taps of the finger. Again, an individual without any criminal record or interaction with law enforcement may still experience a situation where government actors are judging them based on information derived from public surveillance or acquired from consumer data purchased from a private third-party company. Consider the following: “If the government wishes to deprive us of life, liberty, or property, fair process is due. . . . How do you get off a secret list you did not know you were on? How do you challenge a list when you cannot know the criteria? . . . How do you ensure transparency and accountability with opaque data-driven systems?”<sup>210</sup> At present, the United States government is allowing our constitutional rights to be eroded in the name of public safety, without limit, and without adequate notice.

If left unchecked, individual citizens may suffer from the growing pains associated with all new technology. For example, in January 2020, Robert Williams was arrested outside of his residence after police claimed he was suspected of stealing several high-value watches from a local jeweler.<sup>211</sup> Law enforcement suspected Mr. Williams after the victim store owner produced a single, grainy still image from his security system and produced it to police.<sup>212</sup> Investigating officials then took the still image and utilized their own facial recognition software to explore potential matches.<sup>213</sup> Ultimately, the technology

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209. See, e.g., Madison Blevins, *When Dirty Data Leads to Dirty Policing*, 29 RICH. J. L. & TECH. 166, 168, 171 (2023) (“Dirty data stems from routine human error . . .”).

210. FERGUSON, *supra*, note 33, at 53.

211. *Williams v. City of Detroit*, ACLU (Jan. 29, 2024), <https://www.aclu.org/cases/williams-v-city-of-detroit-face-recognition-false-arrest> [<https://perma.cc/9F92-DA25>].

212. *Id.*

213. *Id.*

identified Mr. Williams as a possible match based off a then-expired driver's license that was stored in their system.<sup>214</sup> Police then took the results from their facial recognition software and made certain omissions to the court regarding the software's accuracy, leading to a warrant being issued and Mr. Williams' eventual arrest.<sup>215</sup> After being taken into custody and confined in an overcrowded cell, Mr. Williams was eventually released after thirty hours.<sup>216</sup> Unfortunately, the trauma experienced by the Williams family, who was present at the time of his arrest, and Mr. Williams during his time in custody, as well as any reputational harm, cannot be undone by his release. Mr. Williams ultimately filed suit against the City of Detroit and in June 2024 reached a favorable settlement.<sup>217</sup> In relevant part, the settlement agreement between Mr. Williams and the City of Detroit requires all law enforcement representatives to support facial recognition technology with "independent and reliable evidence" and to train all representatives on the use of such technology and its associated risks.<sup>218</sup> This timely outcome emphasizes the importance of heavily regulating the proper use of technology implemented by law enforcement and the potential disaster that may ensue if such technology is misused or misrepresented by law enforcement. As recognized by the *Williams* decision, courts must begin to recognize and think critically about the use of technology and the influence of human actors who rely upon such processes throughout criminal investigations.

#### IV.

#### ANALYSIS AND POLICY PROPOSAL

Prior to proceeding with proposals for policy reform, I must recognize the importance and potential benefits of utilizing predictive technology to further law enforcement and public safety efforts. While there is significant risk in implementing half-baked data processes to law enforcement, as well as to other areas of society, there can be significant benefit should greater safeguards and oversight be enforced. As one scholar noted, "blue data"<sup>219</sup> can serve as a countermeasure to some of the adverse impacts stemming from

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214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. See FERGUSON, *supra* note 33, at 143–66 (referring to the process of utilizing and analyzing internal law enforcement data to improve "police effectiveness, reduc[e] police violence, and strengthen[] training and accountability").

the use of predictive technology in law enforcement. For example, every law enforcement entity could develop and implement a system that focuses on accountability by cataloging public and substantiated complaints associated with individual peace officers. Such a process would not only further accountability, it would also assist law enforcement in identifying more efficient, public-friendly practices. In fact, databases have already been developed to index such occurrences.<sup>220</sup>

Unfortunately, these systems currently suffer from some of the main ailments that plague predictive technology: accuracy and lack of universal implementation of such oversight processes.<sup>221</sup> Without a robust system to monitor, audit, or otherwise control the collection and use of data by law enforcement, the risk of these technologies being abused by bad actors or the potential for technology to yield inaccurate information is heightened. Certainly, it will take time to develop a uniform process by which we balance collection and use of individual data by law enforcement. As discussed below, we must stem the ever-increasing impact of technology upon legal processes until we develop robust safeguards. While there is significant utility in technology utilized by law enforcement,<sup>222</sup> the benefit will be largely negated absent more robust protections in existing legal processes, as well as heightened oversight and auditing mechanisms. As noted by one data privacy expert,

predictive policing, especially anything that goes to the level of identifying and evaluating individuals, is no different than stop and frisk . . . . Law enforcement is just passing the responsibility for bias to a [data] model rather than the individual officer . . . .

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220. See, e.g., *Justice Department Launches National Law Enforcement Accountability Database*, U.S. DEP'T OF JUST. (Dec. 18, 2023), <https://www.justice.gov/opa/pr/justice-department-launches-national-law-enforcement-accountability-database> [<https://perma.cc/4SU9-62A3>] (discussing the National Law Enforcement Accountability Database (“NLEAD”), a “centralized repository of official records documenting instances of misconduct as well as commendations and awards for federal law enforcement officers”).

221. See Alexis Kenyon, *Colorado’s Database to Track Police Officer Misconduct Is “Wildly Incomplete and Often Flat-Out Inaccurate,”* KGNU (Oct. 26, 2023), <https://kgnu.org/colorados-database-to-track-police-officer-misconduct-is-wildly-incomplete-and-often-flat-out-inaccurate/> [<https://perma.cc/P7D9-AZXG>] (describing an investigation which found that Colorado’s database was not being actively maintained and “failed to report the vast majority of officer misconduct, disciplinary actions or officer decertification”).

222. See generally ASHLEY JOHNSON, ERIC EGAN & JUAN LONDOÑO, INFO. TECH. & INNOVATION FOUND., *POLICE TECH: EXPLORING THE OPPORTUNITIES AND FACT-CHECKING THE CRITICISMS* (2023), <https://www2.itif.org/2022-police-tech-future.pdf> [<https://perma.cc/T3WB-8YDP>] (discussing benefits of police technology and methods of risk mitigation).

Regardless of the algorithm used to predict, the individuals [targeted by law enforcement] quite literally ‘fit a description.’<sup>223</sup>

A description entirely formulated through technological processes.

It is also vital to recognize the importance of our own role in furthering the safe and ethical use of technology. We continue to sacrifice our own privacy via everyday technological practices by, for example, accepting cookies on websites and signing service agreements without adequate review, which only contributes to the civil death. On an almost daily basis, we, as citizens, sacrifice our privacy to big data by clicking “I agree” on long user agreements, consenting to the use of cookies and data collection by websites, or posting our most intimate details and moments on social media, among many other things. Until we recognize the exposure created through our own individual practices, technology will continue to impact us in unforeseen ways, and the following policy proposals will be for naught.

In its present state, big data in the criminal recordkeeping and law enforcement contexts may result in the erosion and deprivation of constitutional protections without adequate safeguards, oversight, and accountability. While people advance these technologies in an effort to increase public safety, they do not meaningfully address the means. Specifically, various legal processes currently used within our society are antiquated once we consider the influence of big data in such contexts and the potential collateral consequences imposed upon citizens. As discussed above, tiling in the military, the use of Title IX transcript notations, and the reliance upon predictive technology by law enforcement are three specific examples of legally grounded processes that are not keeping pace with the rapid progression of technology or are otherwise contributing to the collection and storage of private information without due regard for individual rights. The crux of my proposal is simple: we need to strike a fine balance between furthering public safety and maintaining individual rights and protections. I believe this effort is comprised of a two-prong approach. First, we must reassess existing legal processes and potentially implement additional safeguards in light of the rapid development and integration of technology in the legal realm. Specifically, we should enact additional safeguards focused on protecting one’s information from technology maintained by law enforcement, thus mitigating the potential windfall of any arbitrary

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223. Telephone Interview with Eric Curwin, Co-Founder & Chief Tech. Officer, Pyrra Techs (Dec. 7, 2024); *see also* Blevins, *supra* note 209, at 178–80 (discussing how predictive policing can reinforce biases).

stigma attached to an individual. Next, we must enact robust policies and procedures that focus on oversight of technology, proper use of technology by human actors, and auditing, or any similar process that ensures the technology itself is functioning properly.

A. *Strengthening of Existing Legal Protections*

As to the first prong, my primary contention is that the three legal and administrative processes addressed in this Article are exemplary in that they maintain deficient procedural protections prior to storing an individual's information in big data. The first process, military titling, generally occurs prior to any hearing or legal representation and is determined relatively early in the investigation.<sup>224</sup> Most importantly, an individual can be titled even if formal charges are not brought or the individual is ultimately found not guilty of a charge. In the eyes of the United States military, guilt or innocence does not matter so long as you are initially listed as the subject of an investigation. As mentioned above, titling information can affect a service member's ability to seek promotion, specialty training, and benefits, among other things.<sup>225</sup> In terms of additional safeguards, I believe we must explore the following: (1) guaranteed, substantive involvement and review by legal counsel prior to indexing in the DCII or NCIC; (2) greater transparency via affirmative advisements to service members that contain the definition of titling, a description of the process, potential implications, and avenues for relief or expungement; (3) more robust avenues for appeal, including lower thresholds for service members to expunge improper titling information, as well as mandated document production by government actors; and (4) a limitation on the scope of information that is collected on a titled individual such that the impact of any collateral consequence is mitigated until there is a finding of guilt (i.e., the information stored on an individual should be relevant and sufficiently limited to the scope of allegations or charges). These are all safeguards that are absent in the current titling process and will continue to disparately impact service members, especially those who

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224. See L. OFF. OF JOCELYN C. STEWART, *supra* note 20 (explaining that titling occurs when an individual is named as a subject in a criminal investigation report).

225. See *A Clear Explanation of the Military Titling Process: What Happens After You're Titled?*, NAT'L SEC. L. FIRM, <https://www.nationalsecuritylawfirm.com/a-clear-explanation-of-the-military-titling-process-what-happens-after-youre-titled/> [https://perma.cc/9V5X-GCX3] (last visited Sept. 11, 2025) ("The titling process in the military is a critical event with long-term implications that can affect a service member's career, reputation, and future employment opportunities.").

come from minority populations.<sup>226</sup> Much like our public criminal justice system, race is a driving force when it comes to the veraciousness of investigations and the severity of sentencing.<sup>227</sup>

Moving onto the next legal process, the use of transcript notations in Title IX proceedings, which, again, potentially attaches significant criminal stigma to individuals who are alleged to have committed some wrongdoing on a college campus. Historically, post-secondary schools were required to create quasi-criminal records in relation to on-campus misconduct proceedings, which were typically absent basic due process protections, such as a guaranteed right to confront one's accuser (i.e., cross-examination) or the right to an attorney, among others.<sup>228</sup> Given the volatile nature of Title IX law, it is possible the regulations will revert back to that standard. After considering mandatory federal and state reporting requirements, as well as related inclusion in a law enforcement database, the potential collateral consequences attached to individuals can be substantial and life-altering, especially after considering that Title IX investigations may end up in the public eye via news stories, word of mouth, or even privately maintained databases that track or otherwise monitor allegations against students and faculty.

In order to counteract the potential collateral consequences stemming from the inclusion of data originating from Title IX proceedings in law enforcement technology, we should consider establishing more robust protections, such as adopting a higher burden of proof in order to establish responsibility, among many other potential protections. For example, rather than utilizing a preponderance of the evidence standard,<sup>229</sup> the lowest legal standard, we may consider

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226. See Wentz, *supra* note 19, at 320–24 (describing the disparate impact of current titling procedures and arguing that current titling procedures result in disparate impact).

227. See *id.* at 320 (“[D]ata showed a ‘clearly discernable disparity in disciplinary rates between [B]lack and [W]hite servicemen . . . . [N]ot only were Black Service members disproportionately placed in pre-trial confinement, but . . . the length of time spent in pre-trial confinement was, on average, five days longer than white Service members and was the longest of any racial group in the study.” (second alteration in original)).

228. See Mann, *supra* note 26, at 384 (“[B]y the time of the 2020 Rule, schools were using a variety of models ranging from the nonadversarial route of having the case handled by a trained Title IX investigator to use of quasi-courtroom adversarial models.”).

229. See *Preponderance of the Evidence*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/preponderance\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/preponderance_of_the_evidence) [https://perma.cc/T384-XNZA] (last visited Sept. 11, 2025) (“Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.”).

using the higher civil standard of clear and convincing evidence, which requires the complaining party to establish the evidence is substantially more likely to be true than not.<sup>230</sup> This change would simply increase the burden required to place transcript notations or attach stigma, which would afford litigants greater protection prior to being subjected to potential collateral consequences. An alternative approach would be to address the language included in transcript notations such that it is explicit no criminal wrongdoing has been established through the Title IX process. We should also seriously consider whether other due process mechanisms, such as the right to cross-examine a live witness, the right to trained legal counsel, and the right to a live, in-person hearing, should be adopted to further mitigate the disparate impact of any allegations that may be housed in big data. Although the Biden administration's version of the Title IX regulations was largely devoid of any of the aforementioned considerations, they have since been rescinded by the Trump Administration.<sup>231</sup> However, as mentioned above, nothing is preventing another administration from reverting back to the Biden standards. As such, we must fully appreciate the potential implications tied to prior iterations of the Title IX regulations before enforcing yet another version of the law.

This Article shifts now to the final legal process, predictive technology utilized by law enforcement, which, again, largely relies upon human input and may incorporate inaccurate data that has been collected without permission or through third-party commercial interactions.<sup>232</sup> Essentially, law enforcement is collecting data on private individuals through various means; data that may attach criminal or other negative stigma to an individual without any sort of notice or advisement.<sup>233</sup> While the majority of the issues associated

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230. See *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (“In contrast to the ordinary civil case, which typically is judged by a ‘preponderance of the evidence’ standard, [the clear-and-convincing-evidence standard requires that a party] place in the ultimate factfinder an abiding conviction that the truth of [the party’s] factual contentions are ‘highly probable.’”).

231. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33746–47 (Apr. 29, 2024) (codified at 34 C.F.R. § 106 and rescinded on Feb. 4, 2025).

232. See generally Lee & Chin-Rothmann, *supra*, note 85 (describing how law enforcement avoids Fourth Amendment problems by purchasing data collected by private companies).

233. See Sara Morrison, *Here’s How Police Can Get Your Data — Even If You Aren’t Suspected of a Crime*, Vox (July 31, 2021), <https://www.vox.com/recode/22565926/police-law-enforcement-data-warrant> [<https://perma.cc/67HE-NKX9>] (explaining how law enforcement obtains copious amounts of individuals’ personal data from third parties, with limited to no notice).

with predictive technology can be addressed through more robust oversight and auditing regulations, policies, and procedures, which is discussed in detail below, enacting greater restrictions on public data collection by law enforcement can also curtail some of the issues plaguing these systems.<sup>234</sup> Ultimately, any law enforcement data collection and usage should be narrowed and specifically tailored to the needs of any law enforcement task, investigation, or initiative. Absent reasonable articulable suspicion in compliance with the Fourth Amendment, we should not arbitrarily store data on individuals simply because it may be of use in the future or may inform future practices. If we do not tighten the restrictions on law enforcement data collection and use, we are permitting those agencies to essentially build a playbook on every individual without limit.

### *B. Enacting Robust Oversight and Auditing Processes*

The second prong of my proposal focuses largely on greater regulation and oversight of big data in the context of law enforcement and criminal recordkeeping through consolidated legislation. While the United States has previously attempted to provide greater data privacy rights through the American Data Privacy and Protection Act (“ADPPA”),<sup>235</sup> the proposed legislation ultimately failed, partially due to opposition led by United States Senator Ted Cruz.<sup>236</sup> Still, even the proposed protections under the defunct law were still insufficient when compared to more robust legislation enacted by other global powers, such as the European Union’s GDPR.<sup>237</sup>

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234. Most importantly, we should prohibit law enforcement agencies from accessing or purchasing private data from third-party companies regardless of any potential implications upon efficiency. As argued above, these private companies are monetarily motivated (i.e., potentially biased), are not regulated heavily enough, and fail to update or ensure the accuracy of their data. Stated plainly, law enforcement does not need to collect or understand my preferences as a consumer in order to inform their practices. My purchase of fish oil on Amazon has no bearing on my propensity to commit crimes, nor does the transaction further any investigation.

235. American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022).

236. See Jedidiah Bracy, *Stakeholders React to Draft American Privacy Rights Act*, INT’L ASS’N PRIV. PROS. (Apr. 9, 2024), <https://iapp.org/news/a/stakeholders-react-to-draft-american-privacy-rights-act> [<https://perma.cc/2KUU-KWRL>] (chronicling Senator Cruz’s opposition to the ADPPA).

237. See ANGELA POTTER ET AL., ONE TRUST DATA GUIDANCE, *COMPARING PRIVACY LAWS: GDPR v. ADPPA*, [https://www.dataguidance.com/sites/default/files/onetrust-dataguidance-comparing-privacy-laws-adppav-gdpr-report\\_0.pdf](https://www.dataguidance.com/sites/default/files/onetrust-dataguidance-comparing-privacy-laws-adppav-gdpr-report_0.pdf) [<https://perma.cc/LQ5A-RCMS>] (last visited Sept. 18, 2025); Council Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 119) 55, 11 (EU) (“Processing of personal data relating to criminal convictions . . . shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law

For example, while the GDPR is a comprehensive, all-encompassing piece of legislation that prioritizes the privacy of every EU citizen, individually, the ADPPA focused mainly on data security with attention to the records themselves and played on a patchwork of many other data privacy laws dedicated to specific types of information, which resulted in a hodgepodge of regulations.<sup>238</sup> The main issue with this approach is that the EU can simply regulate and enforce the legislation under a single umbrella whereas an American may have to pursue action through several areas of law depending upon the nature of the data or interest implicated. Accordingly, my primary proposal is that the United States should consider consolidating data privacy laws into a single, comprehensive piece of legislation not only to simplify the law and make it more accessible, but also to consolidate the aforementioned patchwork of laws at the state<sup>239</sup> and federal levels. This will ensure uniformity in law and provide greater clarity to the public at large.

While former President Biden had signed an executive order that seeks to enhance safeguards related to data collection and sharing, the initiative appears to primarily be driven by American compliance with the GDPR in terms of trans-Atlantic information sharing;<sup>240</sup> meaning, the initiative benefits larger systemic interests rather than individual ones. While the Biden administration's action is a step in the right direction, the proposed changes still fall short of the protections afforded by the GDPR.<sup>241</sup> Interestingly, the executive

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providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.”).

238. See generally POTTER ET AL., *supra* note 237 (discussing the similarities and differences between the GDPR and the ADPPA). For example, the ADPPA did not clarify its territorial scope, while the GDPR maintains extraterritorial scope. The GDPR also details the level of protection required prior to transferring data, whereas the ADPPA did not explicitly discuss the issue. The GDPR further requires data handlers to maintain a record of their activities, while the ADPPA did not. See *id.* at 8, 28, 32.

239. See, e.g., 2008 Ill. Legis. Serv. 95-994 (West); CAL. CIV. CODE §§ 1798.100-199 (West 2018); TEX. BUS. & COM. CODE ANN. § 17.50 (West 2005).

240. See Exec. Order No. 14,117, 3 C.F.R. 366, 367 (2025) (“Access to Americans’ bulk sensitive personal data and United States Government-related data by countries of concern through data brokerages, third-party vendor agreements, employment agreements, investment agreements, or other such arrangements poses particular and unacceptable risks to our national security given that these arrangements often can provide countries of concern with direct and unfettered access to Americans’ bulk sensitive personal data.”).

241. Christopher Munoz, *Experts Say Data Privacy Executive Order is Important for National Security*, SYRACUSE UNIV. TODAY (Mar. 7, 2024), <https://news.syr.edu/blog/2024/03/07/experts-say-data-privacy-executive-order-is-important-for-national-security/>

order recognizes the national security risk of allowing foreign actors to obtain

United States Government-related data to collect information on activists, academics, journalists, dissidents, political figures, or members of non-governmental organizations or marginalized communities in order to intimidate such persons; curb dissent or political opposition; otherwise limit freedoms of expression, peaceful assembly, or association; or enable other forms of suppression of civil liberties,<sup>242</sup>

but it fails to acknowledge that similar consequences may arise from law enforcement’s collection of individual data.<sup>243</sup>

In pursuing a uniform, comprehensive piece of legislation, I turn my focus to what has been proposed as the American Privacy Rights Act of 2024 (“APRA”).<sup>244</sup> Where the ADPPA and President Biden’s order left off, the APRA continues and expands upon the prior proposed protections. Most notably, the APRA affords a number of significant protections to private citizens, including, but not limited to, strict data minimization<sup>245</sup> and a focus on regulating large data holders.<sup>246</sup> Under the proposed legislation, covered data, or protected information, includes “information that identifies or is

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[<https://perma.cc/QTY6-RLQV>] (“[The order] allows federal agencies to regulate the transfer of data to ‘countries of concern.’ . . . [T]his order strategically addresses the large-scale transfer of Americans’ personal data to foreign countries of concern[] . . . mitigating the potential threats on Americans’ privacy and data protection against international risks . . .”).

242. Exec. Order No. 14,117, *supra* note 240, at 367–68.

243. See *KUSTOM SIGNALS*, *supra* note 203 (detailing law enforcement’s large-scale use of surveillance and data collection).

244. American Privacy Rights Act of 2024, H.R. 8818, 118th Cong. (2024).

245. Kirk J. Nahra, Ali A. Jessani & Amy Olivero, *New Federal Privacy Bill Draft Hits Congress*, WILMERHALE: PRIV. & CYBERSECURITY L. (Apr. 19, 2024), <https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20240418-new-federal-privacy-bill-draft-hits-congress> [<https://perma.cc/3XE3-J2WP>] (“[C]overed entities . . . are prohibited from collecting, processing, retaining, and transferring personal data unless they meet the data minimization principle of ‘necessary, proportionate, and limited to’ to provision or maintenance of a service or communication, or a specific permitted purpose. This language is stricter than what is currently required for companies under current state comprehensive privacy laws.”).

246. *Id.* (under APRA, “large data holders, defined as ‘a covered entity that has \$250 [million] in annual revenue and collects or processes the covered data of more than 5 [million] individuals,’” would be required to designate data security and privacy officers, annually certify “certain compliance practices, and annually conduct[] an algorithm impact assessment if it uses a covered algorithm that ‘poses a consequential risk of harm,’ and biennially conduct[] privacy impact assessments”).

linked or reasonably linkable,” alone or in combination with other information, to an individual or a device that identifies or is reasonably linkable to one or more individuals.<sup>247</sup> While this is certainly a necessary protection, its potential effect is lessened by an exception that permits the collection of inferences gleaned from public information, which is sometimes inaccurate but still relied upon when indexing information and populating algorithms.<sup>248</sup> For purposes of this Article, this exception is concerning as the permitted inferences that can be made are broad in scope.<sup>249</sup> Additionally, the APRA does not appear to act as a true umbrella for American data privacy laws and seemingly still allows space for states to develop their own unique data privacy laws.<sup>250</sup>

Still, the APRA is not without its potential benefits and is certainly a step in the right direction. In fact, it is highly encouraging that the Biden administration had made a push to further data privacy rights in general. Most notably, even with the aforementioned issues, the APRA seemingly adopts the GDPR’s focus on the individual in several areas. First, the proposed legislation provides individual control over covered data, meaning a person, after submitting a request to an entity that harbors their information, may be afforded the opportunity to access the information, correct any inaccurate or

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247. *Id.*

248. H.R. 8818 § 101(12)(B) (excluding “inferences made exclusively from multiple independent sources of publicly available information . . . .”); see Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 41 (2019) (discussing how predictive policing systems trained on public data “from jurisdictions with proven problematic conduct cannot be relied on to produce valid results . . .”).

249. See H.R. 8818 § 101(12) (“The term ‘covered data’ means information that identifies or is linked or reasonably linkable, alone or in combination with other information, to an individual or a device that identifies or is linked or reasonably linked to [one] or more individuals . . . . The term ‘covered data’ does not include . . . inferences made exclusively from multiple independent sources of publicly available information, if such inferences . . . do not reveal information about an individual that meets the definition of the term ‘sensitive covered data’ with respect to the individual; and . . . are not combined with covered data.”). Sensitive covered data tentatively includes data such as government-issued identifiers, for example, a social security number; health and genetic information; comprehensive financial account and card numbers or access codes and passwords; and certain biometric information. *Id.* § 101(49).

250. See *id.* § 116(g) (“[N]o provision of this section may be construed as altering, limiting, or affecting the authority of a State attorney general, the chief consumer protection officer of a State, or an officer or office of a State authorized to enforce laws applicable to covered entities or service providers to . . . bring an action or other regulatory proceeding arising solely under the laws in effect in such State.”).

incomplete information, and potentially delete it.<sup>251</sup> Next, the legislation provides a mechanism for individuals to pursue legal claims for actual damages, injunctive relief, declaratory relief, and reasonable attorneys' fees and costs of litigation, which will certainly encourage data management entities to comply with the law as they not only face sanctions from the government, but potential civil damage claims by individuals.<sup>252</sup> My concern with perceiving civil causes of action as an avenue for adequate relief is that they are often expensive, stressful, and time-consuming for litigants, which may act as a barrier to justice, as it always has in our legal system. Therefore, legislators should also consider utilizing an optional mediation process prior to any parties pursuing litigation, which is similar to the dispute resolution process offered by the Equal Employment Opportunity Commission, for example.<sup>253</sup> Early mediation, if facilitated by mandatory pre-mediation disclosure of relevant, non-privileged or confidential documentation,<sup>254</sup> would afford all parties an opportunity to potentially resolve the dispute early and significantly reduce the cost of litigation.

However, the APRA, much like the GDPR, contains a blanket "permitted purpose" exception, which permits collecting individual data for purposes of "prevent[ing], detect[ing], protect[ing] against, investigat[ing], or respond[ing] to an imminent or ongoing public safety incident (such as a mass casualty event, natural disaster, or national security incident)," as well as "ongoing or imminent security incident[s] relating to network security or physical security, including an intrusion or trespass, medical alert or request for a medical

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251. *Id.* § 105(a).

252. *Id.* § 117(a).

253. *See Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/mediation-0> [<https://perma.cc/UQ2R-SUCQ>] (last visited Sept. 19, 2025).

254. I advocate for mandatory pre-mediation disclosures simply because, in my professional experience, parties are reluctant to share information prior to litigation simply because it may increase their exposure. Without a mandatory disclosure requirement, parties will likely only disclose information and documentation that is most favorable to their position. This lack of disclosure would prevent the other party from learning potentially relevant information and greatly hinder assessing the veracity of the claims and defenses. For example, under Colorado law, litigants in civil district court must serve initial disclosures within twenty-eight days of the "at issue date," the date each defendant has been served and/or filed a responsive pleading. COLO. R. CIV. P. 16(b)(1), 26(a)(1). Each party's initial disclosures must contain (1) a list of every individual who may have information relevant to the claims and defenses asserted in the matter; (2) a list and copies of all relevant documents that are not subject to some sort of privilege; (3) an itemization of potential damages; and (4) a privilege log indicating what documentation was withheld, including the privilege asserted. *Id.* 26(a)(1), (b)(5)(A).

response, fire alarm or request for a fire response, or access control.”<sup>255</sup> This provision also appears to afford law enforcement significant breadth when storing information under the guise of public safety. The proposed legislation also appears to permit entities to collect and retain information to conduct market research, which is concerning as this may open the door for private companies to continue the collection of information and sale to law enforcement.<sup>256</sup> While it is unclear exactly how these proposed legislative provisions will be enacted, they are but a few of the concerning aspects of the law that may not adequately address concerns voiced in this Article. As such, a need still remains for additional legislation that will enforce restrictions on law enforcement, or any entity maintaining criminal record information or otherwise contributing to public safety, and expand upon the APRA.

## V. CONCLUSION

Civil death, a concept that was once borrowed from English common law, will experience a modern resurgence if left unmitigated. Since the founding of our nation, our society has recognized the tension between individual freedom and governance. In fact, during a now-famed dispute between the Pennsylvania General Assembly and the Penn family, the founding members of the colony, and now state, Benjamin Franklin voiced a position that seemingly has more relevance now than it did at the time.<sup>257</sup> During the discussion, Mr. Franklin stated, “those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.”<sup>258</sup> While Mr. Franklin was merely commenting on the appropriateness of levying taxes against individuals in order to further the safety of the territory,<sup>259</sup> his statement remains relevant in the modern context as we continue attempting to strike a fine balance between public safety and individual rights. Where Benjamin Franklin and other American colonists debated how to develop and secure a nation

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255. H.R. 8818 § 102(d)(11)–(12).

256. *Id.* § 102(d)(6).

257. See *Ben Franklin’s Famous ‘Liberty, Safety’ Quote Lost Its Context in 21st Century*, NATIONAL PUBLIC RADIO (Mar. 2, 2015), <https://www.npr.org/2015/03/02/390245038/ben-franklins-famous-liberty-safety-quote-lost-its-context-in-21st-century> [<https://perma.cc/WDF8-F35C>] (revealing that during the dispute, the state legislature considered taxing the Penn family to bolster the security of the fledgling nation, a move met with staunch opposition).

258. *Id.*

259. *Id.*

through taxation, which was viewed as an intrusion upon individual rights at the time, we find ourselves questioning how much we, as individuals, should sacrifice in furtherance of public safety.

There are undisputed benefits of utilizing technology to facilitate public safety and the efforts of law enforcement, but the development and influence of such technology upon existing legal processes is rapidly eroding existing constitutional safeguards such that individual rights and liberties are being voided without due regard. As demonstrated through the three legal processes discussed herein, the existing safeguards in our current legal system may be inadequate given the significant impact criminal or civil allegations may have on an individual should their information be entered into big data. Where findings of responsibility in the civil realm or guilt in the criminal once had a more finite, punitive impact on an offender's life, technology and big data are now resulting in collateral consequences that have much broader and long-lasting impacts. As such, we must focus on exploring more individual-based data privacy legislation, as well as systemic oversight, so that public trust is not undermined. Simple measures such as regular audits, dedicated compliance teams with specific timelines, greater transparency, sunset mechanisms, procedural standardization, and the development and ownership of technology by government actors, not third-party entities,<sup>260</sup> may further public trust and safety at the same time.

Our modern predicament can be aptly summarized as follows: “[a]nyone who believes that new benefits make [people] forget old injuries deceives himself.”<sup>261</sup> History has shown how questionable law enforcement practices can affect countless lives and history will continue to repeat itself if big data is left unchecked.

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260. This would ensure that law enforcement or other government actors do not have to rely on algorithms developed by monetarily interested third parties. Such a simple measure would ensure that the government is solely responsible for acquiring and analyzing data, updating it, and ensuring its processes and users are operating properly.

261. NICCOLÒ MACHIAVELLI, *THE PRINCE* 30 (Peter Bondanella ed. & trans., Oxford Univ. Press 2005) (1532).

# HOW THE RIGHT OF PUBLICITY, PRIVACY, AND PERSONHOOD SHOULD GUIDE JUDICIAL SKEPTICISM OF LICENSES FOR AI-GENERATED PERFORMANCES

*IAN MUNDY-JACKSON\**

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## I.

## INTRODUCTION

In the second season of *30 Rock*, Jerry Seinfeld returns from vacation to the fact that Jack Donaghy, the president of NBC, has placed computer-generated performances of Jerry in several other shows.<sup>1</sup> Jack is calling it “SeinfeldVision” and he is sure it’s going to set viewership records. Jerry is not happy, but Jack pleads with him to allow those shows to go forward with Jerry’s generated performances. It’s what the people want. After all, they don’t know that Jerry has been on vacation. As far as the viewers are concerned, he has been working diligently in the studio for months to appear in all these shows.

With the rise of generative artificial intelligence (AI) and digital replicas, “SeinfeldVision” is now a possible reality. Without any statutory or judicial limitations, it is likely only a matter of time before an actor signs away their likeness to be used in perpetuity by media companies using deepfakes to capitalize on their fame.<sup>2</sup> Perpetual licensing deals, which have been proven to be lucrative for both parties, already exist in other contexts.<sup>3</sup> It is easy to imagine a retiring actor, news anchor, or musician deciding to license their likeness now that their own career is over. Going one step further, the estate of a deceased actor could profit from a perpetual deal that immortalizes the decedent forever on the silver screen.

It is not necessary to deal in hypothetical futures to find problems—they have already arrived. Contestants on America’s Got Talent sign away their publicity rights in perpetuity including for use in any future media form to be devised.<sup>4</sup> This issue has also been at

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1. *30 ROCK: SeinfeldVision* (NBC television broadcast, aired Oct. 4, 2007).

2. SAG-AFTRA, which represents a variety of performers including actors and singers, has already tried to get ahead of this by laying out guiding principles and encouraging members to consult the union on any proposed contracts involving AI. *Contracts & Industry Resources: Artificial Intelligence*, SAG-AFTRA, <https://www.sagaftra.org/contracts-industry-resources/member-resources/artificial-intelligence> [<https://perma.cc/T4NR-4ZLY>] (last visited Sep. 22, 2025).

3. For example, LeBron James signed a lifetime deal with Nike to forge a lasting brand. Darren Rovell, *LeBron James Signs Lifetime Nike Deal*, ESPN (Dec. 7, 2015), [https://www.espn.com/nba/story/\\_/id/14314807/lebron-james-signs-life-deal-nike](https://www.espn.com/nba/story/_/id/14314807/lebron-james-signs-life-deal-nike) [<https://perma.cc/6ZWS-LZJ6>].

4. *2023 AGT Release*, AMERICA’S GOT TALENT, <https://agtauditions.com/wp-content/uploads/2023-AGT-Release.pdf> [<https://perma.cc/6L77-98ND>] (last visited Sep. 15, 2025) [hereinafter AGT release].

the heart of ongoing NCAA litigation, where the NCAA's position has been that their perpetual ownership of likeness rights prevented them not only from paying current players, but also from paying former players.<sup>5</sup> What if the many holders of similarly broad, unilateral publicity assignments sought to put them to use to create deepfake content of those individuals? What if the holders of those assignments transferred them to a third party for the same use?

Should a court confronted with such contracts require performance? The realities of generative AI, and the new possibilities it opens, require a hard look at the doctrine of the right of publicity. This moment requires not an analysis of current case law, but rather a return to the theoretical underpinnings of the right of publicity in order to understand how the right should be either vindicated or limited in the age of artificial intelligence. In analyzing the right of publicity, the legal nature of personhood and personal property, and the judicial skepticism around current uses of AI, this Note concludes that those who seek to use the right of publicity to produce deepfaked content should face an uphill battle to vindicate such contracts in court in the absence of affirmative legislation.

Part II of this Note surveys the current state of right to publicity and likeness transfers. It discusses the traditional assumption that the right of publicity is a property right and evidence that undercuts this assumption. Part III reviews the history of property rights in the context of biological material and the questions it raises between property rights and personhood. Additionally, it examines the manner in which personhood is often used to sharply curtail or entirely remove recognition of property rights. Part IV turns to the current state of generative AI, looking at both the harms posed by the technology and the limitations and skepticism that the law currently places on the copyright and ownership of content without a human author. Part V argues that the perpetual licensing for the purpose of deepfakes goes beyond mere right to publicity and implicates questions of personhood, and therefore courts should refuse to honor such contracts without further legislative guidance. Finally, Part VI concludes this Note with brief remarks on the policies that must be balanced and why courts are not an apt forum for this balancing.

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5. Third Consol. Amended Class Action Complaint, paras. 12–13, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-01967 CW, 2013 WL 3810438 (N.D. Cal. July 19, 2013) [hereinafter NCAA Complaint].

## II. THE RIGHT OF PUBLICITY

### A. *The Right of Publicity as a Property Right*

The right of publicity is, in its most basic form, the right to control the commercial value of one's own image.<sup>6</sup> There is a level of intuitiveness to this right in the modern commercial market we live in. Celebrities constantly appear in advertisements to help promote sales, and, more than likely, we presume these celebrities are well compensated for those appearances. As an example of this value, LeBron James's career earnings so far as an NBA player are only about half the value of the lifetime deal he signed with Nike.<sup>7</sup> Based only on the sheer amount of money being transferred from Nike to LeBron, we know that Nike must need to secure LeBron James's permission in order to use his likeness and name on their products. Legally, this right of publicity acquired by Nike is traditionally regarded as a property right.<sup>8</sup>

Despite decades of legal groundwork arguing for the protection of fame and public personas, the right of publicity was not formally recognized until the 1950s in the seminal case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>9</sup> This recognition was the culmination

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6. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2025) ("Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity.").

7. As of the 2025–26 season, James's career earnings are around \$528 million, *LeBron James*, SPOTRAC, [https://www.spotracc.com/nba/player/\\_/id/2257/lebron-james](https://www.spotracc.com/nba/player/_/id/2257/lebron-james) [<https://perma.cc/XN7N-T3LY>] (last visited Sep. 15, 2025), compared to the \$1 billion lifetime deal he signed with Nike, Rovell, *supra* note 3; Emmett Knowlton, *LeBron James' business partner confirms lifetime deal with Nike is worth over \$1 billion*, BUS. INSIDER (May 17, 2016 at 14:16 ET), <https://www.businessinsider.com/lebron-james-nike-deal-exceeds-1-billion-maverick-carter-says-2016-5> [<https://perma.cc/WYM7-GWCX>].

8. See MCCARTHY & SCHECHTER, *supra* note 6, § 1:3 ("The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition.").

9. 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); see also Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 204 (1954) (noting that *Haelan Labs* represents the culmination of efforts by lower courts to address the needs of the right of publicity). For example, when Warren and Brandeis laid the groundwork for the right to privacy, they also were laying the groundwork for a property-like right in the expression of one's person. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–205 (1890). However, it does not appear that the right of publicity was recognized by a federal court until litigation arose concerning ownership over the likenesses of baseball players. See *Haelan Lab's*, 202 F.2d at 868 ("This right might be called a 'right of

of a large shift concerning public expectations of fame between the American Revolution and World War II.<sup>10</sup> In the year following *Haelan Laboratories*, Melville Nimmer wrote that the boundaries of the right of publicity should be determined by “first, the economic reality of pecuniary values inherent in publicity and, second, the inadequacy of traditional legal theories in protecting such publicity values.”<sup>11</sup> Indeed, this economic focus echoed the central issue in *Haelan Laboratories*, which was whether one gum company could enforce its exclusive ownership of a baseball player’s likeness to prevent a different gum company from using the player’s likeness.<sup>12</sup> In the years since the right of publicity was first embraced, it has been expanded and generally recognized as a type of property right in order to protect its misappropriation.<sup>13</sup>

When viewed in the context of a commercially licensed likeness, there is a naturalness to the fit of a property rights regime. In such a model, a celebrity inherently owns their likeness and is alienating the right to use of that likeness. In this way, publicity shares a foundation with the original justifications for copyright protections of art and manuscripts—intellectual property arising out of the expression of one’s own thoughts and person.<sup>14</sup> As a next step from copyright, labor put into one’s self to cultivate a valuable image, rather than a valuable external product, has also been protected by a property right.<sup>15</sup> In recognizing the right of publicity as a property right, McCarthy takes notice of this exact doctrinal evolution.<sup>16</sup>

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publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players) . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”)

10. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 148–66 (1993) (recounting how expectations around commercial exploitation of famous individuals changed over time).

11. See Nimmer, *supra* note 9, at 215.

12. *Haelan Labs*, 202 F.2d at 867.

13. Madow, *supra* note 10, at 177 (“The result has been a steady stream of judicial decisions and statutes recognizing a property-like right of publicity and expanding its scope.” (footnote omitted)); see, e.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (“[A celebrity’s] identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property.”).

14. For a recounting of this history, see Warren & Brandeis, *supra* note 9, at 203–05.

15. E.g., *Uhlaender*, 316 F. Supp. at 1282 (“A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status.”).

16. See MCCARTHY & SCHECHTER, *supra* note 6, § 1:26 (“Judge Jerome Frank was apparently the first to coin the term ‘right of publicity’ and Professor Melville B.

There are, however, many theoretical justifications for the right of publicity as a property right. For example, a justification grounded in Locke's labor theory posits that famous individuals should have a property right arising out of the labor that they invested into developing their public image.<sup>17</sup> A related theory comes from a desire to prevent the problem of "free riding," where individuals profit off of the labor of a famous person with very little of their own investment.<sup>18</sup> Under this analogy, the right protects famous individuals from free riders who are effectively stealing from the fame of others.<sup>19</sup> As mentioned above, justifications akin to copyright and patent law indicate that the property right is framed as necessary to protect the economic incentives to invest in one's own likeness.<sup>20</sup> Similarly, an analogy can be drawn to trademarks, where celebrities have a right to their own image at least in part to protect consumers from being misled into thinking they have endorsed a product.<sup>21</sup> This panoply of justifications demonstrates the prevailing strength of the property rights view. Yet, all these arguments are subject to criticism and limitations.<sup>22</sup> The very need to search for so many disparate justifications for a basis in property rights can just as easily demonstrate the inherent weakness in such a view.

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Nimmer was the first to study and define the parameters of this new property right." (footnote omitted)).

17. See Madow, *supra* note 10, at 175-76 (describing Nimmer's work as an extension of Locke's labor theory) (quoting Nimmer, *supra* note 9, at 216 ("Yet, because of the inadequacy of traditional legal theories . . . persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity . . .")).

18. Madow, *supra* note 10, at 200.

19. See *id.* ("Unless the law gives the celebrity a property right in her persona, complete strangers to the process by which her fame and public image were generated will be free to 'reap without sowing,' to 'get something for nothing.'"). In one right of publicity case, "[t]he district court described the defendants' conduct as that 'of the average thief.'" *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

20. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) ("[T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.").

21. See Madow, *supra* note 10, at 229 ("[R]ights of publicity, like trademarks, help consumers make 'rational economic choices . . .'" (quoting Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1187 n.7 (1978))); see also 15 U.S.C. § 1125 (allowing civil actions for false endorsements).

22. See Madow, *supra* note 10, at 179 (asserting that numerous justifications for publicity rights either "fail[]" or "rel[y] upon empirical or normative premises, usually unstated, that are controversial, dubious, or clearly erroneous").

No shoe seems to fit perfectly. One flaw can be seen in the earlier example of LeBron James. Under the view of the Supreme Court, “the right to exclude is . . . ‘a fundamental element of the property right . . . .’”<sup>23</sup> Despite this centrality of the right to exclude to the nature of property, we know that news organizations, like ESPN, constantly run articles about athletes like James without receiving a license in each instance. While interactions with the First Amendment are largely outside the scope of this article, I offer this as an intuitive limitation on the right. Even with a strong and perpetual license to James’s likeness, Nike cannot unilaterally prevent ESPN from running stories about him. This means that, unfortunately, simply stating that the right of publicity is traditionally regarded as a property right does not get us very far in understanding the scope of the doctrine.

So, what are the boundaries of this right of publicity? Michael Madow answers the boundary question by first describing three ways in which celebrity likeness generates value: (1) through demand for information about their lives, (2) through merchandise and branding, and (3) through appearances in advertising.<sup>24</sup> While the right of publicity is not expressly limited by these categories—the value of an A-list actor’s performance in a movie does not neatly fit into any category—Madow uses these broad strokes to demonstrate that the first category tends to be assigned to the public domain, while the second and third categories remain in the personal control of the celebrity unless assigned.<sup>25</sup> This is not by necessity. In theory, a legal system could just as easily choose to assign all categories to the public domain, which would largely destroy the right of publicity as a commercially valuable right. While states disagree on many fronts about the judicial or statutory boundaries of the right of publicity, they have sought to maintain the commercial value of the right. As I will argue, a strong view of the right of publicity as a property right does not get us very far in understanding where to draw these boundary lines.

### B. *Privacy Rights Also Fail to Fully Explain the Right of Publicity*

The primary alternative would be to treat the right of publicity as a privacy right. In Prosser’s influential article *Privacy*, he categorized

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23. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)).

24. Madow, *supra* note 10, at 129.

25. *Id.* at 130.

publicity within a world of four privacy torts.<sup>26</sup> Rather than ground publicity torts in property rights, Prosser looked to the right to privacy first described by Samuel D. Warren and future Justice Louis L. Brandeis.<sup>27</sup> A critical aspect of privacy rights is that they are generally categorized as fundamental, or inalienable, rights.<sup>28</sup> By contrast, a prominent justification for the right of publicity as a property right is that publicity is “a property right in identity that can be legally separated from the person in a way that privacy rights cannot.”<sup>29</sup> Yet, in practice, how legally separable is the right of publicity from the person? Before accepting the property-privacy dichotomy,<sup>30</sup> and that the right of publicity falls on the property side, it is important to first understand the considerable limitations that have been placed on alienating and vindicating the right of publicity.

To start, for someone without a commercially valuable likeness, what are the remedies if their likeness is misappropriated? A famous person can show that their likeness has a particular commercial value and recover damages for misappropriation.<sup>31</sup> In a property regime, this can easily be analogized to conversion or trespass to chattels.<sup>32</sup> However, this property model allows recovery in proportion to which my likeness is valuable without concern for the damage

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26. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

27. *See id.* at 383–84, 389 (explaining that Brandeis and Warren recognized the right to privacy as an interest separate from property rights and concluding that this right to privacy underlies four distinct torts).

28. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. J. 185, 204, 209–10 (2012) (describing privacy-based rights and fundamental rights as personal and inalienable).

29. MCCARTHY & SCHECHTER, *supra* note 6, § 10:8. Maybe ironically, Warren and Brandeis used property right justifications to first lay the groundwork for the right to privacy. Warren & Brandeis, *supra* note 9, at 203–04.

30. An alternative framing to the property-privacy dichotomy would be to view the right of publicity along the property, liability, and inalienability spectrum as originally described by Guido Calabresi and A. Douglas Melamed. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972) (articulating “unified perspective” of property and tort predicated on optimizing protection of particular entitlements). Such a framing is helpful, as the authors illustrate through the example of eminent domain, where even real property interests are more adequately protected by the liability rules normally thought of as tort remedies. *Id.* at 1106–08.

31. *See, e.g.*, *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001) (“California recognizes the right to profit from the commercial value of one’s identity as an aspect of the right of publicity.”).

32. *See* RESTATEMENT (SECOND) OF TORTS §§ 217, 222A, 223 (A.L.I. 1965) (describing conversion as “an intentional exercise of dominion or control over a chattel” and trespass to chattel as “using or intermeddling with a chattel in the possession of another”).

to my privacy or the nature of the invasion. By extension, this means that, for someone without a valuable likeness, the ability to recover for the unauthorized use of their image will be contextually limited and can approach zero.<sup>33</sup> Instead, to recover anything that might feel like fair damages for such a misuse, they would need to look elsewhere.<sup>34</sup>

For the average person then, suit would not be brought under the right of publicity but on invasion of privacy grounds. In *Gionfriddo*, a California court recognized the inherent incongruity between an invasion of privacy and the status of fame.<sup>35</sup> Former professional baseball players brought a claim that Major League Baseball had violated their right of publicity by continuing to broadcast their names, images, and recordings of their play after they had retired.<sup>36</sup> In describing the right of publicity, *Gionfriddo* noted that courts in California had been reluctant to allow celebrities to sue for invasion of privacy torts, reasoning that “fame seemed inconsistent with the injury to solitude or personal feelings implicitly required” by privacy-based torts.<sup>37</sup> Flowing from this, *Gionfriddo* concluded that, separate from privacy rights, “California recognizes the right to profit from the commercial value of one’s identity as an aspect of the right of publicity.”<sup>38</sup> Making the distinction clear, *Gionfriddo* stated, “[P]ublic interest must then be weighed against the plaintiffs’ economic interests . . . and the plaintiffs’ noneconomic interests if the publicity right relied on is rooted in privacy.”<sup>39</sup>

However, in discussing the balancing of economic interests, it is important to avoid the common fallacy of “if value, then right,” which states that just because something has value, it should be

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33. Consider, for example, the “human cannonball” act in *Zacchini v. Scripps-Howard Broadcasting Co.* While Hugo Zacchini may not have been famous in the way someone like Brad Pitt is famous, the Court still found that an unauthorized news broadcast of his circus act may infringe on its economic value by deterring people from coming to see the act in person. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977). In other words, the performance had publicity value even if Zacchini himself did not. On the other hand, invoking an “all press is good press” justification, the Court also recognized the possibility that “respondent’s news broadcast increased the value of petitioner’s performance by stimulating the public’s interest in seeing the act live.” *Id.* at 575 n.12.

34. For example, plaintiffs could look to the privacy torts catalogued by Prosser, *supra* note 26, at 389.

35. *Gionfriddo*, 114 Cal. Rptr. 2d at 313.

36. *Id.* at 310–12.

37. *Id.* at 313.

38. *Id.*

39. *Id.* at 314.

legally protectable.<sup>40</sup> Specifically, this “if value, then right” principle is not embraced by other areas of intellectual property law like copyright, which allows some level of borrowing from other copyright holders.<sup>41</sup> While *Gionfriddo* makes clear that a remedy is available, it also clarifies that the right of publicity is not absolute simply because it represents economic interests, but rather must be weighed against public interest.<sup>42</sup> More simply put, the right of publicity is not absolute simply because it carries with it economic value.

Additionally, by distinguishing why famous individuals need a distinct right, the court made clear that the misappropriation of an average person’s likeness arises not out of a property right, but rather out of a right to privacy.<sup>43</sup> However, both the famous and non-famous person have the same likeness. That is to say, we all have an interest in our own likeness that is disconnected from the outside world. If the right to publicity is a property right, is the property interest then in one’s fame rather than merely in one’s likeness? Another possible explanation is that the right of publicity is not a property right, but an extension of privacy rights for those who live their lives in the public eye. However, attempting to pigeon-hole the right of publicity as either exclusively a property right or a privacy right fails to appreciate and incorporate the nuances of its doctrine. In order to fully develop a coherent jurisprudence on the right of publicity, we should look at it not as a property right, but rather as a right that spans traditional notions of both property and privacy.

### C. *Abandoning the Dichotomy of Property and Privacy and Embracing the Spectrum of Alienability for the Right of Publicity*

Jennifer Rothman suggests this distinction between privacy- and property-based conceptions of the right of publicity is of little value.<sup>44</sup> This echoes the central observation from Warren and Brandeis that,

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40. Alfred C. Yen, *Brief Thoughts About If Value/Then Right*, 99 B.U. L. Rev. 2479, 2480 (2019).

41. *See id.* at 2485–86 (“Doctrines like the idea/expression dichotomy, substantial similarity, and fair use all shield certain types of borrowings from copyright liability.” (footnotes omitted)).

42. *Gionfriddo*, 114 Cal. Rptr. 2d at 314.

43. The opinion noted that “courts were reluctant to permit celebrities to rely on this privacy right” and bring an action for invasion of privacy. *Id.* at 313. Tracing the development of the right of publicity, *Gionfriddo* noted that courts had recognized the “distinction between the personal right to be left alone and the economic right to exploit one’s own fame.” *Id.*

44. Rothman, *supra* note 28, at 205 (“[E]ven if such a distinction in the case law could hold, its value would be limited.”).

even as courts grounded earlier protections of personal writings in property law, they recognized a right of privacy that was fundamentally different from property.<sup>45</sup> Prosser, building off of Warren and Brandeis, developed a view of privacy torts that were not based in a property rights regime, but rather the emerging right of privacy.<sup>46</sup> The attempt to define the right of publicity arises out of the tradition propelled by these seminal pieces.

To illustrate the breakdown of the property-privacy dichotomy, the “conventional wisdom” of the right of publicity, as a strong property right, is that it is “universally and uncontroversially alienable”.<sup>47</sup> One expected consequence of this would be that publicity rights should be assignable to creditors in bankruptcy actions. Despite this, no court has ever held publicity rights to be assignable in the bankruptcy context.<sup>48</sup> Similarly, courts have not realistically found the right to be divisible or assignable in divorce proceedings.<sup>49</sup> Finally, if the publicity right is property, then it should be descendible. Yet descendibility of publicity rights is not uniformly available across the United States, and, where it is descendible, that right itself is often created and significantly limited by statute.<sup>50</sup>

The contested nature of descendibility also indicates a problem with treating publicity as a privacy right. After a person has died, they no longer can suffer the emotional harms that would give rise

45. See Warren & Brandeis, *supra* note 9, at 204–05.

46. Prosser, *supra* note 26, at 386, 389.

47. See Rothman, *supra* note 28, at 186 (“[T]he conventional wisdom [is] that the right of publicity is universally and uncontroversially alienable.”).

48. In a prominent example of an attempt to do just this, the estate of Ronald Goldman attempted to get O.J. Simpson’s publicity right assigned to it in bankruptcy proceedings. *Id.* at 200. See also Sterba et. al., *Some Going Concerns: A Primer on Intellectual Property Issues in Bankruptcy for Licensors and Licensees*, LOWENSTEIN SANDLER LLP (June 22, 2020) (explaining that rights like publicity are generally non-assignable in bankruptcy), <https://www.lowenstein.com/media/5922/ip-issues-in-bankruptcy.pdf> [<https://perma.cc/8NUF-CMJG>].

49. See Rothman, *supra* note 28, at 201–02 (explaining that courts have, at most, recognized “celebrity goodwill”—essentially a right to future earnings—as marital property, but treated this goodwill as inalienable). See also Crosby v. HLC Props., Ltd., 223 Cal. App. 4th 597, 609 n. 10 (Cal. Ct. App. 2014) (explaining that the right of publicity is likely an exception to community property in California).

50. See Rothman, *supra* note 28, at 203 (discussing lack of uniformity in descendibility of publicity rights). David Horton similarly concludes that the “not property” rationale for refusing descendibility rights “adds little to the debate” around descendibility. David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 576–81 (2014). For example, many causes of action are indescendible, *id.*, despite some courts’ strong assertions that a cause of action is a property right. *In re Mucelli*, 21 B.R. 601, 603 (Bankr. S.D.N.Y. 1982) (“It is universally accepted that a cause of action is a property interest of the individual in whose favor it arises.”).

to a tort action.<sup>51</sup> Yet, it is understandable if society is uncomfortable with the unfettered right to profit off of the likeness of the recently deceased—particularly when that violates the wishes of the surviving family. That may be why some jurisdictions have created a descendible right of publicity after courts rejected the idea at common law.<sup>52</sup>

If the right of publicity cannot be adequately characterized as either a property right or a privacy right, we are left to define its contours on our own. Rothman suggests that the right of publicity is better understood in relation to other rationales for limiting alienability, such as that alienability burdens fundamental rights, commodifies personhood, and is economically inefficient.<sup>53</sup> For examples of why the commodification of personhood should limit alienability, we can observe instances of tattoo artists bringing copyright misappropriation suits for their tattoos appearing on avatars of professional athletes in video games.<sup>54</sup> In two of these cases, tattoo artists as plaintiffs brought misappropriation suit against game studios to whom basketball players had licensed their likenesses for use. When those players left the tattoo shop, they believed that the tattoos were a permanent part of their body and their likeness, and therefore that licensing their likeness would implicitly include the tattoos.<sup>55</sup> With that understanding, the copyright claim looks like the tattoo artist is attempting to stake a permanent interest in

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51. Horton points out that many legal claims are indescendible because they address “personal wrongs.” Horton, *supra* note 50, at 581. Our legal tradition has struggled to support this rationale, and it seems completely unsupported if one views those legal claims as property. *See id.* at 581–85 (explaining that the historical reasons for indescendibility of “personal claims” may be coherent to the extent that claim of personal injury is not property, but are hard to rationalize with other rights of survivorship that are equally compensable).

52. For example, after Ohio courts refused to recognize a posthumous publicity right, *see Reeves v. United Artists Corp.*, 765 F.2d 79, 80 (6th Cir. 1985) (per curiam) (“[T]he right of publicity is part of Ohio’s law of invasion of privacy. It is unquestioned . . . that actions for invasion of privacy in Ohio are not descendible and lapse upon death.”), the state legislature created a publicity right that extends sixty years after death. *See OHIO REV. CODE ANN.* § 2741.02(A)(2) (West 2025) (“[A] person shall not use any aspect of an individual’s persona for a commercial purpose . . . [f]or a period of sixty years after the date of the individual’s death . . .”).

53. Rothman, *supra* note 28, at 224.

54. *See, e.g., Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 741 (N.D. Ohio 2022) (describing defendants’ alleged unauthorized use of plaintiff’s “tattoos on various individuals depicted with those tattoos in the NBA 2K series”); *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020) (describing allegations that defendants “infringed [Plaintiff’s] copyrights by publicly displaying [tattoos] for which Plaintiff owns copyrights” in defendants’ video games.).

55. *Hayden*, 629 F. Supp. 3d at 744.

the publicity rights of the defendants. The plaintiffs lost,<sup>56</sup> and, while the court did not explicitly analogize to right of publicity, it is worth considering the artist's interest in comparison to the limitations on the severability of the right of publicity. The tattoo artists did not obtain a veto right to an individuals' publicity by placing a copyrighted work on an athlete's body. While the artists' limitation is not justified by a traditional property rights rationale—in other words, “a property right in identity that can be legally separated from the person”<sup>57</sup>—it is justified by a limitation on alienation that arises out of a skepticism of commodifying personhood. If instead the tattoo artists did have an actionable interest, it would imply that they have actually gained an interest in the body and likeness of the athletes. Courts have rightly rejected that artists have gained such an interest in the bodies of their clients, but they have not used a property rights rationale to arrive at such a limitation.

#### D. *Uncritical Assignability of Publicity Rights Can Lead to Harm*

In their treatise on the right of publicity, McCarthy and Schechter state that “[t]he rule of free assignability in gross of the right of publicity has never been seriously questioned . . . .”<sup>58</sup> The Supreme Court of Georgia has not only endorsed this view but also indicated that free assignability is necessary for the right of publicity to be a commercially viable right.<sup>59</sup>

We should question the truth of such an assertion that free assignability is essential to the value of the right of publicity. For one, despite these assertions, there are substantial disagreements about the descendibility of publicity rights,<sup>60</sup> and the right doesn't appear

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56. Nicole Carpenter, *Take-Two Wins Lawsuit over LeBron James' Tattoos*, POLYGON (Apr. 19, 2024), <https://www.polygon.com/24131877/nba-2k-lebron-james-tattoo-jury-trial-april-2024/> [<https://perma.cc/7GB4-66UH>].

57. MCCARTHY & SCHECHTER, *supra* note 6, § 10:8.

58. *Id.* § 10:13. Assignability is being “[a]ble to be assigned; transferable from one person to another, so that the transferee has the same rights as the transferor had,” *Assignability*, BLACK'S LAW DICTIONARY (12th ed. 2014), so free assignability of publicity rights generally refers to the idea that an individual is free to transfer their own right of publicity to anyone.

59. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 704 (Ga. 1982) (“The right of publicity is assignable during the life of the celebrity, for without this characteristic, full commercial exploitation of one's name and likeness is practically impossible.”).

60. States recognize the descendibility of the right to different degrees, and some disallow it entirely. See discussion *supra* Section II.C.

to be freely assignable in bankruptcy actions.<sup>61</sup> Yet these substantial limitations on the free assignability of the right have not chilled the market for publicity rights in the United States.

To the contrary, free assignability—without some type of limiting regime—could have a depressive commercial effect. Prior to recent NCAA antitrust litigation, players were unable to profit personally from their right of publicity beyond the value of their NCAA scholarships.<sup>62</sup> As of 2023, the market for name, image, and likeness (“NIL”) was estimated to be worth up to \$1 billion with potential for significant growth still.<sup>63</sup> The Georgia Supreme Court suggested that “without [assignability], full commercial exploitation of one’s name and likeness is practically impossible,”<sup>64</sup> yet exactly the opposite can be observed in the NCAA antitrust litigation. If athletes could freely assign their likeness to the NCAA, the NCAA could prevent the NIL market from existing at all.<sup>65</sup> Yet, when the NCAA released their stranglehold on the publicity rights of current athletes, massive new opportunities emerged for student athletes emerged without hurting the NCAA’s market.<sup>66</sup> In other words, unlimited free assignability to the NCAA crushed a vibrant market for player publicity rights.

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61. See Rothman, *supra* note 28, at 200 (“[N]o court has held that the right of publicity is an asset for the purposes of bankruptcy or that it is assignable to satisfy debts.”).

62. NCAA Complaint, *supra* note 5, 2013 WL 3810438, at para. 397.

63. Kathryn Kisska-Schulze, *Narrowing the Playing Field on NIL Collectives*, 34 MARQ. SPORTS L. REV. 59, 59 (2023).

64. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc.*, 296 S.E.2d at 704.

65. See Rothman, *supra* note 28, at 188 (“The NCAA could . . . block the players from making endorsements or appearing in commercials, posters, or other merchandizing. The NCAA could do this as a publicity-holder because it would have the right to prevent anyone—even the identity-holder—from using the athlete’s identity without its permission.”). Rothman suggests the implications are far wider. If the NCAA truly holds an exclusive publicity right in perpetuity for these athletes, it could actually prevent the players from appearing in future professional sports broadcasts. *Id.* at 188.

66. For the 2023–24 fiscal year, the SEC generated over \$808 million in revenue. Will Backus, *SEC Generates \$808.4 Million in Revenue for 2023–24 as Texas, Oklahoma Bolster Conference Earnings*, CBS SPORTS (Feb. 6, 2025, at 15:37 ET), <https://www.cbssports.com/college-football/news/sec-generates-808-4-million-in-revenue-for-2023-24-as-texas-oklahoma-bolster-conference-earnings/> [https://perma.cc/C6Y6-FBJF]. Ironically, the NCAA brought in record revenue in 2024 even as its liabilities dramatically ballooned due its player settlement. See Eben Novy-Williams & Daniel Libit, *NCAA’s FY24 Revenue Sets Record, Offset by \$3B in Liabilities*, SPORTICO (Feb. 28, 2025, at 10:58 ET), <https://www.sportico.com/leagues/college-sports/2025/ncaas-fy24-financials-house-settlement-1234841209/> [https://perma.cc/3GTT-6R9Y]. It is also worth questioning the practical possibility of the NCAA exploiting this NIL market, given the hundreds of thousands of student athletes spread across the entire United States, all of whom can have individual deals.

The NCAA litigation is also striking in that predominantly teenage athletes signed away valuable publicity rights to a massive entity. But comparatively less powerful parties frequently sign away such rights. Reality television shows regularly require their participants to sign away publicity rights.<sup>67</sup> Models also routinely sign away their publicity rights in perpetuity.<sup>68</sup> Perhaps most troubling of all, parents have signed away the publicity rights of their children and courts appear unwilling to place meaningful limitations on such assignments.<sup>69</sup>

At least some of these transfers of publicity rights are limited to copyrighted works like photographs. In these cases, the Copyright Act allows for “termination,” which, in its simplest form, allows authors to undo the transfer of their copyrighted work during a period beginning 35 years after the initial transfer.<sup>70</sup> The possibility of termination creates uncertainty as to the true length of the transfer and acts as a limitation on alienability. Despite this limitation, the market for copyrighted works continues to thrive. Specifically, individuals with extremely valuable copyrights, like Paul McCartney, have been able to effect termination, or at least use the threat to leverage new deals and the market has accepted that.<sup>71</sup>

This illustrates how the certainty of free assignability is understandable but shortsighted. The problem is that holders of publicity rights want to know the boundaries of that right when they receive a release from the person. It could present enormous commercial difficulties if a contestant on *Survivor* could revoke access to their publicity rights a few years down the road. However, it is not at all clear that this problem requires the assignment of all publicity rights in perpetuity. The NCAA litigation has proceeded as antitrust litigation

67. Rothman, *supra* note 28, at 197 & n.48.

68. *Id.* at 198.

69. *See id.* at 195 (“Several cases . . . raise the troubling prospect that parents could assign their children’s rights of publicity with no opportunity for the children to recapture them.”).

70. *See* 17 U.S.C. § 203(a)(3), (b) (“Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests . . .”).

71. *See* Kevin J. Greene, *The Future Is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC’Y U.S.A. 45, 62 (2021) (describing how beginning the termination process “leads, invariably, to a seat at the table to renegotiate a new and better deal” for major artists). On the other hand, many under-resourced artists are effectively blocked from exercising termination. *See id.* at 47 (“[T]he current promise of copyright recapture is severely attenuated by the formalistic and complex labyrinth of copyright termination provisions, as well as music industry practices, customs, and outright resistance to copyright terminations.”).

for the class of athletes,<sup>72</sup> but each person has only one publicity right to assign.<sup>73</sup> As such, every individual potentially feels the anti-competitive harm when their right is transferred in a contract of adhesion. However, anti-competitiveness is far from the lone concern. If a person's publicity rights are held without limit by another party, they can be threatened with significant indignity and left with no legal recourse.

This can only become more relevant as AI allows more complex exploitation of the right of publicity. While advances in technology, like the proliferation of Photoshop, may have bent the contours of what was truly being transferred with the right of publicity, the possibilities of harm enabled by generative AI threatens to bring the right to a crisis point.<sup>74</sup> As such, we need to understand the right of publicity as more than just a run-of-the-mill property right. Instead, we need to look at the justifications for limiting the alienability of publicity rights, and in particular, the commodification of personhood.

## II.

### PERSONHOOD AND BIOLOGICAL PROPERTY

There can be few pieces of property, real or intellectual, that are as personal as one's own likeness. Yet the law of the right of publicity allows the license and transfer of the rights to a person's likeness, within limits, while entirely outlawing the transfer of most biological property. In analyzing these dichotomous results, I will return to the legal theories and frameworks underlying personhood, personal property, and biological property. Understanding this body of law will help to further set the foundations needed to analyze the potential impacts of generative AI on the right of publicity.

#### A. *Personhood and Personal Property*

In *Property and Personhood*, Margaret Jane Radin explored how the conceptual boundaries of property are intimately tied to our

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72. NCAA Complaint, *supra* note 5, 2013 WL 3810438, at para. 1.

73. The publicity right is, of course, severable. *See* MCCARTHY & SCHECHTER, *supra* note 6, § 10:19 ("A license of the right of publicity may be "exclusive" as to any defined scope such as product line, context of use, territory or time duration."). Companies do not *have* to get assignment of the right in perpetuity in gross. Yet the current state of the world says that they will do so whenever the power balance tips in their favor.

74. *See* discussion *infra* Part IV (outlining various challenges and harms posed by AI, including deepfake concerns and implications for First Amendment and right of publicity).

personhood, contending that the law should recognize the value of truly “personal property.”<sup>75</sup> A prototypical example of personal property is a wedding ring. While the ring has objective value in the precious metals or jewels, there is far deeper personal value than could ever be measured in gold.<sup>76</sup>

Radin suggests that the lens of personhood creates a linear correlation in property rights: “The more closely connected with personhood, the stronger the entitlement.”<sup>77</sup> While this view has not been explicitly adopted, it nonetheless can find implicit judicial recognition. For example, the Supreme Court of Colorado prevented the condemnation of a historic church unless no other adequate parcel existed.<sup>78</sup> The question was posed as a tension between the First Amendment’s religious freedom and the Fifth Amendment’s eminent domain powers.<sup>79</sup> However, these legal frameworks oversimplify the relevant personal facts. It was not the abstract practice of religion that was at issue. Pillar of Fire Church had congregations in eighteen states and did not have regular services at the location that was to be condemned.<sup>80</sup> In a very literal sense, tearing down this specific building would not have prevented those individuals from exercising their freedom of religion. Still, the court recognized that Memorial Hall, which stood at the founding of the church, had particular religious significance to the congregants.<sup>81</sup> In other words, the First Amendment issue could not have arisen without the personal value that Memorial Hall represented to the church members.

Origins of the personhood theory of property can be found in Hegel’s view of property.<sup>82</sup> For Hegel, property is the first principle where our being steps beyond the self, or the free will, and into defining rights beyond the person.<sup>83</sup> Hegelian property is the way in

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75. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013 (1982).

76. *Id.* at 959.

77. *Id.* at 986.

78. See *Pillar of Fire v. Denv. Urb. Renewal Auth.*, 509 P.2d 1250, 1253 (Colo. 1973) (holding that “state must show a substantial interest without a reasonable alternate means” of achieving interest in order to condemn Church building).

79. *Id.* at 1252.

80. *Id.*

81. *Id.*

82. See Radin, *supra* note 75, at 977 (describing how Hegel’s theory of personhood “has important ramifications for a theory of personal property which does rely on that richer sense of personhood”).

83. See Peter G. Stillman, *Property, Freedom and Individuality in Hegel’s and Marx’s Political Thought*, in 22 NOMOS: AM. SOC’Y POL. LEGAL PHIL. 130, 130–31 (J. Roland Pennock & John W. Chapman eds., 1980) (describing centrality of property to Hegelian philosophy).

which persons act upon the external world. This property is twofold, it includes both the thought and body of the individual and those things in the external world into which the individual puts their free will.<sup>84</sup> One can see Hegel's philosophy realized in the *Pillar of Fire* building, where the value of Memorial Hall is created by the collective putting a part of their rational selves into the ownership and occupancy of the building.

Another way of viewing the personal property concept is along a continuum of fungibility. Some property is perfectly fungible, meaning that its loss would have no personal effect at all so long as the owner was compensated for the objective value of the loss. At the other end sits perfectly personal property, such as a person's blood or kidney.<sup>85</sup> If we were to treat property on the personal end of the spectrum the same as property on the fungible end, it would lead to absurd results, such as the Fifth Amendment allowing the government to use its condemnation powers to take a person's blood or kidney to serve a legitimate public purpose.<sup>86</sup> Even if our jurisprudence refuses to embrace the full continuum of the personhood property spectrum, there is still no way to avoid its implications. Some buildings, like in *Pillar of Fire*, have more worth than can be expressed in brick and timber.

### B. Moral and Utilitarian Rights in Intellectual Property

In the moral rights theory, this same Hegelian view of property has been used to justify intellectual property, arguing that intellectual works must be granted property recognition because they arise out of an expression of one's person.<sup>87</sup> Moral rights argues that a

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84. See *id.* at 132–33 (“For Hegel, ‘man is implicitly rational, but he must also become explicitly so by struggling to create himself, not only by going forth from himself but also by building himself up from within.’” (quoting G. W. F. HEGEL, PHILOSOPHY OF RIGHT § 10A (T. M. Knox trans., Oxford Univ. Press 1945) (1821))); Radin, *supra* note 75, at 973 (describing Hegel's philosophy as an “occupancy theory” of property).

85. Federal law currently does not treat even these two examples, blood and kidneys, equally. See *infra* Section III.C.

86. Indeed, Radin simply asserts that “[i]f my kidney may be called my property, it is not property subject to condemnation for the general public welfare.” Radin, *supra* note 75, at 1005.

87. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1753–54 (2012) (discussing theories of intellectual property protection “grounded in the notion of natural or moral rights that authors and inventors deserve by virtue of having created their works”). Fromer also discusses the alternative moral rights justification for intellectual property, labor-desert theory, which is based on the Lockean philosophy of property arising from the labor of creation.

person needs some amount of “control over resources in the external environment” in order to achieve full expression and self-actualization.<sup>88</sup> This “external control” can be called property. This view of intellectual property naturally justifies some areas, like copyright, more than others, like patent.<sup>89</sup>

Moral rights are not without critics and shortcomings. Amy Adler has said the view is obsolete in the modern art world, and that there is substantial creative expression that can be found by violating the original artists’ intent.<sup>90</sup> In some ways, copyright already acknowledges this in the way that the fair use doctrine recognizes the value in altering art.<sup>91</sup> Another criticism was recognized earlier in the way that the right of publicity protects an individual’s commercial image but generally still allows news outlets to commercially benefit from reporting on the lives of these celebrities.<sup>92</sup> That holds true even if the reporting is destructive to the value of the celebrity’s cultivated image.<sup>93</sup> These restrictions have a throughline directly to copyright and fair use, where free speech protections allow the likeness and intellectual property of celebrities to be used when that use is “transformative.”<sup>94</sup> In describing uses as transformative and allowing them, courts implicitly recognize that, just as Amy Adler

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*Id.* While both theories are important, I will primarily focus on moral rights and personhood.

88. *See id.* at 1754.

89. *See id.* at 1754 (“Despite its occasional invocation in copyright, personhood theory is less frequently invoked as an explanation for patent law.”).

90. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265, 275 (2009).

91. *See id.* at 281 (“The copyright concept of fair use attempts to capture this interest in altering reproductions.”).

92. *See* MCCARTHY & SCHECHTER, *supra* note 6, § 8:10 (“[A] magazine can feature on its cover a photo of a prominent celebrity who is the subject of a ‘news’ story inside and . . . it need not pay the celebrity for the commercial publicity value of his or her identity . . .”). The First Amendment and right of publicity are subject to multiple balancing tests across states with the Supreme Court, so far, having provided only extremely limited guidance on the issue. *See id.*, § 8:23 (explaining that video games are subject to First Amendment protections and thus presumably the Supreme Court’s guidance on them would extend to infringement on the right to publicity as well).

93. In some ways it is even more true—when someone in the public eye commits a significant wrong, that is arguably of more importance than the ho-hum of their normal doings.

94. *See* MCCARTHY & SCHECHTER, *supra* note 6, § 8:23 (discussing “the majority rule of the transformative test”); *see also id.* at § 8:38 (explaining that publicity has incorporated the transformative use defense from copyright); discussion *infra* Section IV.B (analyzing the implications of deepfakes on First Amendment protections).

described, unique value can be found when acting contrary to the original artists' intent.

Coming from a different angle, utilitarian support of intellectual property argues that exclusive rights need to be granted in order to incentivize creators to take steps they otherwise would not.<sup>95</sup> For example, the limited monopoly offered by patent law incentivizes inventors to disclose details of their inventions that they may otherwise keep secret.<sup>96</sup> As Fromer suggests for other intellectual property, rather than necessarily being incongruous, both the moral rights and utilitarian justifications serve to advance the common justification for the right of publicity.<sup>97</sup> Individuals have both a commercial interest in developing their own brand that should be incentivized and rewarded, and also have privacy interests that should be protected out of a respect for self-expression.

The justification for moral rights is particularly resonant because the right of publicity, in some sense, *is the expression of oneself*. As a result, it seems natural that moral rights can similarly justify the right of publicity as an intellectual property right. However, despite common justifications, the right of publicity is distinct from intellectual property like copyright. For one, the right of publicity is a set of state tort remedies that have evolved to protect the commercial exploitation of one's likeness, while copyright is a federal statutory scheme to protect a range of intellectual property works.<sup>98</sup> As commentators have pointed out, the right of publicity does not neatly fit into the family of intellectual property law.<sup>99</sup> Most importantly for this discussion, while copyright might arise out of an act of

95. Fromer, *supra* note 87, at 1751.

96. *See id.* ("The theory is that public benefits accrue by rewarding inventors for taking two steps they likely would not otherwise have taken: to invent . . . and to reveal information to the public about these inventions that stimulates further innovation."); *see also* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

97. *See* Fromer, *supra* note 87, at 1763 ("[S]olicitude for, and sometimes protection of, creators' moral-rights interests can strengthen utilitarian incentives in copyright and patent law . . .").

98. *Compare* MCCARTHY & SCHECHTER, *supra* note 6, § 6:2 (explaining widespread recognition of right to publicity in state law), *with* 17 U.S.C. §§ 101–1511.

99. *See* Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL J. ART & ENT. L. 283, 286 (2000) ("Unfortunately, in the decade and a half since [Ralph Sharp Brown]'s thoughtful Brace Lecture, the fit of right of publicity into the intellectual property 'suit' has not improved. If anything, mis-sizing is even more acute today than when he first called our attention to it." (footnote omitted)).

self-expression, the work produced is not intimately and perpetually tied to the person in the same manner as the right of publicity.<sup>100</sup> The right of publicity on the other hand, is inseparable from the self in unique ways. For a similar place where this inseparability has been discussed, I will turn to biological property.

### C. *Biological Property*

As Radin suggested, property rights to our own bodies are highly contested. In some ways this should be surprising. After all, who can better assert a right of property in your arm than you? Despite this intuition, property rights in human tissue are sharply curtailed—often, but not exclusively, as a result of the moral backlash from commodifying bodies.<sup>101</sup>

In the oft-cited decision of *Moore v. Regents of University of California*, the Supreme Court of California considered the question of what property rights individuals retain in their own bodies.<sup>102</sup> In that case, Dr. Golde established a patented cell line from Moore's T-lymphocytes that were removed as part of his treatment for hairy-cell leukemia.<sup>103</sup> This cell line turned out to be extremely profitable for Dr. Golde, who received stock and direct compensation in an exclusive agreement for use of the cell line.<sup>104</sup> Moore was not aware that his cells were being used to conduct research and received no compensation for the use of his cells.<sup>105</sup>

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100. Of course, there may be some exceptions to this rule, such as the production of a biopic. The right to produce such a work is generally accepted, although that has not stopped lawsuits from arising, usually for defamation. See Emily Cox, "Based on a True Story"—*The Legal Issues Around Biopics*, STEWARTS (Dec. 13, 2022), <https://www.stewartslaw.com/news/based-on-a-true-story-the-legal-issues-around-biopics/> [https://perma.cc/7UQC-BQ7F] (noting that, although "[n]o individual holds the legal 'right' to the story of their life" in the United States, there have been several high-profile defamation lawsuits stemming from biopics).

101. When the National Organ Transplant Act of 1984 was being considered, then-Congressman Al Gore said in a hearing that the sale of organs "blurs the distinction between people and things, as human organs become simply another commodity to be bought and sold in the marketplace." *Procurement and Allocation of Human Organs for Transplantation: Hearing Before the Subcomm. on Investigations & Oversight of the H. Comm. on Sci. & Tech.*, 98th Cong. 218 (1984) (statement of Rep. Albert Gore, Jr., Chairman, Subcomm. on Investigations & Oversight of the H. Comm. on Sci. & Tech.), reprinted in 2 BERNARD D. REAMS, JR., *THE NATIONAL ORGAN TRANSPLANT ACT OF 1984: A LEGISLATIVE HISTORY OF PUB. L. NO. 98-507* (1990).

102. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 487 (Cal. 1990).

103. *Id.* at 481–82.

104. *Id.* at 482.

105. *Id.* at 481.

Should Moore have retained a property interest in the cells removed from his body? While the court did not close off the possibility, the argument that the cells should be considered property is conspicuously absent from the court's reasoning for declining to impose liability for conversion.<sup>106</sup> Significantly, and harkening back to Justice Holmes's dissent in *International News Service v. Associated Press*, the court in *Moore* was hesitant to provide a judicial remedy for an extremely complicated problem that it saw as more aptly resolved through the legislative process.<sup>107</sup>

Ultimately the view expressed by the concurrence in *Moore* was the one taken up by Congress when they enacted the National Organ Transplant Act ("NOTA").<sup>108</sup> Among other things, NOTA banned the sale of organs in the United States.<sup>109</sup> Yet, despite this ban, the same bill does approve of the sale of other human tissue like blood and plasma.<sup>110</sup> If it is the moral repugnancy of commodifying the human body, it is hard to reconcile the ban on organ sales to the thriving market in human tissue.

Nonetheless, the human body is still significantly commodified by medical researchers—such as Dr. Moore—and there is little

106. *See id.* at 493 ("While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability . . ."). Specifically, the court mentioned three grounds for declining to extend conversion liability: (1) a balancing of public policy interests, (2) the area being more appropriate for legislation, and (3) the necessity of protecting patients' rights. *Id.*

107. *Compare id.* at 496 ("If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision."), with *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 248 (1918) (Holmes, J., dissenting) ("[T]he only ground of complaint that can be recognized without legislation is the implied misstatement . . ."). *See also id.* at 241 (explaining the limited nature of the relief that was granted by the majority). There has been some movement on protection from deepfakes as well with the DEEPFAKES Accountability Act, H.R. 5586, 118th Cong. (2023). While that has not passed, narrower protection for victims of nonconsensual sexual material, including that produced by AI, was enacted as part of the TAKE IT DOWN Act, Pub. L. No. 119-12, 139 Stat. 55 (2025).

108. Justice Arabian was extremely concerned with "commingl[ing] the sacred with the profane" by "treat[ing] human tissue as a fungible article of commerce." *Moore*, 793 P.2d at 497-98 (Arabian, J., concurring).

109. National Organ Transplant Act, Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346-47 (1984) (codified as amended at 42 U.S.C. § 274e) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation . . .").

110. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 69, 81 (2004) ("Furthermore, NOTA's ban on organ sales does not limit the selling of renewable human tissues, like ova, sperm and blood.").

incentive for the state to refuse this right to researchers.<sup>111</sup> While the ban on organ sales faces significant criticisms, including allowing people to die every year waiting for transplants, there are also distributive justice concerns to allowing an open market for organ sales.<sup>112</sup> Exploitation of poor individuals has been borne out in organ black markets globally,<sup>113</sup> but our existing system also has caused poor individuals who cannot afford transplants to be screened by their ability to pay.<sup>114</sup> Unlike publicity rights, where courts have been concerned with destroying the market for a valuable commodity,<sup>115</sup> we have been content to deny mutually beneficial transactions in the context of organ sales.<sup>116</sup>

This is not to say that no property interest in the human body has been recognized. As already discussed, NOTA allows the individual sale of regenerative human tissue and also endorses the multi-billion-dollar industry in biological patents derived from human tissue. Additionally, courts are willing to recognize property-like interests in human biological materials. In *Hecht v. Superior Court*, a California court said that decedent's sperm could be recognized as property within the meaning of the state's probate code sufficient to give the probate court jurisdiction.<sup>117</sup> This was in accordance with the decedent's will and avoided what otherwise would have been required

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111. See Melissa M. Perry, *Fragmented Bodies, Legal Privilege, and Commodification in Science and Medicine*, 51 ME. L. REV. 169, 174 (1999) ("In general, the law states that the individual does not have a property right in his body, but the medical or scientific entrepreneur . . . can exercise such a right . . . . As a result of this 'incidental' privilege, medical researchers, surgeons, and physicians have monopolized the commodification of the body."); see also *Moore*, 793 P.2d at 494 (discussing the need to avoid "hinder[ing] research" in medicine and biotechnology).

112. See Calandrillo, *supra* note 110, at 83–84, 93 (discussing both dire under-supply of organs under current regime and risk of exploitation under free-market regime). Radin also heavily criticizes the distributive justice justification banning organ sales. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 126 (1996) ("[T]o preserve organ donation as an opportunity for altruism is also one way of keeping from our view the desperation of poor people.").

113. See Calandrillo, *supra* note 110, at 87, 94 ("The potential for exploitation is not merely a theoretical or academic concern.").

114. See Perry, *supra* note 111, at 187 (discussing "green screen" preventing people from entering national organ waiting list unless they can demonstrate ability to pay).

115. This is at least part of the rationale from the Georgia court which insisted that free transferability was essential to the ability to commodify one's likeness. See discussion *supra* Section II.D.

116. See Calandrillo, *supra* note 110, at 85 ("Because federal law prohibits sales, however, these mutually beneficial trades never occur.").

117. *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) ("Such interest is sufficient to constitute 'property' within the meaning of Probate Code section 62.").

disposal under another section of the California Code.<sup>118</sup> Similarly, the Ninth Circuit recognized a property interest by parents in the bodies of their deceased children when the Los Angeles County Coroner's office removed the corneas of deceased children without notice or consent.<sup>119</sup>

In the preceding cases, courts maybe have simply embraced property rights as a way to avoid what they saw as a more significant wrong to human dignity.<sup>120</sup> This is indicated by the way those courts make clear that they are not embracing a wide and unlimited property right in arriving at their result.<sup>121</sup> Yet, from Radin's perspective on personal property, it is possible to see the courts recognizing a property interest because such an interest is indistinguishable from recognizing full personhood. In other words, the property interest is not separable from the human interest in fully actualizing personhood in the external world.

#### *D. Specific Performance*

It is widely known that specific performance is unavailable for contracts for personal services.<sup>122</sup> The comments of the Restatement (Second) of Contracts clearly explain that such a remedy approaches an imposition of involuntary servitude on a party.<sup>123</sup> Here, I will analyze this traditional contractual limitation through the lens of personhood with an eye towards how generative AI begins to look like specific performance. Courts are generally willing to require specific performance of contracts involving personal property, such

118. *Id.* at 280 n.4, 283–84.

119. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796–97 (9th Cir. 2002). While the *Newman* decision recognized a property right for next of kin in dead bodies, that view has not been widely adopted. *See Shelley v. Cnty of San Joaquin*, 954 F. Supp. 2d 999, 1007 (E.D. Cal. 2013) (noting that Sixth Circuit decisions relied on by *Newman* were “effectively overruled” by state supreme courts and that California courts have not embraced its holding).

120. In *Hecht*, the California probate court only had the ability to recognize the decedent's bequest if his sperm was recognized as property. *See* 20 Cal. Rptr. 2d at 280 (“The power of the probate court extends only to the property of the decedent.” (quoting *Estate of Lee*, 177 Cal. Rptr. 229, 232 (Ct. App. 1981))).

121. *Hecht* concludes only that “[s]uch interest is sufficient to constitute ‘property’ within the meaning of Probate Code section 62.” *Id.* at 283. *Newman* held that the property interests in the corneas were sufficient to establish a due process deprivation, even if the state legislature had deprived them of all economic and market value. *Newman*, 287 F.3d at 797.

122. *See* RESTATEMENT (SECOND) OF CONTRS. § 367(1) (A.L.I. 1981) (“A promise to render personal service will not be specifically enforced.”).

123. *Id.* § 367 cmt. a.

as a family farm,<sup>124</sup> but will not take the next step to require the rendering of personal services. Personhood, and especially moral rights as discussed above,<sup>125</sup> provide one justification because specific performance results in a court forcing an individual to perform an act of self-expression.

When considering specific performance, then, where should a contract for the sale of human tissue fall? There is, of course, no chance that a court would require specific performance of a contract to donate plasma or, if it were legal, to sell a kidney.<sup>126</sup> This is the case despite the fact that the sale of human tissue is closer to a commodity than to the rendering of a personal service.<sup>127</sup> This makes sense when specific performance restrictions are seen in the light of moral rights and respecting personal autonomy. Under such justifications, it is obvious that something as personal as tissue sale would not be subject to specific performance.

However, the desire to avoid forcing parties to personally perform actions against their wishes is not the only grounds for denying specific performance. Another basis is that the act to compel is contrary to public policy, or that compulsion itself is contrary to public policy.<sup>128</sup> The Restatement demonstrates this by showing situations where a party, A, may want to compel specific performance, but performance would cause a disadvantage to the public far greater than any advantage A would receive.<sup>129</sup> In such a situation, the restatement endorses the position that A should not be able to compel performance to the significant detriment of the public. This is a recognition that it is improper for a court to enforce a promise that would harm the public.

Where will generative AI fit into this world of specific performance? Whether courts have explicitly recognized Radin's theory or not, personhood has been used to both accept and reject property rights when doing so would advance what was seen as a just outcome, especially in the area of biological property. Similarly, we will need

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124. Consider the famous case of *Lucy v. Zehmer* where the defendant was forced to sell his farm for well below market rate based on an agreement written on the back of a restaurant check. *Lucy v. Zehmer*, 84 S.E.2d 516, 517 (Va. 1954).

125. See discussion *supra* Section III.B.

126. No court that I have found has even considered the issue.

127. *But see* *Perez v. Comm'r*, 144 T.C. 51, 56–57 (2015) (finding that egg donor contract “compensated for services rendered and not for the sale of property,” at least in part to avoid difficult tax issues around “the sale of those parts”).

128. See RESTATEMENT (SECOND) OF CONTS. § 365 (A.L.I. 1981) (“Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.”).

129. See *id.* § 365, illus. 2.

to consider how performance via generative AI approaches the imposition of specific performance on the individual whose likeness is being copied. Inevitably, as policies interact with self-expression, courts must wrestle with the foundations of personhood theory or they risk threatening the basic philosophical foundations of what it means to self-actualize in our world.

### III.

#### CURRENT CHALLENGES AND HARMS OF GENERATIVE AI

##### A. *Concerns and Harms of Deepfakes*

While generative AI has produced impressive results over the last decade, it has also contributed to significant societal harms.<sup>130</sup> The ease of deepfake creation, paired with the saturation of social media, has resulted in a network in which misinformation can spread like a forest fire.<sup>131</sup> The democratization of information access has also reduced the power of those gatekeepers that traditionally acted as a check on questionable information. Instead, power has fallen into the hands of content platforms that may not have the incentives to properly filter misinformation.<sup>132</sup> This lack of moderation, combined with natural biases to trust information that is widely shared and fixate on negative information, creates a superhighway through which

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130. Beyond the examples discussed in this paragraph, AI also continues to produce results that reinforce and perpetuate existing biases in society. *See, e.g.*, Nicolas Kayser-Bril, *Google Apologizes After Its Vision AI Produced Racist Results*, ALGORITHM WATCH (Apr. 7, 2020), <https://algorithmwatch.org/en/google-vision-racism/> [<https://perma.cc/RPS2-RJHB>] (documenting racial bias in Google's image-recognition algorithm, including labeling image of dark-skinned individual holding thermometer as "gun," while labeling similar image with a light-skinned individual as "electronic device"); Chris Stokel-Walker, *ChatGPT Replicates Gender Bias in Recommendation Letters*, SCIEN. AM. (Nov. 22, 2023), <https://www.scientificamerican.com/article/chatgpt-replicates-gender-bias-in-recommendation-letters/> [<https://perma.cc/4J2U-5HSN>] (reporting researchers' findings of "significant gender biases" in AI-generated recommendation letters).

131. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1763–64 (2019) (explaining that deepfake technology has spread quickly due to availability of simple tools to create deepfakes and global information-sharing capacity of internet platforms).

132. *Id.* at 1764–65. However, change may be coming. While Section 230 of the Communications Act continues to generate controversy in the United States, the 2022 EU Digital Services Act has required very large platforms to implement stronger content moderation. *See* Parker Williams Hassard, *What's Not to Like?: The EU's Case Against Big Tech and Important Lessons for the United States*, 47 N.C. J. INT'L L. 521, 535 (2022) (advocating for the United States to implement elements of European Union's Digital Services Act to promote transparency and increased content moderation).

misinformation flows.<sup>133</sup> These phenomena have been playing out in American discourse over the last several years and increased access to deepfake technology only increases the risks posed to society.<sup>134</sup>

While social networks exacerbate the scale of the problem, they are not necessary to realize the harms that deepfakes can pose. Over the last few years, deepfakes of celebrities like Elon Musk have been used to scam individuals out of their life savings.<sup>135</sup> YouTube has been flooded with these videos—even using prerecorded deepfakes to act like live broadcasts<sup>136</sup>—and the notoriety of the falsified celebrity acts as its own network to increase audience spread. Use of the live functionality removes the opportunity for the video to go through traditional content moderation and takedown before an end user sees it. The increased proliferation of convincing deepfakes has led the FTC to propose new rules to prohibit the impersonation of individuals via AI to fight back against the surge in fraud.<sup>137</sup>

From the outset, deepfakes have been weaponized to create non-consensual sexual content of women.<sup>138</sup> Unsurprisingly, deepfakes have followed the gendered dimensions of other intimate crimes like cyber stalking and non-consensual pornography.<sup>139</sup> Far from being relegated to some dark corner of the internet, such content can spread rapidly through mainstream social media before

133. See Chesney & Citron, *supra* note 131, at 1765–69 (“[C]ommon cognitive biases and social media capabilities are behind the viral spread of falsehoods and decay of truth.”).

134. For example, a doctored photo of social activist X Gonzalez diffused rapidly through social networks. Alex Horton, *A Fake Photo of Emma Gonzalez Went Viral on the Far Right, Where Parkland Teens Are Villains*, WASH. POST (Mar. 26, 2018), [https://www.washingtonpost.com/news/the-intersect/wp/2018/03/25/a-fake-photo-of-emma-gonzalez-went-viral-on-the-far-right-where-parkland-teens-are-villains/?utm\\_term=.0b0f8655530d](https://www.washingtonpost.com/news/the-intersect/wp/2018/03/25/a-fake-photo-of-emma-gonzalez-went-viral-on-the-far-right-where-parkland-teens-are-villains/?utm_term=.0b0f8655530d) [<https://perma.cc/6NDJ-WADV>].

135. See Stuart A. Thompson, *How ‘Deepfake Elon Musk’ Became the Internet’s Biggest Scammer*, N.Y. TIMES (Aug. 14, 2024), <https://www.nytimes.com/interactive/2024/08/14/technology/elon-musk-ai-deepfake-scam.html?smid=url-share> [<https://perma.cc/M5G7-B9X4>] (describing how celebrity deepfakes are used to market cryptocurrencies and fake investment opportunities).

136. *Id.*

137. FTC Proposes New Protections to Combat AI Impersonation of Individuals, FED. TRADE COMM’N (Feb. 15, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals> [<https://perma.cc/CZ6Y-TGUB>].

138. See Emma Grey Ellis, *People Can Put Your Face on Porn—and the Law Can’t Help You*, WIRED (Jan. 26, 2018, 07:00 AM), <https://www.wired.com/story/face-swap-porn-legal-limbo/> [<https://perma.cc/BAF4-SFEW>] (“Early victims include Daisy Ridley, Gal Gadot, Scarlett Johansson, and Taylor Swift.”).

139. Chesney & Citron, *supra* note 131, at 1773.

being detected.<sup>140</sup> Deepfakes are frequently deployed for no purpose other than malicious denigration.<sup>141</sup>

Today, policy and legislation foreclose most paths to vindication for victims who have had their identity misappropriated by deepfakes. Even if the creators can be found, there are doubts as to whether a suit utilizing the right of publicity presents a useful avenue unless the deepfake was created and produced for some commercial gain.<sup>142</sup> Similarly, the platforms through which information spreads rapidly continue to be heavily protected by Section 230 of the Communications Decency Act.<sup>143</sup> Section 230 has been broadly interpreted by courts to protect platforms even when they republish content knowing it may be illegal.<sup>144</sup> Neither, so far, has criminal liability proved to be a viable recourse to penalizing bad actors.<sup>145</sup> While ex-post penalties would inevitably be incapable of fixing the

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140. See, e.g., Kat Tenberge, *Nude Deepfake Images of Taylor Swift Went Viral on X, Evading Moderation and Sparking Outrage*, NBC NEWS (Jan. 25, 2024), <https://www.nbcnews.com/tech/misinformation/taylor-swift-nude-deepfake-goes-viral-x-platform-rules-rcna135669> [<https://perma.cc/3PJW-QD34>] (“Nonconsensual sexually explicit deepfakes of Taylor Swift went viral on X, . . . amassing over 27 million views and more than 260,000 likes in 19 hours before the account that posted the images was suspended.”).

141. See Coralie Kraft, *Trolls Used Her Face to Make Fake Porn. There Was Nothing She Could Do*, N.Y. TIMES (July 31, 2024), <https://www.nytimes.com/2024/07/31/magazine/sabrina-javellana-florida-politics-ai-porn.html?smid=url-share> [<https://perma.cc/KB32-J5JV>] (explaining the proliferation of revenge porn and describing internet trolls’ creation of doctored pornographic images of local politician).

142. Chesney & Citron, *supra* note 131, at 1794.

143. See 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

144. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 408 (2017) (“Platforms have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products.”).

145. Even if laws existed that did protect individuals, law enforcement officials do not have a strong track record of enforcing digital crimes. See Chesney & Citron, *supra* note 131, at 1801–04 (describing law enforcement’s “lackluster response to online abuse,” with narrow exception of federal prosecutors); see also Kraft, *supra* note 141 (“Special agents explained that there were no federal laws against creating or disseminating non-consensual explicit deepfakes. Florida didn’t have a state law preventing the creation of the material, either, so their hands were tied. The activity was not legally criminal; law enforcement could not investigate further.”). It remains to be seen whether the recently passed TAKE IT DOWN Act will prove to be a viable remedy at the federal level. See TAKE IT DOWN Act, Pub. L. No. 119-12, 139 Stat. 55, 944–47.

harm done by these actors, even the retributive substitute of a criminal conviction fails to be an available legal option.

Of course, generative AI is not without benefits as well. For example, we can imagine the usefulness of the technology in education.<sup>146</sup> One startup, Magic School, advertises itself as a responsible AI platform that can save educators time each week by helping draft lesson plans, assessments, IEPs, and more.<sup>147</sup> In one case study, Magic School reported that a Colorado public school system saw a 28% increase in students who met grade level literacy goals after utilizing Magic School tools that gave students immediate feedback on their writing.<sup>148</sup> Similarly, while many law school classrooms still prefer the chalkboard, one can imagine a teacher using AI tools to create high quality video content to expand on certain points. Such videos could be generated from a script and available videos, possibly offering a better end product in far less time than could be produced without access to a professional studio. These AI tools can also be used to generate visualizations of concepts without requiring years of animation training.<sup>149</sup> Finally, the tools offer a way for individuals to access artistic expression that might otherwise be foreclosed to them.<sup>150</sup>

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146. Though, we should not ignore the harms as well, such as an AI “Anne Frank” chat bot that urged children to avoid blaming the Nazi regime for the Holocaust. Joe Wilkins, *Schools Using AI Emulation of Anne Frank That Urges Kids Not to Blame Anyone for Holocaust*, FUTURISM (Jan. 18, 2025), <https://futurism.com/the-byte/ai-anne-frank-blame-holocaust> [<https://perma.cc/4CXQ-3PF2>].

147. MAGIC SCH., <https://www.magicschool.ai/magicschool> [<https://perma.cc/93TS-2Q9V>] (last visited Sep. 24, 2025).

148. *Aurora Public Schools Has 28% Improvement in Students Meeting Literacy Grade Level Expectations*, MAGIC SCH., <https://www.magicschool.ai/blog-posts/aurora-public-schools-improves-literacy-with-magicschool> [<https://perma.cc/H5VB-RB3J>] (last visited Sep. 24, 2025).

149. See, e.g., Sibel Erduran, *Deepfakes and Students’ Deep Learning: A Harmonious Pair in Science?*, SCIENCE (Aug. 29, 2024), <https://www.science.org/doi/10.1126/science.adr8354> [<https://perma.cc/7DPS-HQB5>] (“[Deepfakes] can be used to create realistic simulations for educational purposes, for example, in supporting the development of students’ medical skills without compromising safety in real-life situations with real patients.”); Mike Perkins, *Deep-Fake It ‘Til You Make It: The Academic Integrity Challenges of Deepfake Technology*, INT’L CTR. FOR ACAD. INTEGRITY (Sep. 21, 2024), [https://academicintegrity.org/aws/ICAI/pt/sd/news\\_article/589624/\\_PARENT/layout\\_interior/false](https://academicintegrity.org/aws/ICAI/pt/sd/news_article/589624/_PARENT/layout_interior/false) [<https://perma.cc/NMN3-3LEB>] (discussing how, despite risks, deepfake technology could allow for creation of “personalized AI tutors” and “hyper-realistic visualizations” of scientific concepts, among other uses).

150. However, this often comes at the expense of unauthorized training on the data of existing artists. For example, Lensa, a photo-editing app that trains on artists’ original work, unleashed a flood of AI-generated portraits on social media for a very low price. Morgan Sung, *Lensa, the AI Portrait App, Has Soared in Popularity. but Many Artists Question the Ethics of AI Art*, NBC NEWS (Dec. 7, 2022, at 16:55 ET), <https://www.nbcnews.com/tech/internet/lensa-ai-artist-controversy-ethics-privacy-rna60242>

The simple truth is that AI is here to stay, and we can experience benefits as long as we are cognizant of the harms as well.

### B. First Amendment Rights

Naturally, like any media form, generative AI also evokes questions about First Amendment protections. Where are the outer bounds of the intersection of deepfakes and free speech? This question, in its entirety, is likely deserving of a separate and much more thorough analysis, but I offer a cursory journey through the issues in this section.

First, many faithful recreations of individuals' likenesses already do not receive First Amendment protections. In *No Doubt v. Activision Publishing, Inc.*, Activision presented a transformative use defense, available in response to right of publicity claims, when they featured members of the band No Doubt as playable characters in their Band Hero video game.<sup>151</sup> No Doubt had previously allowed their likeness to be exactly captured and recreated in the game for limited promotional material in connection with No Doubt songs that would appear in the game.<sup>152</sup> When the members of the band learned that their motion-captured likenesses could be used to perform any song in the game—including user-created content—they sued for Activision's "unauthorized exploitation of No Doubt's name, performances and likenesses."<sup>153</sup> In defending against the claims, Activision argued that use of the avatars was "protected First Amendment activity involving an artistic work," barring No Doubt's right of publicity claims.<sup>154</sup>

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[<https://perma.cc/3W4Q-7L5Y>]. Clearly, the demand for these portraits exceeds the possible output of the artists, but also undercuts the price of an individual commission such as an art. *See id.* ("For a \$7.99 service fee, users receive 50 unique avatars – which artists said is a fraction of what a single portrait commission normally costs."). Still, many artists understandably feel that the AI tools are copying and mimicking their own work. *Id.*

151. *No Doubt v. Activation Publ'g Inc.*, 122 Cal. Rptr. 3d 397, 406 (Ct. App. 2011). ("Activision contends that its use of No Doubt's likenesses in Band Hero constitutes 'protected First Amendment activity involving an artistic work,' and thus No Doubt's right of publicity claim is completely barred."). In analyzing transformative use and the First Amendment, the court compared publicity to copyright, *id.* at 407, which also has a fair use defense with transformative use, 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13E.10 (2025) (discussing foundations of fair use doctrine).

152. *No Doubt*, 122 Cal. Rptr. at 401.

153. *Id.* at 402.

154. *Id.* at 406.

In evaluating and rejecting this claim, the California court applied their “transformative use” test, which balances “the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>155</sup> Ultimately the court found that despite the other creative elements in the game, like fanciful venues and songs, Activision had failed to “transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.”<sup>156</sup> In short, these avatars, created through modern motion capture technology, were nothing more than a simple exploitation of the fame of No Doubt in violation of their right of publicity.

Second, there is also the question of who the speaker is when using the output of generative AI. When computer-generated art was still in its infancy, and long before ChatGPT existed, Pamela Samuelson put the point simply: “[I]t is still fair to say that it was not within Congress’ contemplation to grant intellectual property rights to machines.”<sup>157</sup> That view has remained unchanged in the forty years since Samuelson expressed it and, so far, AI has done nothing to upset the balance.<sup>158</sup> The Copyright Office has endorsed Samuelson’s position, refusing copyright for an image created by generative AI even when the prompt used to create the image was

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155. *Id.* at 407 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001)). The court in *Comedy III* further noted that “[a]lthough such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” *Comedy III*, 21 P.3d at 808 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (footnote omitted)). While the court leaves open other possible avenues for a fair use defense, it made clear that this test is meant to balance the right of publicity and legitimate First Amendment expression. *See id.* at 807–08 (rejecting “wholesale importation of the fair use doctrine into right of publicity law,” but finding the “first fair use factor—the purpose and character of the use’ . . . particularly pertinent to the task of reconciling the rights of free expression and publicity” (quoting 17 U.S.C. § 107(1))).

156. *No Doubt*, 122 Cal. Rptr. at 411; *see also id.* (“Moreover, Activision’s use of life-like depictions of No Doubt performing songs is motivated by the commercial interest in using the band’s fame to market *Band Hero* . . .”).

157. Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1199 (1986).

158. *See Thaler v. Perlmutter*, 687 F. Supp. 3d 140 (D.D.C. 2023), *aff’d*, 130 F.4th 1039, 1044 (D.C. Cir. 2025) (“[H]uman authorship is a bedrock requirement of copyright.”); *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) (holding that “animals other than humans . . . lack statutory standing to sue under the Copyright Act”). For example, the substantial similarity test is meaningless when the output of AI is not copyrightable.

refined hundreds of times.<sup>159</sup> I would assert that this question of copyright ownership is closely related to the First Amendment question, especially in light of the moral rights theory of copyright. If copyright is an act of self-expression, and the use of generative AI acts as a block to achieving copyright protections, then it follows that the use of generative AI is not an act of self-expression.<sup>160</sup> If it is not an act of self-expression, then it is hard to view it as protectable speech. This view is strengthened by the fact that generative AI outputs today are non-deterministic, meaning that the same prompt may produce different outputs.<sup>161</sup> In other words, individuals have a limited amount of actual control over the outputs, and, as a result, the language model itself contributes to the realization of the output for which considering speech protections are being considered. Giving blanket speech protections to the output then, would also be giving speech protections to the contributions of the large language model.

Third, of course, is the fact that the right of publicity is already balanced with free speech protections. In terms of deepfakes, the most translatable lawsuits are likely to be those that arise in the context of biopics, where the likenesses of individuals are sometimes captured in painstaking detail through makeup and visual effects.<sup>162</sup> Biopics are generally allowed under the right of publicity, and the

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159. See Letter from U.S. Copyright Off. Rev. Bd. to Tamara Pester, Attorney to Petitioner for Registry at 6 (Sep. 5, 2023), <https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf> [<https://perma.cc/6VBQ-XDJL>] (“Mr. Allen’s actions as described do not make him the author of the Midjourney Image because his sole contribution to the Midjourney Image was inputting the text prompt that produced it.”).

160. This of course can go the opposite way too. If copyright is protectable for generative AI outputs, then it is an act of self-expression. Alternatively, we can ask the question in the opposite way: Is using generative AI an act of self-expression? If so, we should grant it copyright. However, I think it is not for the non-determinative reasons mentioned.

161. Sean Beard, *Managing the Non-Deterministic Nature of Generative AI*, PARIVEDA (Mar. 27, 2024), <https://parivedasolutions.com/perspectives/managing-the-non-deterministic-nature-of-generative-ai/> [<https://perma.cc/84SS-NB2D>]. Non-determinism is not a bad thing per se, but it poses challenges to the way we normally think of computing as having strict relationships between input and output. See *id.* (“In some cases, this unpredictability can enhance processes and add value. In others, it might bring unwanted complexity or make outcomes less predictable.”).

162. For an example of this makeup, see Cheryl Wischhover, *How to Turn Christian Bale into Dick Cheney*, Vox (Feb. 24, 2019, 22:58 ET), <https://www.vox.com/the-goods/2019/2/22/18233588/vice-makeup-dick-cheney-christian-bale-greg-cannom> [<https://perma.cc/G68Z-83WV>] (reporting on exhaustive biopic transformation by Oscar-winning makeup designer).

path to a viable lawsuit is instead through defamation.<sup>163</sup> On the other hand, preventing the use of lookalikes in advertisements has been successful.<sup>164</sup> Likely, the use of deepfakes rather than lookalikes will find its way onto a similar spectrum.

### C. *Usage of AI and the Right of Publicity*

The recent strikes by both the Writers Guild and SAG-AFTRA highlighted the growing fear of generative AI by those whose jobs are potentially targeted by the technology.<sup>165</sup> The prolonged nature of each strike demonstrated the power that media firms have over some of America's most famous celebrities and their labor unions. Duncan Crabtree-Ireland, chief negotiator for SAG-AFTRA, put it bluntly when he said that a studio having unilateral control over an actor's digital replica felt like the studio owning a person.<sup>166</sup> Ultimately, both strikes resolved with new deals that placed significant limitations on the emerging usage of AI.<sup>167</sup>

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163. See Cox, *supra* note 100 (noting that although “[n]o individual holds the legal ‘right’ to the story of their life” in the United States, there have been several high-profile defamation lawsuits stemming from biopics).

164. See, e.g., *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 256, 263 (Sup. Ct. 1984), *aff'd mem.*, 488 N.Y.S.2d 943 (App. Div. 1985) (holding that a well-known personality was entitled to injunctive relief to prohibit use of advertisement containing look-alike without consent). Separately, the Lanham Act also protects against false endorsements, although this protection does not serve the same purpose as the right of publicity and thus is not necessarily balanced by the same tests. See *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2013) (declining to “import” test for Lanham Act claims “wholesale for right-of-publicity claims,” despite “some overlap” with transformative use defense).

165. See James Poniewozik, *TV's Wars with Robots Is Already Here*, N.Y. Times (May 10, 2023), <https://www.nytimes.com/2023/05/10/arts/television/writers-strike-artificial-intelligence.html> [<https://perma.cc/PA3R-X9YB>] (“[W]riters are asking the studios for guardrails against being replaced by A.I., having their work used to train A.I. or being hired to punch up A.I.-generated scripts at a fraction of their former pay rates.”); Marc Tracy, *Digital Replicas, a Fear of Striking Actors, Already Fill Screens*, N.Y. TIMES (Aug. 4, 2023), <https://www.nytimes.com/2023/08/04/arts/television/actors-strike-digital-replicas.html> [<https://perma.cc/6PPM-27R5>] (reporting that innovations in digital technology and AI were top grievances in actors’ union strike).

166. Tracy, *supra* note 165 (“That’s really abusive . . . and not an OK way for companies to deal with somebody’s image, likeness or persona. It’s like owning a person.”).

167. For the Writers Guild, this included limitations on AI-generated storylines. Andrew Dalton, *The Hollywood Writers Strike Is Over After Guild Leaders Approve Contract with Studios*, ASSOCIATED PRESS (Sep. 26, 2023, at 23:54 ET), <https://apnews.com/article/>

These new deals did not just protect digital replicas of A-list superstars, but also those of extras.<sup>168</sup> While background actors are likely to have limited value in their right of publicity — likely much less than even that of other non-famous individuals like in *Zacchini*—the new regulations guarantee that they get paid at least the daily minimum for background actors for such a use.<sup>169</sup> However, SAG-AFTRA recognizes that this contractual labor agreement can only extend protections so far, and so they have also successfully lobbied for further protections in California state law.<sup>170</sup> By protecting the transfer of digital replica rights without informed consent and the digital replicas of deceased individuals, California took essential steps in protecting the right of publicity in the age of AI.<sup>171</sup>

Organizations like SAG-AFTRA are justifiably nervous about where the AI revolution will take us next. Whether we are ready or not, this new technology means that we cannot wait to understand how the use of AI fits into the rights that we expect. Understanding the harms as well as the benefits will help us better situate the use of AI in our legal landscape. SAG-AFTRA has made advancements in the protection of the right of publicity from misuse in AI, but these are only the first steps in a new world.

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writers-strike-deal-hollywood-vote-actors-d3119d670a4fd3449773bf8f4026fb2b [https://perma.cc/6LTA-53NT].

168. See *A.I. Background Questions*, SAG-AFTRA (Aug. 16, 2024), <https://www.sagaftra.org/ai-background-questions> [https://perma.cc/N9TV-64CY].

169. *Id.*

170. See *SAG-AFTRA vs. AI: Protecting Performers in the Digital Age*, DAVIS+GILBERT (Nov. 22, 2024), <https://www.dglaw.com/sag-aftra-vs-ai-protecting-performers-in-the-digital-age/> [https://perma.cc/6TGJ-LXHC] (noting SAG’s impact on recent California law expanding AI protections for actors).

171. See CAL. LAB. CODE § 927 (West 2025) (providing that “a provision in an agreement between an individual and any other person for the performance of personal or professional services . . . by a digital replica of the individual” is unenforceable if certain conditions are met); CAL. CIV. CODE § 3344.1 (West 2025) (“[A] person who uses a deceased personality’s . . . likeness, in any manner, on or in products . . . for purposes of advertising or selling . . . goods, or services, without prior consent from the person or persons specified . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”). Both bills went into effect on January 1, 2025, so the results are yet to be seen. *California Passes New Legislation Prohibiting Unauthorized AI Replicas*, DAVIS+GILBERT (Sep. 25, 2024) <https://www.dglaw.com/california-passes-new-legislation-prohibiting-unauthorized-ai-replicas/> [https://perma.cc/5KXN-K6SM].

IV.  
RESTRICTIONS ON CONTRACTS LICENSING OR ASSIGNING  
PUBLICITY RIGHTS FOR USE IN GENERATIVE AI

Given the uncertain and precarious position of generative AI both legally and societally, courts should be especially cognizant of treading lightly in future decisions. In particular, deepfakes have the capability to exploit the right of publicity in a manner that so far is unheralded. As stated in the introduction, this note will highlight two primary ways in which the harm emerges. First is the problem of power balances in the transfer of the rights of publicity. With so many individuals having already transferred their right of publicity, access to deepfake technology creates an expansive new regime under which these likenesses, often transferred from comparatively low-powered parties, can be exploited for commercial gain.<sup>172</sup> Second, there is the question of the outer limits of the transferability and assignment right of publicity. Even when publicity rights are transferred with fully informed consent, deepfakes could expand the exploitation of celebrity likeness in ways that are harmful to society without proper regulation.

Given the unique challenges presented by this new wave of technology, I propose the same caution exercised by the court in *Moore*. The exploitation of the right of publicity to create digital replicas and other deepfake content should not be recognized under the terms of a contract. Far from being a hypothetical, this was a central point of contention in the SAG-AFTRA strike.<sup>173</sup> While states like California have introduced legislation to require informed consent for the creation of digital replicas,<sup>174</sup> courts should be skeptical of any contract entered prior or without the full contemplation of generative artificial intelligence. In other words, this judicial skepticism should not only apply to future contracts entered into with living or deceased actors, but also should curtail the enforcement of perpetual publicity agreements already entered into.

A. *Power Imbalances in the Right of Publicity and the Use of Deepfakes*

If we were to accept the strongest versions of the right of publicity as a property right, then contractual transfers as a basis for

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172. As discussed in the introduction, many contracts, like those signed by America's Got Talent contestants and former NCAA athletes, require the signing away of publicity rights. See *supra* Introduction.

173. See *supra* Section IV.C.

174. See *supra* note 170 and accompanying text.

deepfake creation would be a natural result. However, we have seen already how a property rights framing is undercut by actual judicial treatment of the right.<sup>175</sup> Rothman makes the important distinction that if the right of publicity is transferable, then it is necessary to make a distinction between the “publicity-holder” and the “identity-holder.”<sup>176</sup> This helpful terminology immediately highlights a difficult problem: the identity-holder is immutable. The legal separation of identity- and publicity-holder could reduce social welfare for those living with the bifurcated rights.<sup>177</sup> For example, under a strong property rights regime, if someone else exclusively holds your right of publicity, do you have standing to sue for a misappropriation of your likeness? A person would not have the ability to bring a trespass to chattels action for property in which they do not own any interest. In trademark, individuals like Hayley Paige Gutman of Say Yes to the Dress fame who register eponymous brand names have faced significant trouble in professionally using their own name once they have signed away the trademark.<sup>178</sup> For people in Hayley’s position, such transfers can not only harm their future career but also feel like erasure of their freedom to use their identity.

Yet many of us will have the intuition that this outcome feels wrong. That intuition is likely grounded in a recognition that even if we view our publicity as a property right, that property right is intimately rooted in one’s personhood.<sup>179</sup> While not explicit, this is embodied by the concurrence in *JA Apparel Corp. v. Abboud*, which hypothesized that the transfer of “Joseph Abboud” even as a personal name would not imply an exclusive right to use that name in trademarks by the transferee.<sup>180</sup> It is, in a sense, impossible to exploit the right of publicity without simultaneously exploiting personhood. This may also be the same intuition that the jury in *Hayden*

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175. See *supra* Part II (discussing how a property right framing fails to explain the results in contexts like bankruptcy).

176. Rothman, *supra* note 28, at 187 (“If publicity rights are alienable, then the publicity-holder (the person who owns the right of publicity) need not be the same person as the person upon whom the publicity rights are based (the individual with whom publicity rights first vest and whose identity is the one that must be used to show a violation of those publicity rights).”).

177. *Id.* at 221.

178. See Haley L. Macray, *Fashion Victims: Investigating the Legal Pitfalls of Eponymous Brand Names*, 57 SUFFOLK U. L. REV. 203, 203–05 (2024) (describing Gutman’s inability to “design under the name ‘Hayley Paige’ outside of her relationship” with her former employer as a “harrowing” but uncommon “tale for fashion designers”).

179. See *supra* Section III.A.

180. *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 409–10 (2d Cir. 2009) (Sack, J., concurring).

recognized when they refused to recognize copyright infringement for tattoos on the bodies of NBA players.<sup>181</sup>

This intuition is backed up by the longstanding restrictions on specific performance for personal services.<sup>182</sup> Allowing publicity rights to be exploited via deepfakes fully circumvents this limitation. For example, actors who would not appear in a commercial can be digitally conjured with new AI technology. If courts would not allow such specific performance for the individual, they should not allow it to be achieved technologically.

Unfortunately, this type of circumvention is already threatened, because perpetual assignments of publicity rights already broadly exist within our media landscape.<sup>183</sup> In most of such transfers, like the NCAA and AGT examples, the transferor has little bargaining power compared to an already-famous athlete or artist. Even before the threat of AI, these transfers have already been used to harm the identity-holders.<sup>184</sup> Now, potential exploitation of deepfakes uniquely threatens these individuals. While NCAA players were prevented from profiting off their likeness, and certainly suffered some harms to their autonomy and dignity as a result, generative AI provides an avenue through which the publicity-holder can force a performance to be tendered to which the identity-holder would never consent.

It is worth considering normatively if courts want to endorse the further consolidation of the publicity rights in the hands of already powerful media corporations. A strong view of the property right of publicity paired with a presumptive validation of these contracts would endorse such usages based on the mere fact that publicity was transferred. Without a strong termination right in place—likely much stronger than exists in copyright today—courts are offering a way for powerful entities to exploit the likenesses of individuals who transferred their rights while at a disadvantage. This not only feels morally wrong, in that such usage appears to violate the moral rights of identity-holders, but also undercuts the utilitarian incentives for an

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181. See *Hayden v. 2K Games, Inc.*, No. 1:17CV2635, 2024 WL 4336945, at \*2–3, \*9 (N.D. Ohio Aug. 22, 2024) (denying plaintiffs renewed motion for judgment as a matter of law); see also *id.* (“[LeBron] James testified . . . [f]rom my tattoos to my ears piercing to my scars to everything that’s been a part of my body for 37 years, if I decide to give it out or license it or let someone see it, that is my right.”).

182. See *supra* Section III.D.

183. See, e.g., AGT release, *supra* note 4, para. 2 (granting irrevocable right to participant’s likeness); NCAA Complaint, *supra* note 5, para. 370; Rothman, *supra* note 28, at 188 (discussing perpetual assignments of publicity rights in a variety of contexts, including NCAA sports and other entertainment settings).

184. See *supra* Section II.D (discussing how NCAA monopoly on player licensing foreclosed billion-dollar market).

individual to invest in developing their public persona. Courts would be wise to embrace past jurisprudence which hesitated to grant such sweeping property rights without explicit statutory authority.<sup>185</sup>

*B. Harms in Allowing Evenly Balanced Parties to Exploit Deepfake Rights*

Returning to the hypothetical posed in the introduction; it is certainly foreseeable that aging celebrities or estates will perpetually license an individual's likeness. When AI removes the normal constraints of our physical and temporal existence, the possibilities are endless. A professional athlete could license their rights to appear in movies without needing to commit time during a season. An older actor could license a version of their mid-twenties-likeness separately from their late-forties-likeness.

Even for powerful parties, problems arise in the secondary market for these transferred publicity rights. While the individual celebrity might have been comfortable with the first rights-holder exercising the contract, they may be uncomfortable with a later party exercising the same right. This rationale is bolstered by the fact that individuals are increasingly unable to tell the difference between real and AI-generated video content.<sup>186</sup> While enforcement of the contract may not be a forcing of the "literal" individual to specifically perform, that difference is completely immaterial to the public who will not know the difference. The difference is also immaterial in many aspects to the person whose likeness is exploited, as they will have to live with people thinking that they tendered the performance regardless of the digital nature of it. Not only that, but this could lead to a further degradation in the public's ability to trust *any* media content that is being produced. While bad actors will continue to exploit the uses of AI to fraudulent ends, there is still value in holding large media companies to a standard that engenders public trust.

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185. While *Moore* clearly represents this jurisprudence of caution, it is not alone. The Supreme Court embraced a similar caution in deciding a case on hot news before the development of much of modern copyright law. *Compare* *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234–35 (1918) ("We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business."), *with* *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 496–97 (1990) ("[T]here is no pressing need to impose a judicially created rule of strict liability, since enforcement of physicians' disclosure obligations will protect patients against [this] very type of harm . . .").

186. *See supra* Section IV.A (discussing frauds being perpetuated with deepfake videos).

While the indignation problem may not apply to a deceased actor, avenues for harm still exist. As a first matter, courts have been sharply divided on whether the right of publicity survives an individual or is devisable to any extent.<sup>187</sup> Even if allowed, such transfer may still harm the rising generation of young and aspiring artists. For example, one explanation for why fewer pop stars are rising to fame in recent years is the incentive for labels to exploit the catalogs of established artists rather than promote new ones.<sup>188</sup> Judicial endorsement of the ability to exploit the estates of actors through deepfakes could potentially act to encourage an atmosphere that limits the access of rising stars in order to take advantage of the lower overhead of prior, established personas.

To conclude this section on an adjacent concern, courts should also seriously consider what to do with the publicity rights of individuals who live in states that do not recognize the descendibility of the right of publicity. In some sense, these individuals' publicity rights move immediately into the public domain, yet such a treatment can cause similar harms if the actor voluntarily transferred the right. As a result, courts should be hesitant to extend legal protections, like copyright, to works that rely heavily on generative AI representations of recently deceased subjects even without a descendible right of publicity. More generally, courts should treat the use of deepfakes with great reservation, as their continued use threatens our collective ability to discern truth. The field of AI is still very new, and contains many promises, but should not be given free rein to replace the performances of real individuals without some serious legislative and regulatory thought to guide judicial decision-making.

## V. CONCLUSION

AI has promised a revolution in the day to day of our lives. While the technology has improved in leaps and bounds, many of those advances have brought amazing results as well as the risk of significant dangers. Courts have often chosen to tread lightly when new technology and possibilities arise to avoid judicially creating policy in areas sure to be rife with complexity and pitfalls. This caution should only be multiplied by the extremely personal nature of the

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187. Rothman, *supra* note 28, at 203–04.

188. See Chris Eggertsen, *Why Aren't More Pop Stars Being Born?*, BILLBOARD (Aug. 8, 2023), <https://www.billboard.com/music/pop/new-pop-stars-rare-why-music-fans-ideas-1235398872/> [<https://perma.cc/BHP8-HXXR>].

right of publicity and the widespread disagreement among states on its limits.

This same caution also warrants a re-evaluation of existing assignments of publicity rights, particularly with respect to those entered into between parties of comparatively unequal bargaining power. There is at least some evidence from the NCAA that monopolization of these publicity rights leads to economic harm by foreclosing robust markets. More than that though, the advancements in generative AI threaten deeper harm to the dignity of publicity holders in our era. Before allowing such broad assignments of publicity rights to be used to produce content with generative AI, serious policy considerations need to be given to weigh the any benefits against the potential personal and economic harms. Courts are not equipped to balance such factors and, as a result, judicial approval of such contractual assignments should be withheld.

# A PRESUMPTION TOO FAR: MISAPPLICATIONS OF RES IPSA LOQUITUR IN FAMILY POLICING

ANNA LIFSEC\*

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### I.

#### INTRODUCTION

*It was the type of accident that every new mother dreads. On February 11, 2010, Melissa J. dropped her nine-week-old baby while lifting him out of the bath. She rushed her son to the hospital, where an MRI revealed bleeding on his brain. The terrifying incident became even more traumatic when the Administration for Children’s Services (ACS) filed an abuse petition in family court, alleging that the injuries were “unexplained.”*

*At trial, ACS presented expert witnesses. One acknowledged that the injury could have been caused by the fall Melissa described. The second one disagreed, believing the bleeding on the brain sufficient to diagnose child abuse, even in the absence of other indicia of abuse. However, this same expert also testified that he rarely reviewed images of children younger than six. Melissa’s expert, a board-certified pediatric radiologist, testified that the injuries were*

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\* J.D. Candidate, New York University School of Law, 2025. B.A., Cornell University, 2021. This Note is informed by and written in solidarity with the families and the individuals I have worked alongside over the years who have been impacted by the carceral and family policing systems. Thank you so much to Chris Gottlieb for catalyzing this project and guiding me all the way through it. Thank you to all the attorneys at Brooklyn Defender Services for your advocacy, and specifically, thank you to Emma Alpert for the feedback that made this possible. Jordan Waller and Dylan Brenner, thank you for your invaluable edits. All the thanks to the mentors who have inspired me to do this work over the years, especially Richard Rivera, Joseph Margulies, and Randy Hertz. Finally, I thank my family for their love and guidance, which have continually oriented me towards the pursuit of justice.

entirely consistent with the fall Melissa described. Melissa had no history of abuse or neglect allegations—she was a devoted, loving mother who had always prioritized her child’s well-being. She was fully cooperative with medical professionals and ACS caseworkers. Witnesses attested to her kindness and care as a parent. No additional evidence of abuse or neglect was presented at trial. Yet, despite all of this, the family court found her guilty of abuse.

It took more than two years from the time of the fall for Melissa to overturn the abuse finding. Melissa was separated from her child for over six months, during which time she and her newborn missed critical bonding time. Throughout this painful ordeal, the state never produced any affirmative evidence that she abused her son. Unbeknownst to her, and to many similarly situated parents, the improper application of an old tort doctrine, *res ipsa loquitur*, played a significant role in making such a devastating family court prosecution possible.<sup>1</sup>

In order to bring this case against Melissa, prosecutors employed an evidentiary rule used in child protection cases which allows abuse cases to proceed even in the absence of direct proof that a parent inflicted harm on a child. This rule is the tort doctrine of *res ipsa loquitur*, which translates literally to “the thing speaks for itself.” The doctrine originates from ancient tort jurisprudence and, in New York, which will be the sole focus of this note, has been adapted and applied to the family regulation system through statute.<sup>2</sup> The doctrine of *res ipsa loquitur* originated in the 1863 British case *Byrne v. Boadle*, where a barrel of flour fell from a shop window and struck a passerby.<sup>3</sup> The court concluded that such an accident could not have occurred absent negligence and held that the very fact of the injury created a sufficient inference for the plaintiff to survive dismissal.<sup>4</sup>

The importation of *res ipsa loquitur* from tort to family court in New York was a response to significant proof issues in child abuse and neglect proceedings.<sup>5</sup> In cases where *res ipsa* is invoked, there

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1. In re Tyler S. (Melissa J.), 960 N.Y.S.2d 438, 439–41 (App. Div. 2013).

2. In New York child abuse cases, the doctrine is housed in Family Court Act § 1046(a) (ii), which states that “proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible.” N.Y. FAM. CT. ACT § 1046(a) (ii) (McKinney 2025).

3. (1863) 159 Eng. Rep. 299, 299; B. Sonny Bal & Lawrence H. Brenner, *Medicolegal Sidebar: The Law and Social Values: Res Ipsa Loquitur*, 473 CLINICAL ORTHOPAEDICS & RELATED RSCH. 23, 24 (2015).

4. *Byrne*, 159 Eng. Rep. at 299.

5. See Chris Gottlieb, *Improving Res Ipsa Loquitur Doctrine in Child Abuse Cases: A Step Toward Racial Justice*, 25 J. GENDER, RACE & JUST. 411, 416 (2022) (“[T]here

is often a lack of direct evidence, as young children are unable to testify or explain the circumstances leading to their injuries. To overcome this challenge, *res ipsa loquitur* permits prosecutors to bypass the typical requirement of affirmative evidence to initiate a petition against a person legally responsible for a child. Instead, the doctrine allows for the petitioner to make out a prima facie case of abuse, despite the absence of sufficient evidence to sustain a petition in family court under normal circumstances. In New York, a prima facie case of abuse requires that petitioner show that the injury is of a type that does not ordinarily occur except by some act or omission of the parent.<sup>6</sup> The respondent parent may then attempt to rebut the prima facie case during a family court trial, typically in one of three ways. The respondent may:

- (1) establish that during the time period when the child was injured, the child was not in respondent's care[;]
- (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of respondent; or
- (3) counter the evidence that the child had the condition which was the basis for the finding of injury.<sup>7</sup>

Importantly, the ultimate burden of proof should always remain on the petitioner (the state).<sup>8</sup>

Furthermore, legal historians have noted that *res ipsa* may have emerged, in part, as an "effort by nineteenth-century jurists to hold business interests accountable for injuries caused by their machines, even as industrial accidents proliferated and industrialists came to dominate Anglo-American government and society."<sup>9</sup> From the start, then, *res ipsa* was a tool designed for civil liability cases, involving monetary damages and jury determinations. Yet today, that same doctrine is embedded in section 1046(a) (ii) of the Family Court Act (FCA),<sup>10</sup> where it is used not to allocate financial fault but to justify

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often is not direct evidence of specific abusive actions in situations in which the state should be empowered to protect children from further harm.").

6. FAM. CT. ACT § 1046(a) (ii).

7. *In re Philip M.*, 624 N.E.2d 168, 172 (N.Y. 1993) (citations omitted).

8. *Id.* ("[T]he burden of proving child abuse always rests with petitioner; [s]hifting the burden of explanation or of going on with the case does not shift the burden of proof." (quoting *Plumb v. Richmond Light R.R. Co.*, 233 N.Y., at 288) (second alteration in original)).

9. G. Gregg Webb, *The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur*, 59 STAN. L. REV. 1065, 1070 (2007).

10. See FAM. CT. ACT § 1046 sup. cmt. 4 ("Subdivision (a) (ii) is the equivalent of the tort law *res ipsa loquitur* presumption (and is obviously borrowed from tort law).").

state intervention in families' lives, often leading to traumatic removals or lasting abuse findings. This is especially concerning in an area of law where

[t]he State wields its power to intervene in the parent-child relationship, an action which for the present may lead to temporary removal of the child from the home, and which could later result in a permanent severance of the respondent's parental rights. In child-protective proceedings, therefore, it is the burden of the accuser to prove, by a preponderance of the evidence, that the allegations are true before the stigma of neglect attaches. The respondent should not be compelled by the court to facilitate her own adjudication of neglect.<sup>11</sup>

A mechanism once meant to empower plaintiffs against corporate defendants is now deployed to ease the path of prosecution against parents, many of them poor Black and Brown New Yorkers, in a system where the consequences far exceed financial loss.

At the same time, however, case law has indicated that the FCA<sup>12</sup> should be interpreted to engage with families in the least intrusive way possible.<sup>13</sup> Courts can intervene only in cases where sufficient facts support an abuse or neglect petition.<sup>14</sup> Despite this clear

11. *In re Comm'r of Soc. Servs. ex rel. Verena E.*, 621 N.Y.S.2d 436, 437 (Fam. Ct. 1994).

12. This is New York's statutory scheme governing family court procedures.

13. The FCA "erects a careful bulwark against 'unwarranted state intervention into private family life,' for which its drafters had a deep concern." *In re Jamie J.*, 89 N.E.3d 468, 473 (N.Y. 2017) (quoting *Nicholson v. Scopetta*, 820 N.E.2d 840, 845 (N.Y. 2004)); accord *In re Loraida G.*, 701 N.Y.S.2d 822, 827 (Fam. Ct. 1999) ("Parents have a fundamental right to raise their children and the State may intervene only where necessary to protect the child's life, health or safety.").

14. "A proceeding under this article is originated by the filing of a petition in which facts sufficient to establish that a child is an abused or neglected child under this article are alleged." See N.Y. FAM. CT. ACT § 1031. Specifically, for neglect cases, the state must show that either (1) the child's physical or mental condition has been impaired or is in danger of becoming impaired, the parent or guardian failed to exercise a minimum degree of care, and the child's impairment or danger of impairment is a consequence of the parent or guardian's failure to exercise a minimum degree of care, or (2) the child has been abandoned by his parent or guardian. N.Y. FAM. CT. ACT § 1012(f). For abuse cases, the state must show that the parent or guardian has either (1) inflicted or allowed to be inflicted physical injury other than accidental injury which causes or creates a substantial risk of death or serious or protracted disfigurement, protracted impairment of physical or emotional health, or protracted impairment or loss of function of a bodily organ; or (2) created or allowed to be created a substantial risk of such injury; or (3) committed, allowed, or encouraged various enumerated sex crimes involving a child. *Id.* § 1012(e). Definitions of abuse and neglect are strictly construed. See *Nicholson*, 820

directive from the FCA, the temptation to take action in cases with proof problems has led courts down a path that deviates both from the mandate of the FCA and, as this paper will show, from the appellate tort law surrounding the use of *res ipsa loquitur*.

In 2006, the appellate tort case *Morejon v. Rais Construction Co.* clarified a frequent error in the application of *res ipsa loquitur* in tort law.<sup>15</sup> Lower courts were sometimes employing a rebuttable presumption once a prima facie case had been established by *res ipsa loquitur*, rather than using the doctrine to draw a permissible inference of negligence.<sup>16</sup> In *Morejon*, the Appellate Court clarified that the rebuttable presumption standard is *not* the correct standard for *res ipsa* cases.<sup>17</sup> Despite this clarification, appellate family court cases rarely cite *Morejon* for this proposition. Instead, family courts remain blind to this change and largely continue to employ the rebuttable presumption in *res ipsa* cases.<sup>18</sup> In failing to correct for the doctrinal error *Morejon* corrected, family courts continue to import a tort doctrine into family policing without the legal protections that make it fair.

While New York *res ipsa* law is the focus of this paper, “[e]very state has a mechanism to grant child welfare authorities the ability to assign responsibility for harm inflicted on a child when the precise cause of the injury is unknown.”<sup>19</sup> Understanding how this issue has unfolded in New York offers insights into how attorneys might limit the improper use of *res ipsa* and how judges should address those challenges in New York and other states. While the

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N.E.2d at 845 (noting that the legislature was “deeply concerned that . . . imprecise definition[s]” of statutory terms “might result in ‘unwarranted state intervention into private family life.’” (quoting FAM. CT. ACT § 1012 cmt. f (McKinney 1999))).

15. 851 N.E.2d 1143, 1144 (N.Y. 2006).

16. *See id.* at 1146 (“[R]es ipsa loquitur does not create a presumption of negligence against the defendant.”).

17. *Id.* at 1146, 1148.

18. *See infra* Part III.

19. Gottlieb, *supra* note 5, at 420; *see, e.g.*, N.J. STAT. ANN. § 9:6–8.46(a)(2) (West 2025) (“[P]roof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child . . . .”); CAL. WELF. & INST. CODE § 355.1 (West 2025) (“Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a [dependent child of the court].”); FAM. CT. ACT § 1046(a)(ii) (allowing *res ipsa* for proof of child abuse and neglect).

legal strategies in other regions may differ due to variations in local laws and precedents, the central idea stays the same: We must remain alert to the unjust application of *res ipsa loquitur* against parents and caregivers of children. This principle holds true across all jurisdictions.

It is irresponsible to write a paper about family policing without mentioning its racial impact. While *res ipsa* “does not single out Black families, . . . it falls far harder on them because every legal rule that works poorly in the family regulation system falls hardest on Black families.”<sup>20</sup> Black and Brown children make up approximately 90% of child protective investigations in New York City.<sup>21</sup> While only 19% of White children in New York City will experience an ACS investigation by their 18th birthday, 45% of Black and Latino children will.<sup>22</sup> When it comes to *res ipsa* cases, which often arise in hospitals, “Black children are more likely to be evaluated for abuse than white children with comparable injuries.”<sup>23</sup> Once a court case is filed, Black families are thirteen times more likely to have their children removed.<sup>24</sup>

This disparity is fueled in part by a conservative instinct to err on the side of caution when it comes to potential child abuse. When a Black or Brown child presents with injuries, system actors are able to default to the most conservative protective actions allowed by the Family Court Act.<sup>25</sup> The presumption used in §1046(a)(ii) cases relieves decision-makers of the need to name or examine the underlying, sometimes racist, assumptions that guide their actions. Accordingly, *res ipsa* offers a facially neutral legal pathway to act on assumptions often influenced by implicit bias without scrutiny. Black

20. Gottlieb, *supra* note 5, at 414.

21. *Racism at Every Stage: Data Shows How NYC’s Administration for Children’s Services Discriminates Against Black and Brown Families*, NYCLU (June 20, 2023), <https://www.nyclu.org/report/racism-every-stage-data-shows-how-nycs-administration-childrens-services-discriminates> [<https://perma.cc/WAU3-HBUV>]; see also Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. 1, 5 (2022) (“[N]inety percent of children named in [New York City family regulation] investigations . . . are Black or Latinx.”).

22. *Racial Disparities 2019*, NYC FAM. POL’Y PROJECT, <https://familypolicynyc.org/data-brief/racial-disparities/> [<https://perma.cc/35UP-GHXJ>] (last visited Oct. 15, 2025).

23. The Child. ’s Hosp. of Phila., *Pediatricians May Apply Bias in Abuse Assessment, Study Finds*, PR NEWSWIRE (Aug. 17, 2010), <https://www.prnewswire.com/news-releases/pediatricians-may-apply-bias-in-abuse-assessment-study-finds-100891369.html> [<https://perma.cc/R6BZ-BMFE>].

24. Gottlieb, *supra* note 5, at 414.

25. See *id.* at 428 (arguing that courts’ implicit biases might motivate findings of guilt through *res ipsa* in abuse and neglect cases brought against minority parents).

and Brown families are more likely to interact with family regulation systems, those interactions are more likely to escalate into investigations, and those investigations are more likely to result in family separation.<sup>26</sup> In this way, broadening the scope of abuse prosecutions and findings perpetuates the centuries of family separation inflicted on minority groups in America.<sup>27</sup>

This paper argues that the persistent misapplication of the *res ipsa loquitur* presumption in family regulation cases, despite the clear directive in *Morejon* to abandon this doctrinal approach, is a legal mistake worth remedying. This is both because it aggravates other doctrinal errors, including the conflation of prima facie and final burdens, and because it unnecessarily and improperly widens the net of child abuse findings. Doing so is unfaithful to the purposes of the FCA, increases the number of traumatic and unnecessary family separations, and continues to exacerbate centuries of racism in family policing.

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26. See *id.* at 414 n.11 (“Black families are six times more likely than white families to be reported to the child abuse hotline, eight times more likely to have a case indicated . . . , and thirteen times more likely to be separated.”); Jenna Lauter, *Even “Child Welfare” Workers Say Their Agency Is Racist*, NYCLU (Jan. 23, 2023), <https://www.nyclu.org/commentary/even-child-welfare-workers-say-their-agency-racist-0> [<https://perma.cc/W8MB-5EZF>] (“Black families are seven times as likely as white families to be reported to the family regulation system. . . . Ninety percent of the families ACS investigates are Black or Brown.”).

27. See *History of Racial Injustice: Black Families Severed by Slavery*, EQUAL JUST. INITIATIVE (Jan. 29, 2018), <https://eji.org/news/history-racial-injustice-black-families-severed-by-slavery/> [<https://perma.cc/NR4Y-893K>] (“Roughly half of all enslaved people were separated from their spouses and parents; about one in four of those sold were children.”); Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 449 (2022) (“The preservation of a particular notion of the nation also drove the so-called ‘orphan trains’ movement beginning in the mid-nineteenth century, when child welfare workers removed children often based on ‘[c]ultural inferiority’ . . . whenever families failed to resemble the ‘American’ values of temperance, wealth, and whiteness.’ Most children removed from East Coast cities were not orphans, but instead were from impoverished, immigrant families.”); Jessica Lussenhop & Agnel Philip, *Native American Families Are Being Broken Up in Spite of a Law Meant to Keep Children with Their Parents*, PROPUBLICA (June 15, 2023, at 06:00 ET), <https://www.propublica.org/article/native-american-parental-rights-termination-icwa-scotus> [<https://perma.cc/RYP5-3J8T>] (highlighting the progress of the Indian Child Welfare Act in addressing systemic family separation and its varied application by the states); Christie Renick, *The Nation’s First Family Separation Policy*, IMPRINT (Oct. 9, 2018, at 05:05 ET), <https://imprintnews.org/featured/nations-first-family-separation-policy-indian-child-welfare-act/32431> [<https://perma.cc/7E5C-V3G9>] (“[In the late 1960s], between 25 and 35 percent of all American Indian children had been placed in adoptive homes, foster homes or institutions. Around 90 percent of those children were being raised by non-Indians.”).

## II.

FAMILY COURT'S LEGAL MISSTEP: CLINGING TO THE  
REBUTTABLE PRESUMPTION

*In re Philip M.*, a landmark 1993 appellate family court case on the application of *res ipsa* in the family regulation system,<sup>28</sup> is essential to understanding the use and misuse of the doctrine today. This decision clarified a fundamental element of *res ipsa* from tort law: The burden of proof always rests with the petitioner.<sup>29</sup> The court emphasized that, even in the absence of a rebuttal by the respondent, a judge may reasonably determine that the petitioner has failed to meet the burden of proof by a preponderance of the evidence, despite having established a *prima facie* case.<sup>30</sup> *Philip M.* not only clarified a misunderstanding in the family regulation context regarding the application of the burden of proof, but also reaffirmed that the structure and design of *res ipsa loquitur* in tort law should generally be adopted in the family regulation context.<sup>31</sup>

Although *Philip M.* provided important safeguards on the use of *res ipsa loquitur* in child abuse proceedings, it still treated the establishment of a *prima facie res ipsa* case as a rebuttable presumption. Under this presumption, after petitioner establishes there was abuse using *res ipsa*, the burden of explanation (but not the burden of proof) shifts to the respondent, and the respondent can rebut the presumption of parental culpability, usually in one of three ways.<sup>32</sup> Respondent's evidence may:

- (1) establish that during the time period when the child was injured, the child was not in respondent's care[;]
- (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of respondent; or

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28. 624 N.E.2d 168, 172 (N.Y. 1993).

29. *Id.*

30. *Id.*

31. *See id.* (noting that the court's application of § 1046(a) (ii) is consistent with "negligence cases tried on the theory of *res ipsa loquitur*"). In New Jersey, a similar practice of improper burden shifting was occurring in *res ipsa* cases. A seminal case clarified and eliminated that practice. The New Jersey Supreme Court explained that it "ha[s] no authority to import the burden-shifting equitable doctrine of conditional *res ipsa loquitur* from . . . tort law into [New Jersey's child welfare law], a comprehensive and carefully conceived statutory scheme in which the Legislature has determined that [the state] bears the burden of proving by a preponderance of the evidence that a parent or guardian has committed an act of child abuse or neglect." N.J. Div. of Child Prot. & Permanency v. J.R.-R., 258 A.3d 1094, 1106 (N.J. 2021).

32. *In re Philip M.*, 624 N.E.2d 168, 172 (N.Y. 1993).

(3) counter the evidence that the child had the condition which was the basis for the finding of injury.<sup>33</sup>

Despite *Philip M.*'s role in clarifying the relevant burdens, the courts continued to use divergent standards. Judges disagreed as to whether establishing the prima facie case of *res ipsa loquitur* created a rebuttable presumption of negligence or merely an inference of negligence.<sup>34</sup> In 2006, the New York Court of Appeals addressed what it termed the “dizzying array of formulations” surrounding the application of *res ipsa loquitur* in the tort law context.<sup>35</sup> The court sought to clarify the proper application of the doctrine. Specifically, the court concluded that “*res ipsa loquitur* does not create a presumption of negligence against the defendant.”<sup>36</sup> The court further explained that the indiscriminate use of the terms “presumption” and “inference” had led to procedural confusion.<sup>37</sup> Thus, *Morejon* stands for the clear proposition that a rebuttable presumption is not the correct standard in *res ipsa* cases. The standard adhered to in *Morejon* is one of past “jurisprudence, in which [the courts] denominated *res ipsa loquitur* as creating an inference” of negligence.<sup>38</sup>

Despite the important clarification from *Morejon*, Appellate Division or family court cases largely fail to cite the decision for the proposition that *res ipsa loquitur* does not create a rebuttable presumption in the context of child abuse cases. Given that the use of *res ipsa* in the family regulation system is deeply rooted in tort doctrine, the clarification provided in *Morejon* must similarly be applied to the family regulation context. While appellate courts in the tort context

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33. *Id.* (citations omitted).

34. *See* *Morejon v. Rais Constr. Co.*, 851 N.E.2d 1143, 1148 (N.Y. 2006) (describing the various forms of *res ipsa loquitur* applied by New York courts).

35. *Id.*

36. *Id.* at 1146.

37. *See id.* (“Slowly thereafter, *res ipsa loquitur* gained general acceptance with us, but there was some confusion over the doctrine’s procedural effects. Courts, including ours, used ‘prima facie case,’ ‘presumption of negligence’ and ‘inference of negligence’ interchangeably even though the phrases can carry different procedural consequences.”).

38. *Id.* at 1148. This standard was in fact consistent with earlier tort doctrine. *See, e.g.*, *Kambat v. St. Francis Hosp.*, 678 N.E.2d 456, 458 (N.Y. 1997) (“Submission of *res ipsa loquitur*, moreover, merely permits the jury to infer negligence from the circumstances of the occurrence. The jury is thus allowed—but not compelled—to draw the permissible inference.”); *Loeffler v. Rogers*, 523 N.Y.S.2d 660, 660 (App. Div. 1988) (“The facts underlying the occurrence of this incident, although not compelling a finding of negligence, give rise to an inference of negligence [under *res ipsa loquitur*] and, thus, create a question of fact for the jury.”).

have acknowledged this aspect of the doctrine,<sup>39</sup> family courts remain blind to it, continuing to treat *res ipsa loquitur* as establishing a rebuttable presumption.

### III.

#### WHEN FAMILY COURTS GET IT RIGHT—AND WRONG: INFERENCE VS. PRESUMPTION IN THE CASE LAW

*Morejon* clarifies that the rebuttable presumption is the incorrect standard to apply once a *res ipsa* prima facie case has been established.<sup>40</sup> When a prima facie case is made out, it supports only an inference of negligence, which does not compel a finding of negligence. Instead, the inference creates a question of fact for the factfinder, where there may have otherwise not been enough evidence to survive a summary judgment motion, or to even bring the case at all.<sup>41</sup> More often than not, trial and appellate courts fail to understand the permissible inference standard and erroneously use a rebuttable presumption. In fact, this is the outcome in many *res ipsa* cases within the family regulation system.<sup>42</sup> These cases involve two legal mistakes. One is simple: the appellate courts clarified the application of *res ipsa* in *Morejon*, but family courts repeatedly fail to

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39. See, e.g., *Kambat*, 678 N.E.2d at 458; *Loeffler*, 523 N.Y.S.2d at 661 (“The facts underlying the occurrence of this incident, although not compelling a finding of negligence, give rise to an inference of negligence and thus create a question of fact for the jury.”); *George Foltis, Inc. v. City of New York*, 38 N.E.2d 455, 462 (N.Y. 1941) (“[E]vidence which under the rule of *res ipsa loquitur* satisfies the plaintiff’s duty of producing evidence sufficient to go to the jury does not create a full presumption and is ordinarily not sufficient, even where the defendant produces no evidence in contradiction or rebuttal, to entitle the plaintiff to the direction of a verdict.”).

40. *Morejon*, 851 N.E.2d at 1148.

41. *Loeffler*, 136 A.D.2d at 824 (“The facts underlying the occurrence of this incident, although not compelling a finding of negligence, give rise to an inference of negligence and, thus, create a question of fact for the jury.”).

42. See, e.g., *In re Tyree B.*, 75 N.Y.S.3d 391, 391 (App. Div. 2018) (“Petitioner . . . established a prima facie case of child abuse [using § 1046(a)(ii)], and the father failed to rebut the presumption of parental responsibility.” (citing *In re Philip M.*, 624 N.E.2d 168, 173 (N.Y. 1993))); *In re Daughtry A.*, 941 N.Y.S.2d 888, 889 (App. Div. 2012) (The petitioner agency established a prima facie case of neglect [under FAM. CT. ACT § 1046(a)(ii)]. In response, the mother failed to rebut the presumption of culpability. . . . Accordingly, the finding of neglect was supported by the preponderance of the evidence); *In re Zarhianna K.*, 19 N.Y.S.3d 465, 465 (App. Div. 2015) (applying the rebuttable presumption); *In re Devre S.*, 902 N.Y.S.2d 739, 740 (App. Div. 2010) (same); *In re Jacob B.*, 909 N.Y.S.2d 755, 756 (App. Div. 2010) (same); *In re Aaron McC.*, 886 N.Y.S.2d 408, 409 (App. Div. 2009) (same); *In re Seth G.*, 856 N.Y.S.2d 778, 778 (App. Div. 2008) (same); *In re Nasir J.*, 827 N.Y.S.2d 41, 42 (App. Div. 2006) (same); *In re Jessica H.*, 681 N.Y.S.2d 557, 557 (App. Div. 1998) (same); *In re Nakym S.*, 877 N.Y.S.2d 241, 242 (App. Div. 2009) (same).

apply that clarification. The second, and more complex, doctrinal error will be discussed in the next Part. This error arises when, at the conclusion of a case, courts neglect to reassess whether the preponderance of evidence standard has been met, effectively relying on the prima facie standard for the final burden of proof.<sup>43</sup>

As for the legal error, a handful of trial and appellate courts have properly applied *res ipsa* to create an inference rather than a rebuttable presumption. It is useful to discuss these examples when considering what the legal standard should look like, and how the outcomes may differ when a permissible inference rather than a rebuttable presumption is used.

Take *In re Ashley RR.*, where the trial court “erred in finding that respondents abused and neglected their daughters.”<sup>44</sup> In this case, medical evidence suggested that the children had been sexually abused, resulting in charges of abuse and neglect against both the mother and father.<sup>45</sup> In reviewing the trial court decision, the appellate court clarified the proper application of *res ipsa*, noting that “[a]lthough generally referred to as a presumption, this method of proof does not create a true presumption; it creates a permissible inference which the factfinder may draw, but does not compel a finding in accordance with that inference.”<sup>46</sup> By describing section 1046(a) (ii) as allowing a “permissible inference” of abuse or neglect,<sup>47</sup> the Third Department emphasized *Morejon*’s point that *res ipsa* is not a rebuttable presumption.<sup>48</sup>

Following this legal framework, the appellate court evaluated the facts. Notably, the children had been exposed to “approximately 40 different adults” while under the care of the respondent grandmother during the relevant time period.<sup>49</sup> In contrast, the respondent parents had rarely been alone with the children, and the parents credibly testified that they ensured the children were never left alone with other adults while under the parents’ supervision.<sup>50</sup>

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43. See *infra* Part IV.

44. 816 N.Y.S.2d 580, 583 (App. Div. 2006).

45. *Id.* at 582.

46. *Id.* at 582–83.

47. *Id.* at 583.

48. *Morejon v. Rais Constr. Co.*, 851 N.E.2d 1143, 1146 (N.Y. 2006). The *Ashley RR.* opinion, which came out only a month after *Morejon*, relied on tort cases from the 20th century in holding that *res ipsa* is a permissible inference. *Ashley RR.*, 816 N.Y.S.2d at 583 (first citing *Kambat v. St. Francis Hosp.*, 678 N.E.2d 456, 458 (N.Y. 1997); and then citing *Loeffler v. Rogers*, 523, N.Y.S.2d 660, 660 (App. Div. 1988)).

49. *Ashley RR.*, 816 N.Y.S.2d at 581–83.

50. *Id.*

Importantly, the court acknowledged that the petitioner had made out the prima facie case which created the permissible inference.<sup>51</sup> But the court remained faithful to the standard laid out in *Philip M.*, maintaining that the “petitioner retained the burden of proving abuse and neglect by a preponderance of the evidence.”<sup>52</sup> The Third Department emphasized, “While the fact finder may find respondents accountable for sexually abusing a child or allowing sexual abuse to occur after a prima facie case is established, it is never required to do so.” Instead, Family Court is required to weigh all the evidence in the record before making a determination regarding abuse or neglect.<sup>53</sup>

Unlike the trial court, which found respondent’s testimony “self-serving and insufficient to *rebut the presumption*” under the permissible inference framework, the Third Department found that an abuse finding was “inconsistent with the record evidence.”<sup>54</sup> The court reached this conclusion because of the strong evidence that others, such as the respondent grandmother, were more likely responsible for the abuse and neglect.<sup>55</sup>

*In re Christopher Anthony M.*<sup>56</sup> likewise illustrates that courts utilize *res ipsa* more precisely when they understand the attendant legal standards. In this case, the Second Department noted that “Family Court Act § 1046(a) (ii) permits an inference to be drawn so as to establish a prima facie case of abuse or neglect against the parents or other caretakers of a child when the child suffers an injury which would not ordinarily occur in the absence of an act or omission of the caretakers.”<sup>57</sup> The posture of this case was a motion for summary judgment by the respondent parent, which the court granted, finding that there was no triable issue of fact.<sup>58</sup> Notably, the court agreed with the petitioner that “[c]learly, the testimony of the physician as to the mechanism of the burn was sufficient to permit the statutory inference.”<sup>59</sup> However, the court concluded that the evidence the respondent presented demonstrating that he was not present the moment the child was injured “was sufficient to rebut the statutory inference and to establish, prima facie, that his conduct was neither negligent nor abusive.”<sup>60</sup> At this

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51. *Id.* at 582.

52. *Id.* (citing *In re Philip M.*, 624 N.E.2d 168, 172 (N.Y. 1993)).

53. *Id.* at 583 (quoting *In re Philip M.*, 624 N.E.2d at 172).

54. *Id.* at 584 (emphasis added).

55. *Id.* at 583–84.

56. 848 N.Y.S.2d 711 (App. Div. 2007).

57. *Id.* at 713.

58. *Id.* at 712.

59. *Id.* at 713.

60. *Id.* at 714.

point, “the burden shifted back to the petitioner to demonstrate the existence of a triable issue of fact.”<sup>61</sup> However, “the petitioner merely submitted an affirmation of counsel who argued that the statutory inference applied.”<sup>62</sup> Under the inference framework the appellate court concluded that there was no triable issue of fact.<sup>63</sup>

In limited instances, trial courts have also applied this standard correctly in the first instance, including in *In re Nicole C.*, where the court understood that

[a]lthough the statute is often described as providing for a ‘presumption’ of culpability, it does not create a true presumption. Rather, it creates a permissible inference of culpability that the finder-of-fact may choose to draw upon all the evidence in the record . . . .<sup>64</sup>

With this in mind, the court completed a careful analysis of the evidence and concluded that “respondents have rebutted the *res ipsa loquitur* statutory inference and, further, that the record as a whole does not support a finding that respondents abused their child.”<sup>65</sup>

When a trial court errs in its judgment, even if the appellate court subsequently corrects the error, families endure prolonged separation and emotional distress while awaiting the resolution of the case. This can mean years of unnecessary family separation. To mitigate such harm, trial courts must use the law created by appellate courts, as articulated in *In re Ashley*, *In re Christopher*, and *Morejon*. The potential consequences for families involved are far too significant to allow for anything less than a faithful application of the law from the beginning of Family Court proceedings.

#### IV. HOW THE PRESUMPTION DRIVES A FURTHER DOCTRINAL ERROR

Part III outlines courts’ failure to adopt tort doctrine’s permissible inference framework in place of the rebuttable presumption standard. However, this error is not isolated: It exacerbates another doctrinal misunderstanding, namely, the courts’ tendency to conflate the initial prima facie *res ipsa* burden with the final preponderance-of-the-evidence burden of proof. The rebuttable

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61. *Id.*

62. *Id.*

63. *Id.*

64. No. NA–21238/09, 2013 WL 3064054, at \*26 (N.Y. Fam. Ct. June 10, 2013).

65. *Id.* at \*29.

presumption framework aggravates the conflation of burdens because of the short distance between a presumption and a final preponderance showing. When the status quo of abuse is established through a presumption, courts struggle to reassess the evidence at the conclusion of a case to discern whether a preponderance standard has been met.

Importantly, the preponderance standard is still a relatively low threshold, especially when compared to the criminal standard of beyond a reasonable doubt. Holding petitioners to this standard does not preclude findings of abuse when sufficient evidence exists; rather, it simply ensures that such findings are based on sufficient evidence, not on the inertia of a presumption. To avoid conflating the initial and final burdens, courts must pause and evaluate whether, after hearing all the evidence, the case still supports a finding based on the preponderance of the evidence. This is a modest but essential safeguard that protects against infringement on parents' due process rights.

The use of the permissible inference standard, rather than the rebuttable presumption, can help to clarify the difference between the initial burden and the final burden. This is best demonstrated in family court cases that do apply the permissible inference standard rather than a rebuttable presumption. For example, in *In re Nicole C.*, the appellate court successfully applied a permissible inference while also addressing the issue of conflating burdens.<sup>66</sup> The interplay between the permissible inference and the discussion of final burdens offers valuable insight into how the use of an inference could serve as a bulwark against the conflation of burdens. When assessing whether the permissible inference had been refuted, the court discussed expert testimony, ultimately finding that the expert witness "did not provide this Court with any particular insight in this case."<sup>67</sup>

Dr. Palusci's testimony simply established that, in his opinion, neither Rickets nor vitamin D deficiency was a contributing factor to the infant's injuries. Therefore, since he had no other identified cause, abuse was the *presumed* cause "until [we are able to] identify some other cause." That, in the Court's view, is not persuasive expert testimony establishing that abuse was the cause. It is simply a *restatement of the permissible inference* set forth in Family Court Act § 1046(a). In other words, since Nicole, a 47-day-old baby, suffered two fractures and there was no cause that Dr. Palusci was able to identify, abuse was presumed to be the cause.<sup>68</sup>

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66. *Id.* at \*26–27.

67. *Id.* at \*33.

68. *Id.* (alteration in original) (emphasis added).

The appellate court here made a critical point: Courts cannot restate the statutory inference to meet the final burden of proof.<sup>69</sup> This distinction is facilitated by the use of a permissible *inference*, which facially and definitionally can never meet a final burden. With no additional evidence besides that used to create the inference, the appellate court in the case appropriately saw the distance between the initial burden and the final burden and overturned the trial court decision.

*In re Christopher*,<sup>70</sup> discussed in Part III, is another clarifying example. In this case, the appellate court overturned the trial court by applying a permissible inference, rather than a presumption, in granting the respondent's summary judgment motion.<sup>71</sup> The court notably concluded that relying "solely on the statutory inference to defeat the motion for summary judgment . . . would be elevating the statutory inference to an irrebuttable presumption in the face of a motion for summary judgment."<sup>72</sup> The specific posture of this case underscores the dynamics at play: the statutory inference serves merely to bridge an evidentiary gap arising from the unique context of injuries to young children. However, bridging the evidentiary gap cannot be conflated with the petitioner's final burden of proof. In this motion for summary judgment, the petitioner bore the burden of demonstrating a triable issue of fact; in other cases, the burden may be to prove the claim by a preponderance of the evidence. Although the final burden remains the same whether there is a rebuttable presumption or an inference, this case again displays how it may be easier for courts to make the distinction between the initial and final burden with a permissible inference rather than a rebuttable presumption.

Other appellate courts have successfully identified the issue of conflating burdens, even if they fail to rely on the inference standard delineated in *Morejon*. These cases are similarly useful in dissecting the ways in which the rebuttable presumption may aggravate the doctrinal error of conflating burdens.

Consider *In re Liana HH*, where the appellate court concluded that the evidence presented by the respondent "was enough to rebut the presumption of parental responsibility afforded by [§1046(a)(ii)] and, inasmuch as petitioner's case relied upon that presumption, petitioner failed to sustain its burden of showing by a preponderance of the evidence that respondent abused or neglected the

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69. *Id.*

70. 848 N.Y.S.2d 711.

71. *Id.* at 714.

72. *Id.* at 714 (emphasis added).

child.”<sup>73</sup> In this case, the appellate court noted that the “respondent advanced a persuasive, factually based explanation as to how the child’s ‘condition *could* reasonably have occurred . . . without the acts or omissions of respondent.’”<sup>74</sup>

This finding by the appellate court centered on the argument that the child’s condition could have arisen independently of any actions by the respondent. The child had been diagnosed with brain bleeding and hemorrhaging, yet there were no bone fractures, bruising, or other signs typically associated with abuse, nor was there any direct evidence that the respondent had acted inappropriately toward the child.<sup>75</sup> The respondent’s medical expert testified that it would be “‘exceedingly rare’ for trauma to cause a stroke in the well-protected cerebellum” and that there was “no evidence of trauma such as a skull fracture or brain contusion.”<sup>76</sup> A second medical expert “agreed that there was no evidence of trauma and opined that the venous thrombosis and fluid buildup around the child’s brain could have resulted from natural disease and would have led to the child suddenly becoming symptomatic as she did.”<sup>77</sup> When the burden shifted back to the petitioner, the medical expert admitted that “retinal hemorrhages could arise from causes other than trauma and that the medical community was divided on whether retinal hemorrhages were a secondary effect of brain problems rather than the result of direct trauma.”<sup>78</sup> Despite this expert medical testimony, the “Family Court questioned respondent’s account of events and found petitioner’s experts more credible . . . .”<sup>79</sup> The appellate court, however, conducted its own review of the competing expert evidence and reached the opposite conclusion, ultimately reversing the lower court’s finding.<sup>80</sup>

Through the medical experts described above, the respondent presented evidence of a reasonable alternative explanation for the injury—one of the defenses that should have rebutted any inference of abuse. Yet the trial court found that this failed to overcome the presumption. Use of the presumption aggravated the doctrinal error, as even with the concessions from petitioners after the defense case concluded, the respondents still lost in the lower court. This

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73. 86 N.Y.S.3d 278, 282 (App. Div. 2018).

74. *Id.* (quoting *In re Philip M.*, 624 N.E.2d 168, 172 (N.Y. 1993)).

75. *Id.* at 280.

76. *Id.* at 281.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 282.

outcome suggests that the trial court conflated the initial prima facie burden with the final preponderance burden. Despite the presentation of multiple expert opinions strongly supporting an alternative medical explanation, the status quo of “abuse” proved challenging to disrupt, even where a petitioner had produced no direct evidence of abuse.

An additional example of a lower court finding abuse or neglect without sufficient evidence is *In re Tyler S. (Melissa J.)*, where the Second Department overturned a finding of abuse, reasoning that “the Family Court erred in determining that the mother failed to come forward with sufficient satisfactory evidence to rebut the petitioner’s case.”<sup>81</sup> According to the Second Department:

The mother adduced evidence, through her expert, that the subdural hematoma and hemorrhage sustained by the subject child were not caused by another unexplained event, but rather were consistent with the same accidental trauma described by the mother. No other evidence was presented to support the allegation of abuse. Indeed, the record reflects, and it was undisputed, that the mother was a concerned parent who cared for her child. She was forthcoming and cooperative with the medical professionals attending her child as well as the petitioner’s caseworkers. Witnesses testified that the mother was a loving and caring parent and she had no other history with child protective agencies.<sup>82</sup>

After reviewing the record, the appellate court concluded that the evidence indicating that this was accidental trauma, coupled with the plethora of circumstantial evidence that the mother was a responsible parent, indicated that petitioner fell short of the final preponderance standard.<sup>83</sup>

Another illustration of the legal mistake of conflating burdens occurs in *In re Amir L.*<sup>84</sup> The lower court held that the respondents had in fact rebutted a presumption of abuse by providing a credible explanation of their child’s injury, but they failed to rebut a presumption of neglect.<sup>85</sup> However, on appeal, the First Department overturned the neglect finding as well.<sup>86</sup> The appellate court held that

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81. 960 N.Y.S.2d 438, 441 (App. Div. 2013).

82. *Id.*

83. *Id.*

84. 961 N.Y.S.2d 386 (App. Div. 2013).

85. *Id.* at 387.

86. *Id.* at 389.

In light of respondents' rebuttal evidence and the lack of evidence of other neglect, the finding of neglect was not supported by a preponderance of the evidence. Just as the court found with respect to the abuse charges, the inconsistent statements in the medical records attributed to respondents do not tip the scales in petitioner's favor with respect to the neglect charges.<sup>87</sup>

Once again, the appellate court concluded that the final preponderance standard had not been met, and that the lower courts' weighing of the evidence had been incorrectly tipped towards the petitioner.<sup>88</sup>

The conflation of the prima facie burden with the final preponderance of evidence standard is a doctrinal issue that improperly widens the net for abuse and lowers the final burden of proof, thus diluting due process for parents in family court. The use of rebuttable presumptions exacerbates this conflation by blurring the lines between the initial and final burdens. To rectify these errors, courts must shift towards the permissible inference model, ensuring a clearer, more consistent application of the burdens of proof, in line with the purposes set forth in the Family Court Act.

## V.

### A NOTE ON THE LIMITATIONS OF LEGAL LANGUAGE

Transforming a presumption into an inference is, of course, not a panacea. It is essential to pause and consider the potential pitfalls of focusing too narrowly on language without addressing the underlying practices that shape legal outcomes. For the inference to effectively rectify the legal errors discussed above, it must remain strictly a permissible inference. If properly applied, the permissible inference standard may not only be easier to rebut, but it should also increase the gap between the prima facie burden and the final burden of proof, reducing the frequency with which trial courts conflate these burdens. In at least a few cases from the 1970s and 1980s, courts employed the inference standard but effectively treated it as a rebuttable presumption.<sup>89</sup> Courts must be wary of this. One case from that era notes that "[a]lthough the establishment of a prima facie case does not shift the burden of proof, it does permit an inference, and in some cases, *so strong an inference that 'no reasonable man could fail to*

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87. *Id.*

88. *Id.*

89. *See, e.g., In re Edwards*, 335 N.Y.S.2d 575, 579 (Fam. Ct. 1972) (stating that parents must present "satisfactory proof to negate the prima facie case established by statute" or else "a finding of neglect will be made").

*accept it.*”<sup>90</sup> New and old cases have further muddled the issue by using both the inference and the presumption language.<sup>91</sup> These cases should serve as a cautionary reminder that merely changing language cannot resolve all underlying doctrinal issues. In fact, *Morejon* itself warned of the complicated nature of labels.<sup>92</sup> Still, a faithful application of the permissible inference standard would more accurately align with the legal framework laid out in *Morejon* and afford parents a more genuine opportunity to present their case and challenge the statutory inference.

## VI. CONCLUSION

This paper identifies several legal misapplications of *res ipsa loquitur* within the family regulation system. While family court has logically turned to this tort doctrine to address cases where direct evidence of wrongdoing may be inaccessible, particularly due to the young age of the children involved, family courts have erroneously applied this doctrine. Specifically, courts have misapplied *res ipsa* by relying on a presumption (rebuttable or not) rather than a permissible inference. This misapplication has contributed to an additional legal error: At the conclusion of a case, courts neglect to reassess whether the preponderance of the evidence standard has been met, effectively relying on the prima facie standard for the final burden of proof.

The consequences of this misapplication are significant, particularly for low-income Black and Brown families. The use of an improper standard may result in an increased number of abuse findings and the unnecessary or prolonged separation of families. Moreover, this approach further undermines due process protections in family

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90. *In re Tara H.*, 494 N.Y.S.2d 953, 958 (Fam. Ct. 1985) (emphasis added) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 40, at 229–30 (4th ed. 1971)).

91. *See, e.g., In re T.A.*, No. 21833–4/11, 2012 WL 745087, at \*7 (N.Y. Fam. Ct. Feb. 28, 2012) (“The evidentiary presumption . . . does not shift the overall burden of proof from Petitioner to Respondents; however, when evidence sufficient to activate the presumption has been presented, a finding can be made unless Respondents satisfy their burden of coming forward with an adequate explanation.”); *In re Edwards*, 335 N.Y.S.2d at 579 (first describing the Family Court Act as permitting “an inference of neglect to be drawn,” then referencing the standard as a “statutory presumption”).

92. *See Morejon v. Rais Constr. Co.*, 851 N.E.2d 1143, 1148–49 (N.Y. 2006) (“The dizzying array of formulations (from mandatory inferences to permissive presumptions), however, suggests that things would be far less complicated if we viewed the *res ipsa loquitur*/summary judgment issue without undue emphasis on labels and pigeonholes.”).

court prosecutions, which are already few and far between (a lower final burden of proof, no right to a jury, and fewer evidentiary protections, to name just a few).<sup>93</sup> Despite these reduced due process protections, the consequences for parents remain incredibly serious. Employing a rebuttable presumption, where appellate courts have established that a permissible inference is the correct standard, removes yet another layer of protection for families and continues to ease the path to an abuse finding for the petitioner.

Going forward, courts should apply the precedent established in *Morejon* to the family regulation system to ensure that *res ipsa* is used with a permissible inference rather than a rebuttable presumption. While this shift would mitigate some doctrinal errors, it is not a panacea. Courts must remain vigilant, carefully reviewing all evidence to ensure that the permissible inference does not inadvertently function as a rebuttable presumption. Furthermore, after the petitioners and respondents have presented their cases, courts must rigorously reassess the entirety of the evidence to ensure that the preponderance of the evidence standard has been properly met before making abuse findings. Only through such careful application of the law can we ensure more equitable and just outcomes in family regulation proceedings.

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93. See Eli Hager, *In Child Welfare Cases, Most of Your Constitutional Rights Don't Apply*, PROPUBLICA (Dec. 29, 2022), <https://www.propublica.org/article/some-constitutional-rights-dont-apply-in-child-welfare> [<https://perma.cc/36UZ-HJTG>] (discussing the inapplicability of Fourth, Fifth, and Sixth amendment protections in child welfare cases); see also Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense Against Family Policing*, 132 YALE L.J.F. 659, 666–69 (2022) (discussing lack of substantive and procedural protections for parents during often-coercive child welfare investigations).