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Adding this issue of the Virginia Journal to the seventeen that preceded it, we have presented scholarly profiles of more than 50 members of our faculty. The steady addition of outstanding scholars to our community is an enduring source of strength. The three colleagues whose work is discussed in this volume came to us through three different paths: Brandon Garrett began his career at Virginia as an entry-level professor; Kim Ferzan joined us as a lateral hire; and Jon Cannon came to Virginia and to teaching as a third career after decades in high-level government service and private practice. Each brings a distinct scholarly approach but each has been influential in important debates within his or her field. Equally important, each has contributed substantially to the internal flow of ideas within our intellectual community.

**JON CANNON** combines detailed practical, institutional, and theoretical insights into environmental law and policy, honed during his service in two senior posts at the Environmental Protection Agency. His scholarship focuses on how the EPA can adapt statutes enacted in the 1960s and 1970s—which were largely motivated by the presence of chemical pollutants in the air and water—to the more diffuse and complex environmental problems of the 21st century. He has written widely on watershed management, in which cooperative problem-solving among federal and state government agencies and the private sector has taken the place of command and control regulation. Cannon also studies the way in which cultural attitudes about the environment interact with the policy process, focusing in particular on the clash between individualism and the belief in human interconnectedness with nature.

**KIM FERZAN** wrestles with some of the most complex problems of human will and cognition underlying criminal law. Working within a retributivist framework, her writings analyze intent, belief, risk, motivation, and other determinants of desert and therefore of criminal culpability. Her criticisms of traditional conceptions of intention have influenced debates over hate crimes and the laws of war, among others. Ferzan has also written extensively on self-defense. She has paid particular attention to the difficult case of the non-culpable, but nevertheless potentially deadly, aggressor. Her work, characterized by precision and careful attention to philosophical underpinnings, is making a mark in criminal law theory.

**BRANDON GARRETT** is an extraordinarily prolific and visible scholar. He is one of the nation’s leading experts on both wrongful conviction and corporate criminal prosecution. Garrett has studied in detail the factors that lead to wrongful convictions. By immersing himself in trial records, police practices, and prosecutorial and defense strategies, he has generated important insights into what goes wrong. More importantly, he has identified reforms that can avoid the risk of imprisoning or executing innocent people, drawing the attention of police and courts alike. His work on corporate criminal prosecution also uncovers the bargains between prosecutors and defendants that result in plea or non-prosecution agreements and associated compliance efforts. His work has persuaded many commentators that prosecutors should focus more attention on individual wrongdoers.

Paul G. Mahoney
Dean
U.S. ENVIRONMENTAL LAWS enacted in the late 1960s and 1970s were successful in addressing a number of the pressing issues that gave rise to the modern environmental movement. But daunting issues remain, such as climate change, species loss, and watershed degradation, while the public debate about environmental law and policy is more polarized than ever. Jonathan Cannon’s perspectives on these issues grow from a career in environmental law that encompasses, in roughly equal portions, private practice, government service, and teaching and scholarship. This combination is unusual among environmental law scholars and helps give Cannon’s insights a distinctive balance and persuasiveness.

Cannon’s interest in the environment began with a youthful delight in the outdoors, which continues unabated into his seventy-first year. It grew with his attraction as an undergraduate English major to the English romantic poets Wordsworth and Keats and to American writers such as Thoreau and Whitman. Cannon’s undergraduate training as a critical reader of literary texts would later become instrumental in his distinctive interpretation of environmental texts, most notably the Supreme Court’s opinions in major environmental cases. In this aspect of his work, Cannon explores the significance of these opinions as cultural as well as legal texts. Equally important to Cannon’s scholarship was his decades-long apprenticeship as a lawyer in the private practice of environmental law and as a senior official in the U.S. Environmental Protection Agency, charged with shaping and implementing national environmental policy. Stemming from this experience, a second strain of Cannon’s scholarly work is a pragmatic account of how environmental policies and institutions work and how they can be made to work better. Each of these two streams of his work is explored below.
HOW DOES IT WORK
AND HOW COULD IT WORK BETTER?

Federal environmental law consists of thousands of pages of dense statutory material and tens of thousands of pages (and growing) of regulations interpreting and applying those statutes. This body of law governs a dozen or more separate regulatory programs. It is often likened to federal income tax law in its arcane complexity. Equally complex are the institutional mechanisms by which that law is carried out; these include not only the decision processes of the Environmental Protection Agency and other regulatory agencies but also the interventions of Congress and the White House, and intricate relationships with states and Indian tribes, which function as primary implementers of many of these laws. “To students who come to law school with a passion for the environment, this complexity can make the field of environmental law seem brittle and opaque, tempting them to abandon their passion for more intuitively accessible areas of the law,” Cannon said. Cannon has used his deep knowledge and experience in the field to unpack this complexity, diagramming how the laws and institutional actors work together, and offering suggestions for making environmental programs more efficient and effective.

Two early articles in this vein are largely descriptive, detailing the political economy of the EPA’s relationships with regulated entities, Congress, and the White House. These pieces focused on the ability of the EPA—an executive branch agency lacking a congressional charter—to control the nation’s environmental agenda. In one, Cannon analyzes the EPA’s bargaining with regulated entities to satisfy its major constituent groups and protect against overruling actions by Congress and the White House (“Bargaining, Politics and Law in Environmental Regulation,” in Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe (Kluwer Law International, 2001)). He revealed the EPA’s use of its interpretive discretion as a bargaining chip in negotiations with industry that produced net environmental benefits (thus pleasing environmentalists) while reducing compliance costs (thus pleasing industry) and challenging stereotypes of bureaucratic overreaching (thus blunting congressional reform efforts and minimizing the risks of White House oversight). In this, the EPA undertook a “complex dance with its two political overseers” that served to protect its separate interests as “policy-maximizer.”

A second piece documented the EPA’s success as a political actor in fending off congressional amendments that would, in its view, have weakened its regulatory authority. In the process, Cannon argues, the agency also made the political system more responsive to the public’s views (“EPA and Congress (1994-2000): Who’s Been Yanking Whose Chain?,” 31 Envtl. L. Rep. 10942 (2001)). As the new Republican majority advanced its “Contract with America” in the 104th Congress, the EPA mobilized public opinion against the deregulatory legislation and successfully pressured the White House to take a more forceful posture against it. Administrative agencies like the EPA are conventionally understood as agents of the political branches, subject to their direction and control. In this case, however, the EPA used information, expertise, and reputational resources that were uniquely within its possession to shape the political landscape, ultimately moving the White House and Congress in its direction. This behavior might be cause for concern—a rogue agency getting its own way at the public’s expense. But opinion polls of the period showed that the EPA’s position was in accord with the views of a broad majority of Americans. “Rather than frustrating the people’s preferences, the EPA’s political maneuverings arguably helped to bring those preferences to bear on the actions of elected officials,” Cannon said.

Cannon’s assessments of major environmental programs have produced influential recommendations for reform. In “Adaptive Management in Superfund: Thinking Like a Contaminated Site,” 13 N.Y.U. Envtl. L.J. 561 (2005), he captured the awkward predicament of the gargantuan Superfund, a federal liability and funding program to cleanup the nation’s most severely contaminated sites. When Superfund was enacted by Congress in 1980 and substantially amended in 1986, the expectation was that sites would be cleaned up quickly and completely, leaving no residual contamination to complicate their future use. In fact, as it turned out, Superfund sites took much longer (and cost much more) to cleanup than initially anticipated, and most sites had contaminants remaining even after cleanup measures were taken, which resulted in a need for long-term monitoring and review. Cannon used concepts of adaptive management, developed as a tool in restoring damaged ecosystems, to shape recommendations to the EPA for making Superfund more responsive to the realities on site. These recommendations included promoting collaborative stakeholder processes to guide long-term management of sites, improving...
monitoring and feedback mechanisms focused on crucial unknowns, and employing systematic policy-learning for the entire portfolio of sites. The agency has adopted this innovative application of adaptive management principles in its own program reviews (EPA, Superfund Remedial Program Review Action Plan (FY 2014)).

Cannon also undertook a rigorous analysis of federal water quality programs in “A Bargain for Clean Water,” 17 N.Y.U. Envt’l L. J. 608 (2008). Finding that almost forty years after the adoption of the Clean Water Act, between 40 and 50% of the nation’s waters still had water quality problems, he searched the statute and its implementation to understand why. The explanations he found included the lack of regulatory authority over polluted runoff from agriculture and other non-point sources, which caused or contributed to more than half of the nation’s water quality problems. This regulatory void contributed to the weakness of water quality trading schemes that could promote fair and efficient allocation of pollution abatement responsibilities. Also, farm bill subsidies that could work to alleviate the non-point source problem in the absence of regulation were not well-targeted.

Cannon combined his policy analysis with an assessment of the political viability of possible reforms. The result was a set of incremental steps that might be taken to address each of the shortcomings, among them establishing enforceable expectations for non-point pollution sources and shifting to a more performance-based, cost-effective allocation of subsidies for non-point source controls. Cannon qualified his recommendations with an assessment of the political barriers to adopting them and the inherent limitations on market-based approaches in the local and regional settings in which many water-quality problems occur. His prescriptions were incorporated in a comprehensive proposal for reform of environmental laws (David Schoenbrod, Richard B. Stewart, and Katrina Wyman, Breaking the Logjam: Environmental Protection That Will Work (Yale University Press, 2010)).

Cannon’s work on institutional design goes beyond federal regulatory programs to multi-tiered watershed programs. Watersheds are the aquatic and associated terrestrial ecosystems encompassed within drainage basins or sub-basins—for example, the 64,000-square-mile basin of the Chesapeake Bay. “Because they address an assortment of land and water resources subject to both public and private control, watershed management efforts typically depend on collaboration among government agencies, nongovernmental organizations, and the private sector,” Cannon said. Although they may incorporate federal programs, such as the Clean Water Act, these programs emphasize the federal government’s role as facilitator or enabler, rather than top-down decisionmaker. In several articles, Cannon mined the experience of watershed programs, with a specific attention to the Chesapeake Bay Program, in the search for keys to effective design of these complex institutions (“Choices and Institutions in Watershed Management,” 25 Wm. & Mary Envt’l L. & Policy Rev. 369 (2000); “Checking in on the Chesapeake: Some Questions of Design,” 40 U. Richmond L. Rev. 1131 (2006); “Sustainable Watersheds,” 107 Mich. L. Rev. First Impressions 74 (2008)). A major challenge, he concluded, was navigating between the Scylla of undue centralization and the Charybdis of parochial interests that threaten overuse of the ecological commons. Cannon identified a potential role for the federal EPA—providing accountability for individual actors within a cooperative framework of agreed-upon goals. That approach has since been implemented in the Chesapeake Bay, through adoption of bay-wide water quality standards and implementation plans. Moreover, the Third Circuit Court of Appeals recently upheld this framework in the face of legal challenge.

LAW AND MEANING—THE CULTURAL SIGNIFICANCE OF ENVIRONMENTAL DECISIONS

The second dimension of Cannon’s work addresses the interplay of culture and environmental law and policy. Cannon sees competing paradigms of nature and people’s relation to it as deeply woven into our political and legal discourse. Federal environmental statutes give concrete form to these paradigms; political debates and conflicting judicial interpretations reharre the continuing tension between them.

In an early work, Cannon and a co-author traced the shape and influence of environmental worldviews in the speeches of U.S. presidents on the environment. They discovered recurring rhetorical patterns—themes, images, and stories—that were remarkably consistent among presidents of different ideologies and political agendas (“Presidential Greenspeak: How Presidents Talk About the
Environment and What It Means” (with Jonathan Riehl), 23 Stan. Envtl. L.J. 195 (2004). (The study extended through the first term of President George W. Bush.) The presidents used this common symbolic stock in their efforts to reconcile apparently conflicting values, claiming that environmental protection was consistent with continued technological progress and economic growth. This insight led the authors to ask whether there indeed might be a consensus environmentalism in the U.S. that crossed political lines, although they also detected within the presidential discourse competing cultural values that could send environmental policy in very different directions.

Cannon’s subsequent work on the cultural dimensions of the Supreme Court’s environmental decisions continued this line of inquiry, although rather than the consensus suggested by the study of presidential speech, it pointed less optimistically to a growing disensus on environmental values. In several law review articles and his new book, Environment in the Balance: The Green Movement and the Supreme Court (Harvard University Press, 2015), Cannon used beliefs and values associated with the environmental movement as an interpretive lens to assess the cultural significance of the Court’s major environmental cases. For Cannon, the cultural meanings of the cases were not separate from the law, but grew from the interplay of legal doctrine and reasoning with the values and beliefs of the justices drawn from society. “The interpretive challenge was that the justices typically do not acknowledge the background beliefs and values that shape their approach to legal questions, representing themselves instead as ‘finding’ the law through neutral principles and logic,” Cannon said. To meet this challenge, Cannon combined conventional legal analysis, focused on the structure and content of legal argument, with attention to the imagery, tone, and narrative elements of the opinions.

Cannon drew on the work of social scientists and the literature of the environmental movement to identify the beliefs and values associated with environmentalism and its cultural antithesis. “The new ecological paradigm espoused by most environmentalists emphasizes the interconnectedness and fragility of natural systems, the need for collective restraint in protecting those systems, and the desirability of maintaining harmonious relations with non-human nature. This paradigm often expresses itself as resistance to industrial-scale technology and economic markets,” Cannon explained. (Pope Francis’s Laudato Si embodies it, he added.) “The competing dominant social paradigm emphasizes individualism, entrepreneurial effort, technological mastery, and economic growth. In contrast to the interdependence and fragility of the environmentalist worldview, the dominant paradigm projects an atomistic model—a world of discrete features and events of largely individual or local significance, a world that is resilient rather than fragile.”

In a focused analysis of thirty of the Court’s most important environmental cases since 1970, Cannon found that a majority of the Court sometimes gravitated toward the ecological paradigm and sometimes toward the dominant paradigm. Decisions from the early 1970s shared the urgency of environmentalist concerns: for example, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (reversing the Secretary of Transportation’s decision to allow an interstate highway to bisect an urban park) and United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (extending standing based on attenuated causal linkages between local streams and forests and national freight rates for recyclables). The Court’s early embrace, however, soon gave way to a more neutral stance and, in some cases, to skepticism and even animosity toward the environmentalist worldview, as in the castigation of ecologically based theories of standing in Lujan v. Defenders of Wildlife (Lujan II), 504 U.S. 555 (1992).

Cannon’s thirty cases included major victories for environmentalists, such as Massachusetts v. EPA, 549 U.S. 497 (2007), in which the Court not only vindicated environmentalists’ legal claim that the EPA had authority to regulate greenhouse gas emissions under its existing Clean Air Act but also conveyed an underlying sense of the urgency of combatting climate change. On balance, however, Cannon concluded that the resistance to environmentalist beliefs and values in these cases overshadowed the gains for environmentalists. As he put it in his book, “Much in these cases presents as a cultural rear-guard action—the importation of pre-ecological values and practices into judicial doctrine and the statutes of a new ecological era.” Even more importantly for his analysis, beneath the surface of the diverse outcomes of these cases, persistent divisions among the justices were apparent along the fault line of competing cultural paradigms. Among sitting justices, conservatives such as Chief Justice Roberts and Justices Scalia, Thomas and Alito have tended to align in environ-
mental cases with the dominant paradigm; liberals such as Justices Ginsburg, Kagan and Sotomayor with the ecological. In the middle are Justice Kennedy, a conservative who has nevertheless been responsive to the ecological model in important cases, and Justice Breyer, a liberal who has expressed concern about extending environmental protections regardless of costs, as evidenced by his separate opinions in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) and *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

In Cannon’s analysis, this division among the justices replicates the progress of environmentalism in society and supports the theory that in becoming widely institutionalized, environmentalism galvanized its cultural opposition. Passed by large majorities from both parties, the demanding federal environmental laws of the 1960s, 1970s and 1980s suggested a basic reordering of societal values and priorities. By the 1990s, however, it was increasingly clear that if there had ever been a consensus environmentalism, it was not a complete or enduring one. Cultural resistance to environmentalist gains organized itself around themes of economic freedom, property rights, and resource use, and found voice in the wise-use and property movements. “The rise of these movements was associated with a broader cultural sorting,” Cannon said, “as environmentalism became more closely identified with the Democratic Party, and the Republican Party became more consistently and assertively the defender of the dominant paradigm.” Although the environmental movement’s early surge, which included the passage of the major federal environmental laws, had strong public support, the Court and other institutions worked over time to find expression for competing values that were subordinated at the surge but remained deeply engrained in the culture.

Finding that the resurgence of the dominant paradigm has stymied the environmental movement, sapping its ability to force progress on pressing issues that remain, Cannon spends the last portion of his book investigating possible futures for the movement that might overcome the stalemate. Options put forward by other commentators range from radically reframing the movement, with the goal of wresting it from the clutches of liberals, to radically transforming society, in the form of a liberal revolution covering every aspect of public life—from the electoral process, to wealth distribution, consumption, and corporate governance. Cannon argues for more provisional and plural responses that test new practices for their ability to create alliances across existing cultural divides or perhaps to create new paradigms entirely.

The pervasiveness and irreversibility of human impacts—a condition that some argue warrants placing us in a new geologic era, the Anthropocene—is causing environmentalists to question their received concepts of nature and the proper role of humans within it. This new awareness suggests changes in our understanding of what relationships are possible and of the role that technology and markets should play securing those relationships. Cannon agrees that the movement needs to come to terms with the Anthropocene (and is in the process of doing that), but he also concludes that it would be a mistake to abandon the traditional wellsprings of the movement—its deep sense of connection “to the natural processes central to all life.” As he puts it in his book’s concluding chapter, “The continued tenacity and power of the movement may depend on keeping its roots deep in the cultural soil from which it grew, even as its expressions take on new adaptive forms.”
EXCERPTS

ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT

(Harvard University Press, 2015)

INTRODUCTION

This is the story of the modern environmental movement’s encounters with the United States Supreme Court. It is a story of the movement’s efforts to transform the culture of the country and, particularly, the law culture embodied by the Court. The results of these efforts are recorded in hundreds of the Court’s decisions in environmental cases over the last four decades but are most vividly revealed in a smaller set of decisions that have special cultural resonance as well as legal significance. These cases show how environmentalism has in important ways affected the Court’s deliberations and been affected by them.

Although diverse, the modern environmental movement has cohered around a discrete set of beliefs about the way the world is and how we should value it. Environmentalists embrace an ecological model of the world—one in which human and natural systems are closely interconnected and human actions affecting one part of a system are likely to have harmful effects that may be widespread in place and time. Environmentalists typically assign special value to the environment, view the threats to it as grave, and argue that efforts to protect it are entitled to high priority among competing concerns. They often express a sense of crisis and urgent need for action. Substantial protective measures must be taken, and quickly, often in the form of regulations that limit individual choice, use of technology, and economic growth. At their most ambitious, environmentalists seek not only protective policies but also a transformation of societal institutions and practices to reflect their beliefs and values. Values dominant in the national culture, such as individualism, technological mastery, and commitment to economic growth, resist that ambition.

What follows is a perspective on the success of this transformational enterprise through the lens of the Supreme Court, using its environmental decisions to probe the cultural sources of our resistance as well as our receptivity to environmentalism. In diverse cases over the last four decades, advocates have pressed the Court to shape the law to accommodate environmentalist tenets. Their arguments and the Court’s response to them are framed in the specialized language of legal discourse. But a careful reading of these cases shows that the justices’ deliberations reflect deep-seated, extralegal beliefs and values, both for and against environmentalist claims.

... Opinions in these cases reveal sharply divergent views among the justices at the level of cultural as well as purely legal debate. For example, differences among the justices on legal issues such as standing, federalism, land-owners’ rights, and the scope of regulatory authority in environmental cases often reflect different levels of acceptance of the environmentalists’ ecological model and the values associated with it. Similarly, varying degrees of sympathy with claims for the special importance of environmental concerns color the justices’ interpretations of institutional orderings and legislative priorities. These persistent divisions among the justices are consistent with other evidence that the environmental movement has yet to achieve its transformative aspirations. Opposing cultural elements have endured and remain deeply embedded in our institutions and practices. This unresolved cultural conflict has produced a stalemate in which the movement has been largely successful in maintaining its historic gains but has struggled to make progress on the issues that remain.

What might this stalemate mean for the future of environmentalism, at a time when the movement is undergoing critical self-analysis and facing environmental challenges, such as climate change, of breathtaking scope and complexity? One choice for environmentalists is to double down on the cultural commitments that have brought them this far. The movement has already succeeded in changing political institutions, including monumental legislative enactments in the 1960s, 1970s, and 1980s, and might make further
inroads as circumstances change: for example, improved scientific understanding and public acceptance of the causes and risks of global climate change. But the abiding resistance to environmentalist claims among a number of the justices illustrates the difficulty of simply overwhelming the cultural divisions that limit the movement’s success. A second choice is to neutralize the cultural divide by broadening the movement’s cultural appeal, through such means as increased reliance on markets and emphasis on economic growth, transformative technologies, and active management of natural systems. These and other innovations offer the movement risks as well as rewards—indeed, they may sever the movement from the very connectedness to nature that has powered it in the past. The book encourages a cultural pragmatism that can engage a range of perspectives in the search for beneficial outcomes while staying connected to ideas about the place of humans in nature that have been crucial to the movement’s energy and purpose.

MASTERY, TECHNOLOGY, AND NATURE

Environmentalists have resisted mastery values expressed through technological manipulation of the environment and economic growth. In his dissent in Sierra Club v. Morton, Justice Douglas represented these values as the “bulldozers of ‘progress,’” poised to “plow under all the aesthetic wonders of this beautiful land” and reduce “priceless bits of Americana ... to the eventual rubble of our urban environment.” Virtually all of the contested actions and policies in this book’s selected cases were variants of the “bulldozers of ‘progress’”—from dams, highways, and nuclear plants to land development, mining, and industrial emissions. In opposing them, environmentalists sought more harmonious relations with nature, reducing the human footprint and limiting technological intrusions. Mastery for environmentalists, however, is less straightforward than this account suggests.

Reconsidering the Antimastery Narrative

The founding text of the movement, Rachel Carson’s Silent Spring, begins with her “A Fable for Tomorrow,” depicting a rich and harmonious world threatened by death-dealing synthetic chemicals. Critics have attacked this narrative as a harmful romanticization. Nordhaus and Shellenberger, for example, argue that it falsely depicts nature as Edenic and the natural impulse of humans to control it as sinful, aping the myth of the fall in the book of Genesis. “It is this reality—human agency—that most bothers environmentalists like Carson,” they write. “For her, human attempts to control nature inevitably end in tragedy.” But Carson’s actual response to the crisis she depicted was more complex—and much less antimastery—than this criticism presumes. She did not urge retreat to a prechemical past but instead encouraged the development of a “science of biotic controls” that could offer comparable protections for agriculture with fewer ecological risks than chemical poisons: for example, chemical sterilization to wipe out the screwworm fly in the southeastern United States. This was hardly a return to Eden.

The valence of mastery has only become more complex with increasing awareness of the pervasiveness of human impacts on the environment and the recognition that technological and economic development will be essential to manage at least some of those impacts, most notably climate change. In The End of Nature, environmental activist Bill McKibbin ruefully argued that anthropogenic climate change pervaded nature in a way that made human dominance complete. Although we had intruded on nature before, “we never thought we had wrecked [it] ... we never really thought we could.” Climate change, however, changed the meaning of nature from something reassuring and secure to something contingent, subdued. On the basis of a comprehensive tracing of the human imprint across ecosystems and landscapes, the Nature Conservancy’s (TNC) chief scientist, Peter Kareiva, and his colleagues confirm that “virtually all of nature is now domesticated.” By “domesticated,” they mean nature “exploited and controlled.”

If nature is thoroughly domesticated, the question for environmentalists may shift from how we put it back or set it free to how we manage it to best effect. This shift in perspective revealed itself dramatically in the split among environmentalists over the Cape Wind project off Nantucket. Environmentalist Robert F. Kennedy Jr. proclaimed his support for wind power but drew the line at a project that would compromise the beauty of his beloved Cape Cod. He framed the case against Cape Wind as an antimastery narrative,
emphasizing the industrial scale of the project and its violation of the Massachusetts coastal environment. “130 giant turbines whose windmill arms will reach 417 feet above the water [will] be visible for up to 26 miles,” “hundreds of flashing lights ... will steal the stars and nighttime views,” and “a transformer station rising 100 feet above the sound would house giant helicopter pads and 40,000 gallons of potentially hazardous oil.” Kennedy compared siting the project on Nantucket Sound to building a wind farm in Yosemite Park. The Massachusetts coast, while “far from pristine,” was itself a kind of wilderness, necessary for the “spiritual renewal” of people in nearby cities, like Boston, and vulnerable to the wind farm’s disruptions.

Nordhaus and Shellenberger criticized mainline environmental groups, such as NRDC, for not taking Kennedy, one of their own, to task; Kennedy’s opposition, they argued, was selfish NIMBYism. But a number of environmentalists did object to Kennedy’s stance, including Bill McKibben, probably the nation’s most prominent environmentalist and climate change advocate. In an open letter to Kennedy, McKibben and others wrote that the adverse impacts of Cape Wind were trivial when measured against the need to address the climate change crisis, which “will require the dramatic transformation of America’s energy economy.” They offered a future not of technological and economic restraint but of “cutting-edge technologies, and rewarding high-paying jobs.” In his 2010 approval of Cape Wind, Secretary of the Interior Ken Salazar celebrated its grand scale, job creation, and carbon-reducing benefits while taking steps to reduce local disruptions, including “visual impacts from the Kennedy Compound National Historic Landmark.”

“OLD GREENS VERSUS NEW”

Reconsideration of the antimastery narrative extends beyond climate change and embraces a collection of revisionist views on technology, nature, and the goals of environmental stewardship. Mark Lynas, a self-described environmentalist and former advisor to the president of the Maldives on climate change, argues in his book The God Species that Earth is stressed across a number of its major system processes, and humans have transgressed the boundaries of three of them: biodiversity loss and excessive nitrogen (eutrophication) in addition to climate change. To reestablish sustainable practices in these areas and avoid exceeding other planetary boundaries, Lynas writes, we must reject “the standard Green creed ... that playing God is dangerous. Hence the reflexive opposition to new technologies.... My thesis is the reverse: playing God (in the sense of being intelligent designers) at a planetary level is essential if creation is not to be irreparably damaged or even destroyed by humans unwittingly deploying our newfound powers in disastrous ways.”

Lynas seems intentionally to challenge Leopold’s foundational trope: god-like Ulysses is called not to humble himself as a “mere citizen” of the biotic community but to assert his prowess, albeit with a knowledge of the natural limits of the systems within which he must live. This recast stewardship urges the development and use of technologies and economic strategies across a range of planetary problems. These tools are to be used wisely within the real constraints that nature imposes, but their purpose is not to establish a prelapsarian state. It is to secure the conditions for sustained human flourishing in a nature unalterably different from that which would have been if the “god species” had never appeared.

Like Lynas, new environmentalist Peter Kareiva challenges the antimastery narrative by undercutting the movement’s received wisdom. In a 2011 lecture, he provocatively marked the cultural break with traditional environmentalists by disparaging the views of prophets of the movement such as Thoreau and Abbey. Thoreau and Abbey were hypocrites in their sanctification of pristine nature: Thoreau’s mother did his laundry while he lived at Walden Pond; Abbey privately expressed his loneliness while publicly celebrating the “loveliness” of his wilderness experience. Although he has been kinder to Rachel Carson, lauding her role in bringing about needed environmental protections, Kareiva dismisses her “fragility trope” (with its corollary of apocalypse) as inconsistent with data showing nature’s resilience.

The promise of these change initiatives is not only a more pragmatic approach to looming environmental challenges but also a cultural inclusivity that could lead to broader acceptance of the scientific basis for urgent action as well as agreement on forms that action should take. The risk is that they will dissolve the environmentalist perspective into an undifferentiated sea of competing interests and
value preferences. In a world of trade-offs, one may question what remains of environmentalism's transformative aspirations. It is unclear, in the end, what Shellenberger, Nordhaus, and their followers offer other than the cultural status quo and the indifferent environmental outcomes that we might expect from it.

My own view is that although the movement needs to come to terms with the Anthropocene (and is already doing that), it would be a mistake to abandon its traditional wellsprings, as Kareiva and others have urged. There is power in the idea of nature, although we understand that nature is, and perhaps has been since humans appeared in numbers on the planet, beyond recall in a “pristine” state. “People feel that nature matters and act on that conviction.” That primary connection to nature has set environmentalism apart from the other great social movements of our time. It has rallied the movement's adherents. To give up that idea entirely is to abandon the allegiances that have powered the movement—to show the white flag, as Wilson quipped—and abdicate its enterprise of deep change.

A cultural synthesis is plausible. Seminal figures such as Aldo Leopold and Rachel Carson offer bridges between the old and the new. Leopold was an advocate of wilderness protection, but he also valued working landscapes, including the Wisconsin farm that he brought back into productive use from past abuse and neglect. His land ethic is the fount of eco-centric theories that would limit human intervention. But it also lends itself to anthropocentric interpretations. Carson defended an idyllic harmony from the harms of pesticides but envisioned a chemically managed future for modern high-yield agriculture. Contemporary environmentalist writer and activist Bill McKibben wrote *The End of Nature* but remains an advocate for wildness in multiple forms. “For me,” he writes, “the idea that there’s no such thing as pure wilderness has made the relative wild all the more precious.”

The synthesis may take the form of benign mastery: the world is what we make it, but we make it out of concern not only for ourselves. Benign mastery need not imply allegiance to intrinsic value theories, but it does imply an attitude of respect for nature in all its forms—our own bodies included. Justice Douglas's *Sierra Club* dissent imagined an assemblage of species of the Mineral King Valley “standing before the Court” in their own right. But because we cannot speak with the environmental other, there may be little practical difference between this view of an egalitarian council of life and the more anthropocentric but empathetic views of Justice Blackmun's dissent or even the Court's opinion. These views all support a more generous consideration than a narrow utilitarian or instrumentalist perspective would grant. The challenge going forward would be to deepen and broaden that consideration to encompass diverse environments, technologies, knowledge systems, and cultural idioms. In this version of the movement's future, as Jedediah Purdy wrote, the triad of Leopold's land ethic—“integrity, stability, and beauty”—stand not as “qualities of unchanged ‘wild’ nature, but goals for active management, both of wilderness and of densely inhabited places.”

One might argue that continuing the emphasis on our connectedness to nature is not based on reason, but flatters instead the movement's mystical or quasi-religious side, risking romantic excess or policy irrelevance. Even reason has its limits, however. It cannot by itself force change beyond prevailing conventions of reasonableness. Movements may appeal to reason; they may use the implements of reason, such as CBA, to advance their aims. But they are not powered by reason, and reason may arbitrarily limit their horizons. This was the point of David Brower, who knew something about what made a movement, when he claimed provocatively that “objectivity is the greatest threat ... today.” The continued tenacity and power of the movement may depend on keeping its roots deep in the cultural soil from which it grew, even as its expressions take on new, adaptive forms.

**A BARGAIN FOR CLEAN WATER**

*17 N.Y.U. Envtl. L.J. 608 (2008)*

This paper reviews the effectiveness, efficiency, and political viability of federal water quality programs and possible reforms of those programs. The paper’s primary focus is the conundrum of what to do about pollution from non-urban stormwater runoff—an issue that has long been identified as crucial to achieving the nation’s avowed water quality goal but that remains fundamentally unresolved.

...
To further cost-effective implementation of national water quality goals, the CWA should be applied or, if necessary, amended to: require states and localities in problem watersheds to develop water quality implementation plans applicable to non-point source as well as point source dischargers and facilitate cost-effective implementation on a watershed basis by increasing the flexibility and scope of trading where possible.

... Unregulated nonpoint source pollution is solely responsible for failure of 30 to 50 percent of U.S. waterbodies to meet water quality standards and is a contributing factor in an even larger percentage. The waterbodies seriously and adversely affected by non-point source pollution include major interstate watersheds, such as the Mississippi River Basin/Gulf Coast complex, which drains two-thirds of the lower forty-eight states, the Chesapeake Bay, center of a five-state watershed, and the Great Lakes, fed by portions of eight states and Canada. For waters such as these, some federal involvement is appropriate and likely necessary for effective control of non-point as well as point source pollution to achieve desired water quality.

... Proponents argue the advantages of market-based approaches over competing instruments in cost-effective attainment of environmental goals, transparency, stimulating technology innovation, and reducing administrative costs. The classic market-based instrument is the cap-and-trade program, in which government determines a “cap”—a maximum desired amount of discharge of a pollutant in a geographic area—and creates allowances in the amount of the cap. The allowances are auctioned or otherwise distributed to the pollution sources in the area, each of which is prohibited from discharging in excess of the allowances it holds. Sources may freely trade allowances among themselves. Sources with relatively high pollution reduction costs would be expected to purchase additional allowances from sources with relatively low reduction costs, with the result that the area reductions represented by the cap would be achieved in the most cost-effective manner. Although cost-effective allocation of pollution reduction among sources could be attempted administratively, cap and trade relegates the allocation to the decisions of source managers in a market setting. Proponents argue that this mode of allocation is superior because the source managers have better information about their costs and sharper incentives to reduce their costs through reallocations and because the costs of administering the program are less.

EPA seeks to approach this model in its Water Quality Trading Policy. [But] the current trading policy ... does not require that discharges from non-point sources be capped or otherwise limited. The system is only partially capped, as only point sources must hold allowances (permits) in order to discharge. The ability of uncontrolled non-point sources to generate credits risks the problem we identified with subsidies—encouraging activities that the policy seeks to discourage. Also, the failure to limit non-point source discharges means that one of the major advantages of a cap-and-trade system—assurance that a desired environmental endpoint will be met using limited allowances—is not realized. Under the current trading policy, non-point sources may generate and sell pollution reduction credits, after voluntarily meeting “baseline” expectations, but those reductions may be offset by increased discharges by other non-point sources not subject to controls.

Failure to cap or otherwise restrict non-point sources may also discourage trading by raising the threshold for trading by non-point sources: in order to begin to generate pollution reduction credits for sale, a non-point source must first undertake to meet baseline expectations, which are otherwise voluntary and, to the extent not underwritten by subsidies, may be costly to the source. Moreover, in the absence of a TMDL implementation plan specifying what measures are needed to meet the non-point source allocation, baseline expectations may be quite unclear.

... At least for large watersheds with systemic water quality problems, where market-based approaches offer the greatest promise, the ultimate objective would be a cap-and-trade system fully integrating point and non-point sources. But the feasibility of that objective remains subject to a number of questions. These questions include: limitations on the scope of watershed trading due to the characteristics of aquatic systems and the effects of pollutants within those systems; uncertainties in measuring or estimating the actual amounts of pollution flowing from individual non-point sources over time; and the transaction costs associated with trading, which have the potential to swallow the savings achieved. These concerns may prevent the
broad scale success of water-quality based trading and force consideration of alternatives, such as mandating management practices for non-point sources in watersheds not meeting water quality standards or, if that proves still to be politically infeasible, abandoning current national water quality goals as not reasonably attainable.

CONCLUSION

The CWA is stuck. There is substantial public support for further progress toward the goals of the nation’s water quality program and evidence that further progress could be made for lower marginal costs than much of the progress to date. And yet there is a lack of systematic progress and even, in some of the country’s premier watersheds, evidence of slipping backward as the effects of urbanization and more intensive agricultural uses swallow the gains of advanced point source controls. The sole regulatory focus on point sources becomes increasingly inefficient with continued efforts to achieve water quality goals, and to the extent that it foists disproportionate burdens on the point source sector is also unfair. Trading programs struggle under restrictions placed on the scope of trading by point sources and failure to establish requirements for the non-point sector.

The analysis has focused on the federal role, but the great majority of the policy making and implementation must be done by state and local stakeholders. The goal, ultimately, is a watershed-based system in which non-point sources would bear obligations (and opportunities) comparable to their point source counterparts and in which, to the extent feasible, allowances would be traded freely among point and non-point sources.

ADAPTIVE MANAGEMENT IN SUPERFUND: THINKING LIKE A CONTAMINATED SITE

INTRODUCTION

Over the last three decades adaptive management has emerged as one of the most promising innovations in natural resource management and environmental regulation. Yet the possible benefits of this approach for Superfund, which is among the Nation’s most expensive and controversial environmental programs, have not been comprehensively explored.

The Article concludes that, in the complex and uncertain world within which it must operate, Superfund does have something to learn from adaptive management. Superfund would work better, adaptive management principles suggest, with five changes in the framing and management emphasis of the Superfund program:

1. EPA should adopt a broad and flexible view of the public interest affected by Superfund sites. This expanded notion of the public good would encompass not only the values made explicit in the Superfund statute, such as environmental protectiveness, but also other values that emerge from consultation with those most affected by a site’s disposition. It would give future use of sites a central importance in the Agency’s decisions.

2. EPA should promote and monitor institutional innovations, including collaborative stakeholder processes, to clarify and order values in deliberations on alternate futures for the site.

3. In the lengthy process of site study, remediation and post-remedial review, EPA should improve monitoring and feedback mechanisms focused on crucial unknowns or uncertainties at the site and revisit and adjust prior decisions as warranted in light of new information. In particular, the Agency should improve its information gathering and review of anticipated future uses of the site in tandem with its planning, implementation, and review of cleanup actions.

4. Acknowledging the ability of players in both the public and private sectors and at multiple levels of government to affect out-
comes at the site, EPA should foster the integration of decisions across sectors and jurisdictional scales.

5. EPA should employ conscious policy learning in its management of the entire portfolio of sites. It should consider framing program policies on controversial issues or questions involving scientific or technical uncertainty as experiments and commit to systematic recording and analysis of program experience as a basis for review and change.

More generally, the Article recommends that the Agency embrace adaptive management principles in administering Superfund. Superfund as currently implemented, including recent agency initiatives in several of the areas mentioned above, provides some support for an adaptive approach. But “adaptive management has not yet been incorporated into the [cleanup] process as a whole,” nor has Superfund adopted it as a management guide. Systematic application of adaptive management principles will be necessary to realize the full potential of this approach.

IV. HIERARCHICAL LINKAGES: INTEGRATING ACROSS SCALES

Adaptive management attends to hierarchical linkages, in both natural and human systems. It calls on EPA and others who make decisions affecting Superfund sites to locate their understanding of the site’s physical and biological resources in the larger physical and biological systems to which they belong. It also calls on decision makers to understand their place within the institutional hierarchy that affects the site. Because Superfund sites— as distinct from other categories of land generally managed by private markets and local regulation—experience a substantial federal presence, the hierarchical considerations affecting these sites are both unusual and complex.

The federal presence at nationally listed sites and other contaminated sites warranting emergency response serves important functions, but the possible theoretical justifications for that presence do not provide overwhelming support for federal hegemony. The interests and capabilities of states, localities, and private parties in the management of Superfund sites justify a substantial and ongoing role for them in site-related decision making. Typically the benefits of cleaning up and redeveloping a Superfund site are realized predominantly within the state and indeed within the local jurisdiction in which the site is located. A significant portion of the costs of cleanup and reuse are also likely to be felt within the state and the locality. Even if federal funds are used for cleanup, spreading most of the remedial costs nationally, the state remains obligated for a share of those costs and for long-term operation and maintenance costs as well. Moreover, the land use aspects of Superfund sites fall within the traditional purview of state and local regulation. Accordingly, adaptive management in Superfund site management suggests that EPA invest heavily in processes to elicit the preferences of state and local stakeholders throughout its involvement at the site—with particular emphasis on the community where the impacts of site activities will be concentrated—and to facilitate integration of the results into federal, state, and local decisions affecting the site.

V. ADAPTIVE MANAGEMENT OF THE SUPERFUND SITE INVENTORY

Adaptive management principles are also applicable to EPA’s management of the Superfund site portfolio as a whole. Program level issues that might benefit from continuous learning include what remedies work best in particular types of sites or with particular types of contaminants; what remedies work best with specific types of land use; what community involvement techniques are most effective in eliciting useful and reliable information about community preferences; how best to integrate decisions across private and public sectors and across federal, state, and local jurisdictions; and what the relevant contingencies are and how best to address them.

Institutional learning has been going on since the program began, but much of it has been episodic and reactive. EPA could improve Superfund policy learning program-wide by acknowledging and addressing complexity and uncertainty in program implementation; framing policies to test hypotheses about how the program might work better and carefully monitoring their implementation; and, even more fundamentally, systematically monitoring and recording experience at sites as a basis for ongoing review.
and adjustment of national policies. The last of these—generating and recording site information—is crucial for continuous learning, and it is an area of particular difficulty for Superfund. Despite the existence of various Superfund databases, Katherine Probst and Diane Sherman found that “it is difficult to obtain reliable information on key attributes for [NPL] sites” without talking to regional staff directly involved with the site. Well-developed case studies of Superfund site decision making are scarce. ... There are also few well-developed accounts of the post-ROD process, including remedy review and reuse decisions. The absence of such accounts makes it very difficult to determine, among other things, frequently occurring contingencies and the most effective responses or moderating measures for those contingencies for the Superfund universe as a whole.

Probst and Sherman recommend that the Agency develop a core set of data for each site that includes “important measures of progress as well as key site attributes” and “that meets the needs of the full panoply of stakeholders.” They see a consistent, well-maintained site monitoring and reporting system not only as a means of improving management of particular sites but also as a source of aggregated data for improving overall program efficiency and effectiveness. Similarly, the recent report of the Superfund Subcommittee of EPA’s National Advisory Council for Environmental Policy and Technology (NACEPT) recommended that EPA “develop and implement a system to ensure clear, transparent dissemination of a core set of data for all NPL sites and Superfund program activities.” Properly detailed, this data could provide the basis for more effective integration of diverse stakeholder perspectives within Superfund’s complex hierarchical setting.

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BOOKS


ARTICLES


KIMBERLY KESSLER FERZAN fell in love with criminal law theory during her second semester of law school. That spring, she took both Criminal Law and an elective titled “Legal Personhood.” The latter was a course about what the law presupposes about people, raising questions including the free will–determinism debate (through the lenses of behaviorism, Freud, and neuroscience); personal identity over time; and the content and the role of intentions. The intersection of these classes ignited a spark for Ferzan. From her perspective, one cannot look at the criminal law without seeing the deeper philosophical presuppositions at its core. During her legal career, Ferzan has emerged as a leading figure for exploring these themes with her prolific work on culpability, attempts, self-defense, and many other foundational topics of criminal law. By weaving careful and contextual analysis with deep philosophical insight, she has, time and again, identified areas of criminal law that seem settled but actually require new layers of analysis. Her compelling theories have reoriented the way scholars and lawmakers think about crime, blame, and punishment.

Ferzan has never strayed from the pursuit of these topics. She began to unpack the relationship between law and underlying moral presuppositions with her student note, “The Role of Luck in the Criminal Law,” 142 U. Pa. L. Rev. 2183 (1994). In the article, Ferzan argues that attempts should be punished the same as completed crimes. Indeed, she insists that the only difference between those who try and those who succeed is luck, and the criminal law ought not to distinguish between such actors in terms of blameworthiness or punishability.

Writing that paper was fortuitous. Larry Alexander, a law profes-
sor at the University of San Diego, read it and called one of Ferzan’s professors, Heidi Hurd, to ask whether Ferzan might be interested in teaching. Prompted by that call, Hurd served as matchmaker by suggesting that the two co-author a paper Alexander had just begun on the question of whether it is appropriate to punish for attempts at early points when the defendant can still change his mind. The Model Penal Code, for example, only requires that the defendant take a “substantial step.” The defendant need not be near completing the crime to be guilty of an attempt. In “Mens Rea and Inchoate Crimes,” 87 J. Crim. L. & Criminology 1138 (1997), Alexander and Ferzan argue that punishment is not appropriate until defendants have unleashed a risk of harm that they can no longer completely control.

After graduating from law school, Ferzan clerked for two years in the Eastern District of Pennsylvania and was then accepted into the Department of Justice’s Honors Program, where she was placed in the Public Integrity Section of the Criminal Division. “Being a prosecutor was a wonderful experience,” Ferzan said. “I learned a tremendous amount about how to think systematically through the intersection of facts and law. When you are trying to figure out if someone has committed a crime, you hone in on the specific proofs that are necessary. It was also an incredible experience to be able to make judgment calls about what the just results should be: Should you charge? For what crime? What sentence should you pursue?”

Ferzan thrived as a prosecutor, but she was driven to become a scholar and write about the criminal law. She started her teaching career at Rutgers University, School of Law, Camden, and based on the quality of her scholarship in legal theory, she was later appointed as affiliated faculty to Rutgers’ world-class philosophy department. In 2014, Ferzan joined the law faculty at the University of Virginia.

Throughout her scholarly career, Ferzan has pursued a variety of topics, including a quest to understand the role and meaning of mental states in criminal law. Her article, “Beyond Intention,” 29 Cardozo L. Rev. 1147 (2008), directly examines the union of criminal law and philosophy of mind. What does it mean to say some result or circumstance falls within the scope of an intention? The standard answer is that a result or circumstance must be motivationally significant—it must explain why the actor performed the action. If a defendant shoots a victim in order to cause that victim’s death, then the death is intended. If a defendant steals a laptop because it belongs to the government, then stealing the government’s property is intended. But the conventional wisdom also states that a known circumstance or result that is not motivationally significant may not fall within the scope of an intention. For example, according to the laws of war, the killing of civilians (so-called collateral damage) may be justified by a good result when the civilian deaths are not intended.

In “Beyond Intention” Ferzan grapples with the problem of “closeness” in which individuals intend to perform one act and a side effect appears to be so inextricably intertwined so as to count as intended. “To see both sides of the puzzle,” Ferzan said, “imagine a defendant who intends to shoot Tom, an African-American man, who slept with the defendant’s wife. Let’s stipulate that the description ‘man who slept with my wife’ is what is motivationally significant to the defendant. Is this a hate crime? The answer appears to be no, as the victim’s race is not motivationally significant. This would place the victim’s race outside the scope of the intention. On the other hand, few would argue that the defendant did not intentionally kill a human being. But Tom’s status as a human being is not the motivationally significant description either. Does this mean that Tom did not intend to kill a human being?”

Ferzan draws on the philosophy of mind, and in particular an analysis of mental content, to argue that if the actor empirically and conceptually understands one act to entail the other, then the latter is also intended. The idea is that both concepts mean the same thing to the actor—they are different “senses” of the same intentional object. Ferzan maintains that by intending to kill “this person,” the defendant intends to kill “Tom,” “an African-American,” “the man who slept with his wife,” and “a human being.” The defendant intends to kill someone with all the descriptions he attributes to the victim. One implication of Ferzan’s analysis is that because intentions extend beyond what is motivationally significant, intentions cannot be used to delineate the relevance of motive, as in the case of hate crimes.

This analysis also has important implications for legal and moral prohibitions on the intentional killing of non-combatants in war, a topic that Ferzan recently addressed in “Intentional Content and Non-Combatant Immunity: When Has One Intentionally Killed a Non-Combatant?” (forthcoming Methode). In this article, she criticizes the recent works by philosopher Jeff McMahan and criminal law professor Adil Haque. Both theorists address the same question: If you
believe there is a risk that a person you are killing is a civilian, then are you intentionally killing a civilian? McMahan answers the question in the negative, whereas Haque argues that some instances should count as intentional. But Ferzan criticizes both theorists for offering too stipulative an account of intentions. Neither theorist undertakes an analysis of intentions to reach his conclusion. Ferzan shows that a proper understanding of the content of intentions reveals that these actions should not count as intentionally killing civilians. She adds, however, that other moral principles may dictate that it remains impermissible to kill under some conditions of uncertainty.

Ferzan’s work has extended beyond intentions to other mental states within the criminal law. For instance, what should we make of cases in which individuals understand they are imposing a “dangerous risk” but do not consciously unpack the meaning of “dangerous” into exact percentages of risks to persons and property? In “Opaque Recklessness,” 91 J. Crim. L. & Criminology 597 (2001) she argues that though the actor may only consciously think “dangerous,” he is still culpable for what “dangerous” means to him. Ferzan further dissects the culpability of intentional actors in “Plotting Premeditation’s Demise,” 75 L. & Contemp. Probs. 83 (2012). There, she theorizes that the law seeks to do too many things with just one concept and asserts that culpability requires looking at, among other things, the agent’s motives, the quantity of deliberation, the opportunity for deliberation, the quality of deliberation, and the other choices made before and after the act. Ferzan claims that premeditation alone is not up to the task; indeed, no single concept could cover the diverse array of factors relevant to an individual’s culpability.

As her premeditation piece reveals, Ferzan not only strives to understand underlying questions of content; she also pursues insights related to why and how our choices make us more or less blameworthy. In one criminal law case, a defendant, unaware of whether his shotgun had a live or dummy round in it, suggested playing Russian roulette with his friend, and immediately thereafter fired the gun at his friend, thereby killing him. A dissenting judge argued that the defendant was not depravedly indifferent to human life because the defendant was extremely distraught when he realized he had killed his friend.1 Ferzan disagrees, arguing that the appropriate question is not whether the defendant is upset but whether the defendant made a choice that shows he does not care as much about others as he should. Ferzan focuses on these connections between mechanics of choice and blameworthiness in a trio of articles: “Don’t Abandon the Model Penal Code Yet! Thinking Through Simons’ Rethinking,” 6 Buff. Crim. L. Rev. 185 (2002), “Holistic Culpability,” 28 Cardozo L. Rev. 2523 (2007), and “Act, Agency, and Indifference: The Foundations of Criminal Responsibility,” 10 New Crim. L. Rev. 441 (2007) (reviewing Victor Tadros’ Criminal Responsibility).

Ferzan ultimately offered a comprehensive assessment of the relationship between choice and blameworthiness when, fifteen years after Alexander’s call to Hurd, Alexander and Ferzan completed Crime and Culpability: A Theory of Criminal Law (Cambridge University Press, 2009). In their influential book, Alexander and Ferzan begin by discussing their moderate retributivist position. That is, Alexander and Ferzan believe that desert is necessary for punishment and desert is also an affirmative reason to punish. They then defend a view that culpability can be understood as an improper balance between the risks the agent understands she is imposing and her justifying reasons for imposing the risk. In other words, you may speed to get a sick child to the hospital, but not to show off for your friends. Alexander and Ferzan also defend the view that negligence is not culpable, as there is no principled way to define the reasonable person and because any “failures” that cause an agent not to notice a risk, or to misjudge a risk, are generally not culpable. A clumsy person can fall below the “reasonable person standard,” but an argument is needed for why clumsiness is blameworthy. Alexander and Ferzan return to their views that results do not matter and that individuals must unleash an ex-ante risk of harm. The book also advances thinking on what a “unit” of culpable action is, how one would draft a proposed code, and how to understand justifications and excuses.

Self-defense is among Ferzan’s favorite topics. One of her first pieces on self-defense was “Defending Imminence: From Battered Women to Iraq,” 46 Ariz. L. Rev. 213 (2004). “The Bush Doctrine that was used to justify the Iraq war stands in stark contrast to the criminal law’s understanding of imminence, and I wanted to push the contradictions,” Ferzan said. In the article, Ferzan claims that the Bush Doctrine’s assertion of an ever-present threat as “always imminent” did not amend imminence; it eliminated it. In contrast, battered women who killed their abusers in non-confrontational set-

In the paper, Ferzan defends an imminence requirement to the extent that it serves as the act requirement for a threat—Ferzan argues that an aggressor must do something. But she also insists that most discussions of battered women stack the deck. “Theorists stipulate that the woman cannot leave. But if she cannot escape him, then the question should be whether that liberty restriction is sufficient, not whether he will ever kill her,” Ferzan said. Many cases, Ferzan concedes, are more complicated than the stylized cases employed by criminal law theorists. Women may lack the educational and financial means to leave, or they may have children, factors that complicate leaving but do not render it impossible.

Ferzan has also contributed to the theoretical underpinnings of self-defense doctrine. May you kill a culpable aggressor who will otherwise kill you? The answer seems to be obviously yes. But what if the aggressor is innocent, such as a child with a real gun that she believes to be a toy? Should we distinguish these cases? And what if you are mistaken and the culpable aggressor will not actually succeed? Ferzan claims that there is a distinction between culpable aggressors who forfeit rights and innocent aggressors who do not. She argues, for example, that these distinctions become apparent when we consider that it seems the innocent aggressor ought to be able to fight back, third parties may be entitled to aid the innocent aggressor, and the number of innocent aggressors matters. If we are entitled to harm an innocent aggressor, argues Ferzan, then it is because we are entitled to give our lives slightly more weight. This agent-relative preference, however, will have limits. Ferzan again developed her ideas in a collection of articles: “Justifying Self-Defense,” 24 L. & Phil. 711 (2005); “Self-Defense, Permissions, and the Means Principle: A Reply to Quong,” 8 Ohio St. J. Crim. L. 503 (2011); and “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,” 9 Ohio St. J. Crim. L. 669 (2012) (symposium).

Ferzan also seeks to extend our understanding of self-defense beyond paradigmatic cases. She has argued that individuals who are culpably responsible for appearing to be threats also forfeit rights, thus rejecting the claim that individuals may only use defensive force when it is actually necessary to save themselves. She has distinguished aggressors from provocateurs—individuals who pick fights. According to Ferzan, aggressors forfeit rights such that defenders who harm aggressors do not wrong them. In contrast, although provocateurs pick fights, they do not, without more, forfeit their underlying rights against being harmed (though Ferzan also argues that, because they have “started it,” they are not entitled to defend themselves). In other words, if a culpable aggressor attacks you, you are entitled to harm him. If someone picks a fight, you are not entitled to harm him, although he has lost his right to defend against the harming. Ferzan worked through this under-examined type of actor in “Provocateurs,” 7 Crim. L. & Phil. 597 (2013).

“Although it seems theoretical,” Ferzan said, “The inability to distinguish provocateurs and initial aggressors can make a mess of jury instructions, including those given in the Trayvon Martin case.” Many jurisdictions have self-defense rules whereby an individual cannot fight back if he intentionally provokes the fight; however, in interpreting their statutes, jurisdictions conflate initial aggressors and provocateurs and incorrectly employ only initial aggressor formulations. Initial aggressors are those who attack with deadly force, but the sorts of behaviors that might be intended to start a deadly affray may be quite broader: stalking someone, pouring beer on someone’s head, perhaps even name-calling in extreme cases. The problem, then, is that jurisdictions eliminate a category of people who may not fight back—not because they aggressed—but because they picked the fight.

“One question with George Zimmerman,” Ferzan said, “is whether his behavior provoked the fight. But because the Florida Supreme Court interpreted their provocation rules to require initial aggression, this question never got to the jury.”

Ferzan’s scholarship has recently broadened in a new direction, thanks to an opportunity to speak at an American Philosophical Association panel about what retributivists think about preventive detention. To address this question, Ferzan sought to map out the ways in which self-defense theory might assist in thinking through the problem. Specifically, if culpable aggressors forfeit rights, and thus may be preemptively stopped, might some instances of preventive interference likewise be justified by this same theory? Convinced that this was a normative and conceptual space worth exploring, Ferzan wrote “Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible,” 96 Minn. L. Rev. 141 (2011). This paper won the APA’s Berger Prize for the best paper.
in the philosophy of law written during the prior two years. Ferzan has continued to defend and extend the thesis in “Inchoate Crimes at the Prevention/Punishment Divide,” 48 San Diego L. Rev. 1273 (2011); “Moving Beyond Crime and Commitment,” 13 APA Newsletter in Phil. & L. 1 (2014); “Thinking through the ‘Third Way’: The Normative and Conceptual Space Beyond Crime and Commitment,” 13 APA Newsletter in Phil. & L. 16 (2014); and “Preventive Justice and the Presumption of Innocence,” 8 Crim. L. & Phil. 505 (2014). This topic of preventive detention brings her work full circle. Having argued that the criminal law ought not to punish incomplete attempts, her theories had left a gap where the state cannot do anything to stop dangerous actors. Now, this new work on preventive detention fills that void, though Ferzan intriguingly reaches the solution through her self-defense work and not by seeking to “fix” the puzzle her prior work on incomplete attempts created.

Going forward, Ferzan plans to continue her contributions to emerging and important questions of criminal law. Alexander and Ferzan are teaming up to write another book, building on their work in Crime and Culpability. Ferzan is also unifying her work on self-defense and preventive detention for a separate monograph. And Ferzan has recently started a new project on consent within the context of sexual assault. As an adviser to the American Law Institute’s Model Penal Code Sexual Assault project, Ferzan has taken a particular interest in how the law ought to understand consent. Ferzan hopes to reconcile the affirmative consent standard—requiring affirmative permission to initiate sexual contact by words or conduct—with the role of context and relationships. As affirmative consent assumes greater importance, not only in the criminal law but also in campus sexual assault provisions, codes and regulations will need to articulate how to take into account implicit factors that might matter. Although no law ought to endorse a marital rape exemption, all laws must distinguish between subway gropings and small, unsolicited displays of affection between intimates. Grasping the distinction is intuitive, but articulating it is much more vexing. Few topics, however, are likely to benefit more from Ferzan’s astute observations on intent, culpability, and context in the criminal law.

**EXCERPTS**

**PLOTTING PREMEDITATION’S DEMISE**

*75 Law and Contemp. Probs. 83 (2012)*

Few legal concepts are as accessible to the layman as is premeditation. Popular culture is filled with images of premeditating actors, be they Professor Moriarty, Voldemort, or even the opaquely denominated Dr. Evil. What is striking about popular culture depictions is that these characters are typically one-dimensional: they do nothing but plan the demise of the hero. No doubt exists as to the antagonist’s culpability because all the actor does is plot the protagonist’s death.

Unfortunately, art sometimes does imitate life all too accurately. The events of September 11th reveal that there are human beings who truly spend significant effort deliberating over killing other people and planning those killings. Osama bin Laden, Adolf Hitler, and Saddam Hussein represent real-world embodiments of one-dimensional evildoers.

But the run-of-the-mill killing is not committed by Hitler or Voldemort. It is committed in strikingly different contexts—romantic rifts, bar fights, gang wars. One might think that, with such striking examples of premeditating actors, it would be easy to apply the common man’s view of premeditation. In fact, however, theorists are exceedingly skeptical as to whether premeditation actually exists in any discernible way and, even if it can be conceptually captured, whether premeditation is an appropriate means for distinguishing between first- and second-degree murder. Indeed, Dan Kahan and Martha Nussbaum proclaim, “‘Premeditation’ is in fact one of the great fictions of the law.”

Fiction or not, premeditation is a real problem. Despite the Model Penal Code’s rejection of premeditation, twenty-nine states, the District of Columbia, and the federal government all employ a premeditation or deliberation formula as a part of their murder statutes. In some of these jurisdictions, premeditation is the difference between life and death. In others, premeditation may make a significant difference in prison term.
In efforts to adjudicate the guilty mind, premeditation presents obstacles at numerous levels. First, as a normative matter, there is reason to doubt that premeditation truly distinguishes the most culpable killings. As Sir James Fitzjames Stephen imagined, a man “passing along the road [ ] sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him.” Stephen noted that in this case there is no premeditation but that it represents “even more diabolical cruelty and ferocity” than premeditated killings. At the other end of the spectrum is *State v. Forrest* in which the defendant killed his suffering, terminally ill father; a first-degree murder conviction was upheld by the North Carolina Supreme Court. Premeditation thus appears to be both over- and under-inclusive in capturing the most culpable actors.

Second, at the conceptual level, articulating a clear distinction between premeditation and an intention to kill is difficult. In the average case, to form the intention to kill requires desiring something, believing that one will achieve what one desires by killing, and then forming the intention to kill. Is the deliberation inherent in choosing distinguishable from premeditation? Moreover, once the intention is formed, rational agents will often have to further deliberate as to how to kill, so intention execution may also involve deliberation. The problem is that, even if all that an intentional killing requires is the choice or intention itself, it is an extraordinarily rare individual who will not engage in some additional exercise of deliberation in intention formation or intention execution.

Third, even with viable normative and conceptual assumptions, translating this normatively charged concept into hard-edged legal rules will require that statutory drafters either opt for vague and overinclusive moralized standards (leaving “premeditation” to be filled in by juries) or underinclusive analytic styles (such as requiring specific time or ability to reflect). The latter will inevitably fail to capture some of the worst killers. Criminal law’s mental states consistently present this problem. Moreover, any attempt to take a continuum concept and give it hard edges will necessarily involve creating a rule, and rules themselves are by their nature over- and under-inclusive. Hence, any statutory formulation is bound to be imperfect.

Finally, even with the best test, things can go awry. Faced with heinous killings that fall outside the statutory definition, courts and juries might still begin to stretch the concept. That is, if bad facts make bad law, heinous facts make for expansive definitions of the law. In addition, the law may be changed for an entirely different political agenda. For instance, the desire to limit psychiatric testimony in the wake of the Twinkie defense led to restrictions in California’s test that cannot easily be reconciled with any coherent understanding of premeditation. Specifically, section 189 of the California Penal Code provides, “To prove the killing was ‘deliberate and premeditated,’ it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act.”

A good understanding of philosophy of the mind may be able to solve the second problem, and the third and fourth concerns are more general problems for the criminal law. These are hurdles with which, given the topic of the symposium, legal theorists are rightly concerned. Nevertheless, they are surmountable. However, no progress can be made on any other level until premeditation’s normative dilemma is solved, and premeditation is rotten at its core. The problem is that premeditation captures only some aspects of what makes some killers the most culpable; and unfortunately, as formulated, its reach is woefully under- and overinclusive. The critical question is, if premeditation should be put to death, what should replace it? Answering this question requires the dissection of the various aspects of a choice that make choices particularly culpable. Unfortunately, culpability is complex and there is no one answer. Culpability may involve at least six factors: the analysis of risks imposed; the reasons why they were imposed; the defendant’s thoughts about the killing—either identifying with the wrong or displaying utter indifference to it; the quality of the defendant’s reasoning process; the number of choices the defendant made in killing; and the defendant’s responsibility for prior choices that may lead to degradation of his later reasoning. With all of these factors, it is simply no wonder that premeditation cannot capture the most culpable killers. No one test could. Moreover, because different aspects of choice yield different conceptions of why premeditation is culpable, abandoning premeditation will result in greater doctrinal clarity than simply suggesting supplements to it.

...
IV. UNPACKING CULPABLE CHOICE

To figure out what constitutes the most serious killings, it is necessary to unpack the content and quality of a defendant’s choice to kill another. Culpability assessments derive the meaning of a defendant’s choice—that it reveals insufficient concern—by looking at the content and the mechanics of that choice. For instance, it is not the defendant’s cognitive state of knowing that his act will kill another that makes him culpable. Rather, it is our judgment that people who act despite this knowledge truly do not care about others. Hence, it is through looking at the content of the defendant’s choices that we are able to ascertain whether he is acting culpably.

Consider the following aspects of choice that a premeditation formula might speak to: should the defendant kill, why will the defendant kill, and how will the defendant kill? The premeditation formula might also speak to the quality of the defendant’s deliberation—was it cool blooded or hot tempered? Assessing the act of killing also requires looking at the defendant’s choices before, during, and after the act. This section reviews each of these aspects of reason to determine when a decision appears to be particularly culpable.

A. Should?

Before killing another human being, a defendant may ask, “Should I kill?” The most important factor in asking this question is whether the defendant takes seriously that ending a human life is a reason against killing. Albert might be deliberating about whether to kill his father as an act of euthanasia, and he is tortured by the idea of ending his father’s life. Ben might be deliberating about whether to kill his father, but he does not value the fact that he will end another’s life. Carl might choose to kill his father, giving no thought at all to the fact that he is ending a life. Carl does not even stop to ask, “Should I?”

Notice that Carl does not appear to be less culpable than Ben. That is because giving no weight to ending human life may occur either with or without deliberation. It appears that Albert is less culpable. It is questionable, however, that Albert is less culpable because he gives his father’s life weight in his reasoning. After all, the bottom line is that Albert’s reason is ultimately defeated. He chooses to kill, even after acknowledging that there is reason not to do so. Indeed, imagine David, who kills his father because he desperately needs to inherit money from his father’s will. Is David less culpable if he deliberates over the fact that he should not kill his father if, ultimately, David decides to do so anyway?

When a defendant asks the “Should?” question and determines the answer is yes (as evidenced by the killing itself), the defendant determined that something was more valuable to the defendant than the life he ended. This is not insignificant. On the other hand, asking the “Should?” question is neither necessary nor sufficient for culpability. It is not necessary because giving the killing no thought can be extraordinarily culpable as in Carl’s case. It is also not sufficient because some killings may, in fact, be justified, and so, the “Should?” question, without seeing what is on the other side of the scale, does not tell us enough. Thus, it appears that if premeditation is meant to ask whether the defendant asked the question “Should I kill him?”, it is asking a question that is neither necessary nor sufficient for culpability.

B. Why?

Another aspect of reasoning that premeditation may reach is the question of why the actor is killing another person. This aspect is highly relevant to culpability. Individuals deserve punishment when they act culpably, and an actor is culpable when he exhibits insufficient concern for others. Actors demonstrate insufficient concern for others when they (irrevocably) decide to harm or risk harming other people (or their legally protected interests) for insufficient reasons—that is, when they act in a way that they believe will increase others’ risk of harm regardless of any further action on their part, and when their reasons for unleashing this risk fail to justify doing so. If Alex decides to drive one hundred miles per hour on the highway, whether society deems Alex culpable and deserving of blame and punishment will depend upon whether he has chosen to impose this risk to impress his friends with how fast his car can drive or, alternatively, to transport a critically injured friend to the hospital.

The relevance of the defendant’s reasons for acting is immediately apparent. Albert’s decision to kill his father is less culpable than David’s decision to kill his father because Albert’s reason nearly justifies his action whereas David’s killing for money is a poor reason
Carl is culpable not because he acts for a bad reason, but because he acts for seemingly no reason at all. Now, this may be restructured such that one might want to say of Carl that he acted for his amusement or “to see someone die.” But it might simply be that Carl did not reason beyond the act of killing. When asked why he killed, Carl might simply ask, “Why not?” The most that could be said of Carl, then, is that he killed for the sake of killing, and this appears to be a rather evil reason for action. Notice that preméditation is not formulated to ask the “Why?” question and thus cannot distinguish the mercy killer from the cold-blooded killer. Therefore, preméditation cannot capture a critical aspect of culpability.

C. How?

A defendant begins by deliberating over whether to form the intention to kill. This is the “Should?” question. While weighing the reasons against killing, he also weighs the reasons for committing the act. This is the “Why?” question, and the ultimate “why” is determined when the defendant forms the intention to act for a particular reason. If he forms the intention to kill, he might then ask “How?”

After forming an intention, rational agents will typically engage in means–end reasoning about “how” to accomplish their intentions. Of course, this sort of reasoning is not required. An agent might form the intention “to kill him with a gun” during the first deliberation about whether to kill at all. Or the agent might engage in rather irrational thoughts as to how to execute his intention.

Still, the question is whether asking the “How?” question reflects any additional culpability. Now, one facet of the “How?” question is that, if one chooses a particularly gruesome means of killing another, this may reflect on one’s culpability because one is not just killing but is causing substantial pain during the killing. That aspect of “how,” however, is covered fully by looking at the risks the defendant is imposing and his reasons for acting. Rather, what the defendant’s asking of “How?” adds to the mix is that the defendant is taking time trying to figure out how to achieve his end.

The reason why the defendant’s expenditure of time and effort in deliberating about how to execute his intention poses concern is that the more effort he expends, the more he seems to identify with his end. A defendant who not only aims at evil, but takes time and consideration to achieve this evil, appears particularly culpable. He takes this end as central to his agency. This sort of view is most at home with the distinction that Antony Duff draws between attacks and endangerments. Duff claims that when the defendant intends harm, he attacks, thus revealing a practical attitude of hostility. When the harm is just a side effect, the defendant endangers, thus revealing his indifference. On this view, preméditating is particularly hostile to the victim. By the same reasoning, a theorist who believes that purpose is more culpable than knowledge because the defendant’s agency is identified with the wrong should hold that preméditated killings are more culpable. What preméditation seems to add is that, even amongst purposeful killings, some seem to be more culpable than others.

... There is the third case, however, and this returns us to Carl and Stephen’s man on the bridge. They do not deliberate. They do not think about how. They do not think that thinking about the killing is worthy of their time. They do not identify with the evil. They are indifferent to it. Ultimately, the problem is that attacks and identity do not operate independently of an overall indifference assessment. Normatively, endangerments can be just as culpable as attacks. To take an example from Claire Finkelstein, an actor would appear equally culpable whether he (1) burns down a house for the insurance money on the occupants or (2) burns down a house for the insurance money on the house, knowing there are people inside (whom he knows will leave in thirty minutes) but not bothering to wait.

Conceptually, attacks ultimately collapse into endangerments. To determine whether purposefully injuring another is culpable, one must know why the injury was done. An act of self-defense may first appear to be an “attack” that manifests “hostility.” But, once the reason is known (to act in justifiable self-defense), the attack neither manifests hostility nor indifference. In other words, an attack is only culpable if it not only targets a legally protected interest (the fact that makes it an attack) but also does so for insufficient reasons. This is the indifference assessment. Thus, when an individual has an opportunity to engage in enhanced decisionmaking, through time and reflection—but does not—he manifests indifference. And this indifference can be just as culpable as when an individual does expend time and effort. Indifference in not caring enough and indif-
ference in identifying with one’s evil aim are both very culpable. That is, Anderson would have been very culpable if he had planned his brutal attack of Victoria Hammond. That he did not identify with his killing, however, but rather was completely indifferent to it, likewise manifests substantial culpability. It is hard to see why one killing would be worse than the other and, indeed, so much worse that only one is worthy of punishment as first-degree murder.

...  

**F. Summary**

Culpability is complex. Premeditation is capable of covering two of the factors in culpability assessments. First, in those cases in which the defendant identifies with the act of killing, the defendant appears more culpable when he actually deliberates and spends time planning the killing. Understood in this way, premeditation should be quite concerned with the actual amount of time spent deliberating. The more deliberation, the more culpability. Second, premeditation also appears to be able to capture the qualitative assessment of the defendant’s reasoning. The question of whether the defendant was able to calmly deliberate about the killing is relevant, not only when more deliberation is indicative of more identity, but also when any failure to be able to deliberate would undermine the defendant’s ability to think through why he should not act.

Although premeditation can capture some aspects of culpability, it is woefully underinclusive in capturing others. It cannot reach the culpability of indifference in its entirety; it cannot look to whether the defendant’s prior responsibility led to the later impairment in reasoning skills; and it cannot capture the way in which choices made during and after the defendant’s action can also affect his culpability. Moreover, to the extent that premeditation fails to take into account the defendant’s reasons for action, it lacks a critical aspect of nuance—the reason for which a defendant acts is critically important to culpability assessments.

Although one possibility is to retain premeditation to capture some aspects of culpability, concerns remain about exactly what premeditation is doing and why. For instance, one might think that premeditation should remain as evidence of identity-type culpability. This conception would require that courts take seriously a requirement for substantial time and planning, something they have yet to do. Premeditation might also serve as the default rule, with first-degree being the norm, and rash and impulsive acts being the exceptions that warrant a departure to second-degree murder. This is more in line with what courts are doing. Because these two conceptions compete, one would need to be chosen. And then, it would still be necessary to figure out how to account for the other complex factors that enter culpability judgments. Whatever work premeditation will do, it will not do enough to serve as the sole criterion for first-degree murder liability.

**BEYOND CRIME AND COMMITMENT:**  
**JUSTIFYING LIBERTY DEPRIVATIONS OF THE DANGEROUS AND RESPONSIBLE**  
96 Minn. L. Rev. 141 (2011)

**INTRODUCTION**

There is a range of dangerous persons who walk among us. The sexual predator who intends to molest a child. The terrorist who plans to bomb a public square. The psychopath who will inflict injury without remorse. The determined killer who aims to end the life of another.

We want the State to protect us from these dangerous people. Truth be told, we want the State to lock them up. The scholarly literature argues that the law approaches dangerousness from two distinct and irreducible vantage points. These are disease, where the State may prevent and confine, and desert, where it may punish and incarcerate. If the State denies the agent is a responsible agent, it can detain him. It can treat him as it treats other non-responsible agents, as a threat to be dealt with, without fear of infringing his liberty or autonomy interests. With respect to responsible actors, the State can use the criminal law. It can punish the deserving for the commission of a crime. For a responsible agent, the State should not intervene in any substantial liberty-depriving way prior to his commission of an offense for fear of denying his autonomy. The State must respect that a responsible agent may choose not to commit an offense. It cannot detain an actor for who he is. It must wait to see what he will do.
Thus, to the extent that we have preventive practices that do not fit either model, these mechanisms are typically condemned as unjust.

This choice between crime and commitment leaves a gap. We have no justification for substantial intervention against responsible agents prior to when they have committed a criminal offense. We have no theory of when or why we may engage in substantial liberty deprivations of dangerous and responsible actors. This Article bridges that gap. It offers an account of how, in one class of cases, the actor has made himself liable to preventive interference and thus cannot object that the liberty deprivation violates his rights.

How should we understand the relationship between prevention and punishment? At first blush, prevention and punishment seem to be conceptually distinct. Prevention looks forward. Punishment looks backwards. Prevention looks at what a person will do. Punishment looks at what a person has done. Prevention does not care about responsibility. Punishment requires the actor to be responsible.

Scholars warn against allowing punishment practices to focus on dangerousness, and conversely, of allowing commitment models to capture responsible actors. For instance, Paul H. Robinson argues that the current criminal law “cloaks” preventive practices as punishment. As Robinson rightly notes, three strikes laws and other habitual offender penalties increase the amount of punishment not based on what the agent deserves, but based upon how dangerous he is. This contorts the criminal law.

Simultaneously, the Supreme Court’s jurisprudence on the involuntary detention of sexual predators has drawn scholarly criticism. The test employed by the Court, which allows confinement of those with a mental disorder and an inability to control their conduct, fails to differentiate “the bad,” who deserve punishment, from “the mad,” who ought to be confined.... The message scholars are sending is clear: prevention and punishment are two distinct practices, but in both instances, the State is failing to maintain the clear boundaries between the two.

Although punishment and prevention are thus presented as non-overlapping practices, there is significant overlap that ought to be acknowledged. First, criminalization of conduct reduces that conduct. Second, theorists who subscribe to a mixed view as to the justification for punishment find desert to be a necessary but insufficient criterion for punishment. That is, mixed theorists believe we should punish if the offender deserves it and the punishment will prevent crimes, through deterrence or incapacitation. Moreover, in the real world, a world of limited resources where we cannot give everyone the punishment they deserve, one particularly good way to choose which criminals to focus upon is by looking to what other benefits accrue by punishing them.

A third way that desert can intersect with preventive goals is by way of the mode of punishment. When we are selecting how we punish—the mode of punishment—we may also decide that incarceration is a particularly important mode of punishment for the dangerous. (To put the point another way, we could simply cut off a criminal’s left hand as punishment, but that would mean that a mere few weeks after his sentencing, he would be standing behind you in the Starbucks line ordering a nonfat mocha Frappuccino). Hence, we could reserve imprisonment for dangerous offenders, thus getting the benefit of incapacitation, and use other punishment mechanisms for offenders who are not dangerous and do not need to be detained. Notably, the amount of punishment would then be determined by desert, but the method of punishment would be dictated by other factors.

Finally, as a theoretical matter, prevention and punishment appear to play on the same normative and epistemic turf. Epistemically, both practices fear false positives, as both result in significant injustices—the punishment of the innocent or the detention of someone who would not harm others. Normatively, both practices ask when a State may interfere with an individual’s liberty. And both practices also may be constrained by other values. A retributivist might believe that the death penalty is what certain offenders deserve, but because it is applied in a racist manner, it should not be used. Prevention principles are likewise constrained by equality concerns. When prevention requires a focus on certain groups, this focused prevention threatens to undermine equality, stigmatize groups, and mask authoritarian state regimes.

Thus, the view that punishment and prevention are wholly independent sorts of inquiries grossly oversimplifies their relationship. However, the problem is not just that the literature has lacked the requisite degree of nuance. The problem is that this way of looking at the practices has blinded us to a familiar predictive practice that is grounded in responsible agency. We can have a model that
looks not only at what the agent has done but also at what he will do. Sometimes what actors do justifies acting on predictions of what they might do in the future. This is the framework of self-defense. What the aggressor has done grounds the defender’s right to act on the prediction of what he will do.

The false assumption that we must choose between prediction and responsibility has blinded theorists to how and why preventive interference is sometimes justified short of state punishment. This Article fills that chasm. The self-defense model demonstrates that there are grounds for substantially depriving responsible agents of their liberty to prevent their future crimes.

Part I argues that rather than having two concepts—desert and disease—we have three: desert, disease, and liability to preventive force. This Part first reviews the current state of the desert/disease analysis and then introduces the third perspective—liability to defense. The self-defense literature has recently spawned the concept of liability to defensive force. Liability explains why the defender does not wrong the aggressor—because the aggressor by his own culpable attack has forfeited his rights against the defender’s use of force against him.

Part II makes the case for a predictive practice grounded in responsible agency, and argues that the normative principles that underlie self-defense are directly applicable to preventive interference generally. Self-defense and liability to preventive interference have the same normative structure. Both are preventive principles grounded in responsible action. Part II begins by making conceptual space for this interference against criminal endeavors—a space currently occupied by preparatory offenses and attempts. Part II next sketches out the requirements for preventive interference, including both a culpable mind and an overt act, as well as how the State may intervene, using the United Kingdom’s civil preventive mechanism employed to prevent terrorist acts—the control order—as a possible model. Part II then addresses potential distinctions between the two practices, including that self-defensive actions are only authorized when a harm is imminent and that the nature of a self-defensive response is short lived. Part II argues that neither of these restrictions on individual self-defense has any normative traction when applied to State action. The Part concludes with an example of how this regime would work to prevent a criminal act by a sexual predator.

Part III addresses potential objections to the preventive interference approach. These objections include whether this model is sufficiently autonomy-respecting, whether it is properly a civil, as opposed to criminal, mechanism, whether it is affordable, and, finally, whether it will conceptually and normatively collapse into a pure preventive regime. Part III argues that this model does respect the actor’s autonomy and can provide the actor with sufficient constitutional protections, even outside the criminal law. It further argues that any government must make trade-offs in determining how to allocate resources, but this regime is unlikely to be more expensive than the resort to the criminal law. Finally, Part III claims that the principles that underlie this regime do not inevitably endorse a pure preventive-detention system, and that the regime can be practically implemented in a way that takes responsibility seriously.
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BRANDON GARRETT is a prolific member of the Virginia Law faculty whose work enjoys a national reputation within the legal academy, throughout the state and federal judiciary, in Congress, and in the popular media. He has made substantive and timely contributions to numerous policy debates, and he is especially known for his work studying wrongful convictions. He is also a leading scholar on the criminal prosecution of corporations and a prominent figure in the rapidly changing areas of forensic science and other matters of criminal justice. In all of these fields, Garrett manages to combine academic theory, empirical analysis, and practical application in a unique way that has captured the attention of countless policymakers who seek his expertise.

Garrett has spent the last decade pursuing an intriguing collection of questions: How can innocent people be convicted of crimes? How can corporations be prosecuted for crimes? What constitutional rights should corporations be able to litigate? How should forensic science be used in criminal cases? Why is the death penalty continuing to decline in America? Garrett’s work shares a common approach. By digging deeply into the on-the-ground practice of the law, Garrett has described root causes and patterns that had not been previously well understood.

Garrett’s interest in civil rights and criminal law issues began when he volunteered for homeless outreach while an undergraduate at Yale College, where he studied painting and graduated with a degree in philosophy. He later worked as an advocate representing individuals in the Bronx and Manhattan in reclaiming welfare benefits and avoiding evictions. These experiences convinced him to go to law school. Garrett’s student note, “Remedying Racial Profiling,” 33 Colum. Hum. Rts. L. Rev. 1 (2001), and a law review article written in law school, “Standing While Black: Distinguishing Lyons in Racial
of the innocent. One of his first projects was to examine what actually happened in the cases of the 200 individuals who had by then been exonerated by DNA testing. Garrett was offering a new course on habeas corpus and post-conviction remedies, and he wondered how those innocent people had actually litigated their cases on appeal and post-conviction, particularly in the years before they obtained the DNA tests that led to their exonerations. Garrett conducted a detailed empirical study and painstakingly tracked what claims each inmate had raised and how courts ruled on them. That work resulted in an article, “Judging Innocence,” 108 Colum. L. Rev. 55 (2008), which has been widely cited by journalists, judges, scholars, and policymakers. Garrett showed that these innocent people had great difficulty trying to raise their innocence in the courts on appeal and post-conviction. Efforts to challenge the flawed evidence that had convicted them often failed. Garrett also constructed a set of “matched” individuals, studying the success rates of similarly situated inmates, who fared no better or worse than the exonerees did in the years before they obtained the DNA tests that exonerated them.

In the summer of 2007, a committee of the National Academy of Sciences was formed to investigate the state of forensic science in the United States. Garrett was asked to explain what role forensic testimony played in his review of DNA exoneration cases. The committee issued a groundbreaking report in 2009 on the need to overhaul forensics in the United States. Garrett realized that to provide the committee with the data they requested, he would have to dig deeper into the claims raised by exonerees on appeal or post-conviction by studying the testimony of forensic analysts at criminal trials. Studies of criminal trials had been rare, and trial transcripts themselves can be quite difficult and expensive to obtain. But, by working with Peter Neufeld, Garrett assembled a large archive of trial testimony from DNA exoneree cases. Garrett and Neufeld presented their findings, which showed just how common invalid and unreliable forensic testimony was in those cases, along with detailed information on specific types of errors. This report to the National Academy of Sciences committee was later published as a law review article, “Invalid Forensic Science Testimony and Wrongful Convictions,” 95 Va. L. Rev. 1 (2009). Having amassed an unusual archive of criminal trials of the innocent, Garrett pursued still more complex research on the trials of DNA exonerees. His next project examined their false confessions in the article “The
Ultimately, Garrett expanded on this body of research in his first book, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, published by Harvard University Press in 2011. “The book illustrated what went wrong in the cases of the first 250 people exonerated by DNA tests in the United States, examining failures such as eyewitness misidentifications, false confessions, false informant testimony, and flawed forensics,” Garrett said. The book developed detailed data—but it was also written for a general audience.

*Convicting the Innocent* was widely reviewed and critically acclaimed. A *New York Times* book review by Jeff Rosen hailed it as “a gripping contribution to the literature of injustice, along with a galvanizing call for reform.” Similarly, it has been praised as “a fascinating study” (John Grisham) and an “invaluable book” (Scott Turow). The book has been cited extensively since its publication in a wide range of newspapers and magazines (including *The New York Times*, *Mother Jones*, *USA Today*, Slate, and *Cosmo*), as well as on television and radio programs. Garrett’s findings have influenced policymakers and been cited by prominent courts, including the U.S. Supreme Court, a series of federal Courts of Appeals, supreme courts in states such as Massachusetts, New Jersey, Oregon, Pennsylvania, Tennessee, and the Texas Court of Criminal Appeals, and the supreme courts of Canada and Israel. The Innocence Project co-developed and co-hosted with Garrett a widely viewed multimedia website with video interviews and graphics exploring the book’s research. Litigators have also relied on the book, and an accompanying website with data and information concerning the cases of DNA exonerees is hosted by the Arthur J. Morris Law Library at UVA Law. Widely assigned in both undergraduate and graduate courses, the book has also been translated into Japanese and Chinese.

Garrett has brought his fastidious analytical rigor to a very different type of criminal justice phenomena—one relating not to the least privileged criminal offenders, but rather the most fortunate. As early as 2006, he noticed that federal prosecutors were beginning to settle some of the largest corporate criminal cases using detailed and largely out-of-court agreements. “They resembled the types of ‘structural reform’ cases used in civil rights litigation, harkening back to the racial profiling cases that I studied as a law student,” Garrett said. “But now the structural agreements were being used to settle complex

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*Convicting the Innocent* was widely reviewed and critically acclaimed. A *New York Times* book review by Jeff Rosen hailed it as “a gripping contribution to the literature of injustice, along with a galvanizing call for reform.” Similarly, it has been praised as “a fascinating study” (John Grisham) and an “invaluable book” (Scott Turow). The book has been cited extensively since its publication in a wide range of newspapers and magazines (including *The New York Times*, *Mother Jones*, *USA Today*, Slate, and *Cosmo*), as well as on television and radio programs. Garrett’s findings have influenced policymakers and been cited by prominent courts, including the U.S. Supreme Court, a series of federal Courts of Appeals, supreme courts in states such as Massachusetts, New Jersey, Oregon, Pennsylvania, Tennessee, and the Texas Court of Criminal Appeals, and the supreme courts of Canada and Israel. The Innocence Project co-developed and co-hosted with Garrett a widely viewed multimedia website with video interviews and graphics exploring the book’s research. Litigators have also relied on the book, and an accompanying website with data and information concerning the cases of DNA exonerees is hosted by the Arthur J. Morris Law Library at UVA Law. Widely assigned in both undergraduate and graduate courses, the book has also been translated into Japanese and Chinese.

Garrett has brought his fastidious analytical rigor to a very different type of criminal justice phenomena—one relating not to the least privileged criminal offenders, but rather the most fortunate. As early as 2006, he noticed that federal prosecutors were beginning to settle some of the largest corporate criminal cases using detailed and largely out-of-court agreements. “They resembled the types of ‘structural reform’ cases used in civil rights litigation, harkening back to the racial profiling cases that I studied as a law student,” Garrett said. “But now the structural agreements were being used to settle complex
accompany corporate prosecutions. A separate line of research examines the increasingly prominent litigation of constitutional claims by corporations. In “The Constitutional Standing of Corporations,” 163 U. Penn. L. Rev. 95 (2014), Garrett studies this latter problem as not one of whether corporations are “persons” in some sense, but as a question raising Article III standing or justiciability issues, particularly if a corporation seeks to litigate the interests of third parties. “This question has become particularly pressing in the wake of recent U.S. Supreme Court decisions such as Citizens United and Hobby Lobby,” Garrett said.


Garrett continues to work on ways to improve the use of forensics in criminal cases. He co-authored with University of Virginia law professor Greg Mitchell an empirical study of how laypeople interpret testimony explaining fingerprint comparison evidence in “How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information and Error Acknowledgement,” 10 J. Empirical Legal Stud. 484 (2013). Surprisingly, they found that laypeople responded very little to even quite overstated language describing a fingerprint “match” as near conclusive. Instead, the authors found that language describing some possibility of an error had a great impact, suggesting important avenues for future research and policy. Garrett and Mitchell intend to continue that line of research. Garrett helped to plan the newly created Forensic Science Center of Excellence, funded by the National Institute of Standards and Technology. The center, which will foster research studying ways to improve the connection between criminal justice, scientific evidence, and statistics, is a partner with the University of Virginia and the Law School. Goals of the center include further study of how lay jurors understand forensic evidence, helping lawyers and judges to better use forensic evidence, and assisting crime laboratories in assessing and improving their procedures.

Garrett has also written about how forensics and DNA technology have affected the law more broadly. During a visiting fellowship at All Souls College, Oxford in the summer of 2015, Garrett worked on an article exploring how DNA has changed rules surrounding claims of innocence across the world. Other countries with very different legal systems have reconsidered rules of finality and the status of innocence claims, just as the United States has had to do, in reaction to DNA technology and amplified research on wrongful convictions. In addition, Garrett co-authored with University of Virginia law professor Kerry Abrams an article exploring the legal uses of DNA evidence across criminal law, family law, public benefits law, and employment law, “DNA and Distrust,” 91 Notre Dame L. Rev. ___ (2016).

Teaching habeas corpus has encouraged Garrett to think more about the connections between bodies of law regulating detention of prisoners before a trial, including in national security cases, as well as civil detention of immigrants facing deportation, and the use of habeas corpus to challenge criminal convictions. This has resulted in another series of law review articles, including “Habeas Corpus and Due Process,” 68 Cornell L. Rev. 47 (2012), which explores the misunderstood relationship between the Suspension Clause, habeas corpus remedies, and the Due Process Clauses of the Constitution, and “Accuracy in Sentencing,” 87 S. Cal. L. Rev. 499 (2014), which explores the complex body of law regulating the uses of Section 2255 challenges to federal criminal sentences. That work led to something more ambitious still: the first comprehensive casebook on federal habeas corpus, co-authored with Lee Kovarsky, Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation (Foundation Press, 2013). Garrett and Kovarsky are now working on a second edition of the casebook as well as a new book in contract with Foundation Press describing death penalty case law, litigation, and social science research on the death penalty.

Garrett frequently speaks about criminal justice matters before legislative and policymaking bodies, groups of practicing lawyers, and law enforcement, and to local, national, and international media. He helps organize the Virginia Association of Criminal Defense Lawyer’s
annual conference hosted at UVA Law. He has written op-eds in Asahi Shimbun, The Boston Globe, The New York Times, The Washington Post, and the Richmond Times-Dispatch, while also periodically contributing to online publications, such as Slate, ACS Blog, the Conversation, Jurist, and Huffington Post.

Garrett is presently serving, along with University of Virginia law professor Rachel Harmon, on an American Law Institute panel studying policing in the United States. That work will involve examining practices, policy, and law concerning use of force by police, criminal investigations, and police supervision. Relatedly, he is working on a paper with University of South Carolina School of Law Professor Seth Stoughton, a 2011 UVA Law graduate. “A Tactical Fourth Amendment” explores the relationship between police practices and constitutional doctrine regulating police use of force.

Garrett is also interested in the state of the death penalty in the United States. For example, he presented work at the United Nations and contributed to a volume examining the U.N. moratorium on the death penalty (DNA Exonerations in the United States, United Nations, OHCHR Global Panel, “Moving Away from the Death Penalty: Wrongful Convictions” (2014)). He also described U.S. death row exonerations in a report focused on the death penalty in Japan (The United States, in The Death Penalty Project, Wrongful Convictions, Miscarriages of Justice, Unfair Trials and the Death Penalty (2014)).


In his works in progress, Garrett is using some of his past approaches, including careful study of empirical data and criminal trial records, to examine a new puzzle: Why is the American death penalty in such a rapid state of decline? Garrett has begun that work in an academic article, “The Decline of the Virginia (and American) Death Penalty,” which examines in detail capital trials in Virginia. Virginia used to be the second-largest death penalty state in the United States, having executed the second-highest number of prisoners since the 1970s, after Texas. However, in the past decade, there are now two or fewer capital trials in Virginia, and over one-half of those trials now result in a life sentence. By studying those trial records in detail, Garrett has found that defense lawyers have transformed how death penalty cases are litigated in Virginia, placing detailed mitigation evidence before a jury, humanizing their clients, and as a result, often sidestepping a death sentence. “Defense lawyers are litigating hard and obtaining life sentences in cases that would have resulted in death sentences a decade ago,” Garrett said. Other factors are likely at work; public opinion may make jurors more receptive to mitigation evidence. “Concerns about wrongful convictions may also play a role, and indeed, innocence claims have been litigated in many of the recent capital trials in Virginia,” he added. Fewer prosecutors in Virginia (and around the country) seek the death penalty, and very few counties in Virginia seem willing to tackle the costs involved. Garrett is currently collecting and studying empirical data to examine what factors might explain the nationwide decline in the death penalty and the implications for this remarkable decline.

Taken together, Brandon Garrett’s research blends rare theoretical insight with detailed empirical analysis to shed new light on fundamental topics of criminal justice. His indefatigable and creative pursuit of these ideas, his extraordinarily prolific scholarly output, and his willingness to engage in practical legal reform merge together in a way that has transformed Garrett into a leading figure.
In October 1993, Ronald Jones sat on death row in Illinois waiting to be executed. He had been sentenced to death for a gruesome rape and murder in Chicago. Jones clung to one last request—for a DNA test, which he claimed would prove his innocence. His lawyers offered to pay the $3,000 that it would cost to do the test. At the time, only a handful of people had ever proven their innocence using postconviction DNA testing. The prosecutors opposed testing, arguing that it would make no difference. Indeed, there appeared to be overwhelming evidence of Ronald Jones’s guilt. Cook County circuit judge John Morrissey agreed and angrily denied the motion, exclaiming, “What issue could possibly be resolved by DNA testing?”

Eight years before, in March 1985, the victim, a twenty-eight-year-old mother of three, was out dancing late with her sister on the South Side of Chicago. She was hungry and decided to get food a few blocks from her home at Harold’s Chicken Shack. She ran into a friend on the street. As they talked, a panhandler approached; people in the neighborhood had nicknamed him “Bumpy,” because of his severe acne. “Bumpy” asked the friend for fifty cents. She gave him fifty cents and all three parted ways.

Several hours later, the victim was found half-naked and dead in a nearby alley behind the abandoned Crest Hotel. She had been stabbed many times and beaten. Ronald Jones, who was familiar to the police because he was a suspect in a sexual assault case that was never brought to a trial, was arrested. He had a severe acne problem and was known as Bumpy. He may have in fact been the man the friend saw that night. He was “a homeless, alcoholic panhandler” with an IQ of about 80.

After Jones was arrested, he was placed in a small police interrogation room with walls bare save a sheet of paper listing the Miranda warnings. During an eight-hour-long interrogation, he confessed. Jones did not just say, “I did it.” He made far more damning admissions, signing a written statement that included a series of details that only the killer could have known. The victim was assaulted in a room inside the vacant Crest Hotel, where police found a large pool of blood and some of her clothing. In his statement, Jones said that on the morning of the crime, he was walking “by the Crest,” saw the victim, and assaulted her in a room inside. Police analysts detected semen in the victim’s vagina. Jones said that they had sex. The pathologist testified that the victim had injuries from trying to fend off blows. Jones said they were “wrestling and tussling.” The victim had been stabbed four times. Jones said he lost his temper and “cut her a few times” with a knife. Police had found a trail of blood leading out of a window that had no glass, into the alley where they found the victim’s body. Jones knew there was “an alley” by the hotel and said he came and left through an open “side window.” It was unlikely that anyone could coincidentally guess so many details that matched the crime scene.

The lead detective testified at trial that he brought Jones to the crime scene, where Jones offered more details. Jones “showed us the room” and “showed us where the struggle took place and where she was actually stabbed.” He accurately described the victim’s appearance. Jones supposedly offered all of these crime scene details without any prompting. Those details sealed his fate.

Ronald Jones’s confession was not the only evidence against him. Forensic evidence also linked Jones to the crime. DNA testing was attempted on the semen evidence, but the results were said to be inconclusive. At the time of the trial, in 1989, DNA technology was brand-new and could only be conducted in cases with large quantities of biological material, so conventional A-B-O blood-typing was performed. At trial, the forensic analyst explained that 52% of the population could have been the source of the semen and that Ronald Jones’s blood type placed him in that group.

At the five-day trial, Jones took the witness stand and recanted his confession. In his closing argument, the prosecutor told the jury to consider that Jones was a “twice-convicted felon.” He added, “Please don’t be fooled by this man’s quiet demeanor in this court-

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room and on the witness stand. The only two eyes that witnessed the brutal rape and murder ... are in this courtroom, looking at you right now.” The jury convicted Jones and sentenced him to death.

Jones appealed and lost. He argued that his confession was coerced and said procedural errors infected his trial. The Illinois Supreme Court denied his petition, as did the U.S. Supreme Court. Then the trial judge denied his request for DNA testing.

But at the eleventh hour, Ronald Jones's luck began to change. In 1997, the Illinois Supreme Court reversed the trial judge and granted his request for DNA testing. The DNA profile on the sperm did not match Jones. The DNA also did not match the victim's fiancé, with whom she had been living at the time of the murder. It belonged to another man, who remains at large. Jones's conviction was vacated. But prosecutors waited until 1999 to drop the charges. Governor George H. Ryan pardoned Jones in 2000. He had spent more than thirteen years behind bars.

DNA testing saved Ronald Jones's life. Jones later commented, “Had it not been for DNA, who knows about me?” He likely would have been executed.

What went wrong in Ronald Jones’s case? Why did he confess to a crime he did not commit? How did he confess in such detail? Why did the blood evidence appear to modestly support the State's case? The answers appear in the records from Jones's trial.

The transcripts of the criminal trial reveal a troubling story. Ronald Jones signed the written confession statement only after enduring hours of interrogation. On the witness stand at trial, Jones testified that a detective had handcuffed him to the wall and hit him in the head again and again with a long black object, because he refused to confess. Jones said that a second detective then entered the room and said, “No, don’t hit him, because he might bruise.” That detective instead pummeled him with his fists in a flurry of blows to the midsection. The defense had argued prior to trial that, based on this police misconduct, the confession should be suppressed. The detectives both denied Jones had been struck. The lead detective denied using any interrogation techniques at all. He testified, “I sit down, I interview people, I talk to people. That’s all I do, sir.” The judge ruled that the confession should be admitted at trial, explaining, “I do not feel that there was any coercion or any undue influence used upon the defendant.”

Even if the confession was physically coerced as Jones described at trial, it still raises a puzzle. Now that we know Jones was innocent, one wonders how he could have known so much detailed inside information about the crime. At trial, Jones explained that when police took him to the crime scene they had walked through how the crime happened. The detective “was telling me blood stains on the floor and different clothing that was found inside the abandoned building,” and that the victim “was killed with a knife, and she was stabbed, three or four times.” It appears that Jones repeated the specific details about the crime in his confession statement not because he was there, but because the police told him exactly what to say.

The forensic evidence at Jones's trial was also flawed. Although the prosecutor told the jury in his closing statement that “physical evidence does not lie,” in fact, the forensic analyst had grossly misstated the science. Jones's blood type was the most common type. He was a Type O. However, he was also a nonsecretor, meaning that his body fluids did not reveal his blood type. Only 20% of the population are nonsecretors. The victim was a Type A secretor, as are about 32% of the population. The vaginal swabs collected from the victim's body matched her type and had Type A substances on them. The analyst testified that the percentage of males who could have been the source for the semen was the percentage of nonsecretors added to the percentage of Type A secretors, which would add up to about half the population.

The analyst was wrong. A competent analyst would have explained that any man could have been the rapist. The analyst had found nothing inconsistent with the victim’s Type A. This raised a problem that was common at the time, called the problem of “masking.” Substances from the victim could “mask” any material present from the rapist. The evidence from this crime scene was totally inconclusive. Nothing at all could be said about the blood type of the rapist.

**THE 250 EXONEREES**

In retrospect, Ronald Jones's case provides a stunning example of how our system can convict the innocent. If his case were the only case like this, we might call it a tragic accident, but nothing more. But his case is far from unique. Since DNA testing became available in
the late 1980s, more than 250 innocent people have been exonerated by postconviction DNA testing.

Who were these innocent people? The first 250 DNA exonerees were convicted chiefly of rape, in 68% of the cases (171), with 9% convicted of murder (22), 21% convicted of both murder and rape (52), and 2% convicted of other crimes like robbery (5). Seventeen were sentenced to death. Eighty were sentenced to life in prison. They served an average of thirteen years in prison. These people were typically in their twenties when they were convicted. Twenty-four were juveniles. All but four were male. At least eighteen were mentally disabled. Far more DNA exonerees were minorities (70%) than is typical among the already racially skewed populations of rape and murder convicts. Of the 250 exonerees, 155 were black, 20 Latino, 74 white, and 1 Asian.

DNA testing did more—it also identified the guilty. In 45% of the 250 postconviction DNA exonerations (112 cases), the test results identified the culprit. This most often occurred through a “cold hit” or a match in growing law enforcement DNA data banks. The damage caused by these wrongful convictions extends far beyond the suffering of the innocent. Dozens of criminals continued to commit rapes and murders for years until DNA testing identified them.

Before the invention of DNA testing, the problem of convicting the innocent remained largely out of sight. Many doubted that a wrongful conviction could ever occur. Justice Sandra Day O’Connor touted how “our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.” Judge Learned Hand famously called “the ghost of the innocent man convicted” an “unreal dream.” Prosecutors have from time to time claimed infallibility, announcing, “Innocent men are never convicted.” Others acknowledged that human error is inevitable, but doubted that convicts could ever convincingly prove their innocence. Scholars spoke of “the dark figure of innocence,” because so little was known about wrongful convictions.

DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system’s accuracy. This sea change came about because of the hard work of visionary lawyers, journalists, and students who suspected that the criminal justice system was not as infallible as many believed. Barry Scheck and Peter Neufeld, two well-known defense lawyers, founded the pioneering Innocence Project at Cardozo Law School in the early 1990s, which helped to free many of the first 250 exonerees. I first met several of these exonerees when, as a rookie lawyer, I worked for Scheck and Neufeld representing innocent people who sued to get compensation for their years behind bars. Over the years, lawyers, journalists, and others established an “innocence network,” including clinics at dozens of law schools, designed to locate innocence cases. Today, DNA exonerations have occurred throughout the United States, in thirty-three states and the District of Columbia. Public distrust of the criminal justice system has increased, and popular television shows, books, movies, and plays have dramatized the stories of the wrongfully convicted. We now know that the “ghost of the innocent man” spoken of by Judge Learned Hand is no “unreal dream,” but a nightmarish reality.

WHAT WENT WRONG

What we have not been able to know, however, is whether there are systemic failures that cause wrongful convictions. Now that there have been so many DNA exonerations, we have a large body of errors to study. Did the first 250 DNA exonerations result from unfortunate but nevertheless unusual circumstances? Or were these errors the result of entrenched practices that criminal courts rely upon every day? Are there similarities among these exonerees’ cases? What can we learn from them?

This book is the first to answer these questions by taking an in-depth look at what happened to these innocent people. Collecting the raw materials was a challenge. Although scholars have surveyed jurors and judges using detailed questionnaires, no one has studied a set of criminal trial transcripts to assess what evidence was presented, much less studied the criminal trials of the exonerated. One reason is the difficulty and expense of locating trial records. These voluminous records must often be pulled from storage in court archives or requested from the court reporters. I was able to overcome these difficulties with the help of numerous librarians and research assistants. For each of the first 250 DNA exonerees, I
contacted defense lawyers, court clerks, court reporters, prosecutors, and innocence projects around the country. I located documents ranging from confession statements to judicial opinions and, most important, transcripts of exonerees’ original trials. I obtained 88% of their trial transcripts, or 207 of the 234 exonerees convicted at a trial. I also obtained hearing transcripts and other records in thirteen of sixteen cases where exonerees had no trial but instead pleaded guilty. In the remaining cases, the records had been sealed, destroyed, or lost.

When I began to assemble this wealth of information, I had a single goal: to find out what went wrong. When I analyzed the trial records, I found that the exonerees’ cases were not idiosyncratic. The same problems occurred again and again. Like Ronald Jones, almost all of the other exonerees who falsely confessed had contaminated confession statements. Most other forensic analysis at these trials offered invalid and flawed conclusions. As troubling as it was, Ronald Jones’s case looked typical among these exonerees: his case fit a pattern of corrupted evidence, shoddy investigative practices, unsound science, and poor lawyering.

These trials call into question the “unparalleled protections against convicting the innocent” that the Constitution supposedly affords. The system places great trust in the jury as the fact finder. When the Supreme Court declined to recognize a right under the Constitution for convicts to claim their innocence, it reasoned, “the trial is the paramount event for determining the guilt or innocence of the defendant.” Yet at a trial, few criminal procedure rules try to ensure that the jury hears accurate evidence. To be sure, celebrated constitutional rights, such as the requirement that jurors find guilt beyond a reasonable doubt and that indigent defendants receive lawyers, provide crucial bulwarks against miscarriages of justice. But those rights and a welter of others the Court has recognized, like the Miranda warnings, the exclusionary rule, and the right to confront witnesses, are procedural rules that the State must follow to prevent a conviction from being overturned. Few rules, however, regulate accuracy rather than procedures. Such matters are typically committed to the discretion of the trial judge.

Exonerations provide new insights into how criminal prosecutions can go wrong. We do not know, and cannot ever know, how many other innocent people have languished behind bars. Yet there is no reason to think that these 250 are the only ones who were wrongly convicted because of the same types of errors by police, prosecutors, defense lawyers, judges, jurors, and forensic scientists. The same unsound but routine methods may have contaminated countless other confessions, eyewitness identifications, forensic analysis, informant testimony, and defenses.

TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS
(Harvard University Press, 2014)

1. UNITED STATES VS. GOLIATH

“I know what this is about. I have been expecting you.”

It was not until 2006 that The Banker finally got the knock on his door. Six police officers and a prosecutor were standing there with an arrest warrant. He later recalled, “I was a true Siemens man, for sure. I was known as the keeper of the slush fund. We all knew what we were doing was illegal.” The Banker was in charge of just some of the multinational bribery operations at Siemens Aktiengesellschaft, a German multinational firm, ranked in the top 50 of the Fortune Global 500 list of the world’s largest corporations. It has more than 400,000 employees in 190 countries and makes everything from trains to electrical power plants to home coffeemakers. Among its many activities was paying more than a billion dollars in bribes around the world to secure lucrative business from foreign governments. Now Siemens would be prosecuted, and not just in Germany but also in the United States.

This book is the first to take a close look at what happens when
A company is prosecuted in the United States. A corporate prosecution is like a battle between David and Goliath. One would normally assume that federal prosecutors play the role of Goliath. They wield incredible power, with the ability to hold a corporation liable for a crime by even a single employee and the benefit of expansive federal criminal laws. It is hard to think of federal prosecutors as the little guy in any fight. Yet they may play the role of David when up against the largest and most powerful corporations in the world.

Some companies are not just “too big to fail” but also “too big to jail”: they are considered to be so valuable to the economy that prosecutors may not hold them accountable for their crimes. The expression “too big to jail” has mostly been used to refer to failures to prosecute Wall Street banks. A dismayed reaction to the lack of prosecutions after the last financial crisis is understandable, but to see why corporations may escape prosecution, it is important to understand exactly how a company can be prosecuted for a crime and the many practical challenges involved. The very idea that a corporation can be prosecuted for an employee’s crime seems odd on its face, and even among criminal lawyers, the topic of corporate crime had long been obscure. Over the past decade, corporate crime exploded in importance—not only because of greater public interest in accountability but also because prosecutors transformed their approach to targeting corporations.

In this book, I present data collected from more than a decade of cases to show what really happens when prosecutors pursue corporate criminals. I examine the terms of the deals that prosecutors now negotiate with companies, how prosecutors fine companies to punish them, the changes companies must make to prevent future crimes, and whether prosecutors pursue individual employees. The current approach to corporate prosecutions raises “too big to jail” concerns that extend beyond Wall Street banks to the cases brought against a wide range of companies. I argue that prosecutors fail to effectively punish the most serious corporate crimes. Still more troubling is that not enough is known about how to hold complex organizations accountable; prosecutors exacerbate that problem by settling corporate prosecutions without much transparency. My main goal in exploring the hidden world of corporate prosecutions is to encourage more public attention to the problem of punishing corporate crime.

Bribing foreign government officials is a crime in Germany, the United States, and many other countries. In 2008, prosecutors in Germany charged The Banker with corruption, leading to a conviction, two years’ probation, and a $170,000 fine. He received leniency on account of his cooperation with the authorities. When he later spoke to journalists, he expressed disappointment that Siemens treated him like an “outsider” and gave him a “kick in the pants” while people at the top were not held accountable. “I would never have thought I’d go to jail for my company,” he later said. “Sure, we joked about it, but we thought if our actions ever came to light, we’d all go together and there would be enough people to play a game of cards.”

The controversy surrounding this global bribery scheme would eventually bring in prosecutors around the world, notably those in the United States. They would wield a powerful new approach to tar-
geting corporations, one I explore throughout this book. In the Siemens case, was The Banker right that underlings would be the only ones held accountable, or would the storm reach the summit—the top executives or the company itself?

No Soul to Be Damned, No Body to Kick

How exactly are corporations convicted of a crime? The word corporation comes from corpus, the Latin word for “body.” A corporation may be a body, but it is a collective body that can act only through its employees. As the British lord chancellor Edward Thurlow reportedly remarked in the late eighteenth century, corporations have “no soul to be damned, no body to kick.” Corporate persons obviously cannot be imprisoned. However, companies can face potentially severe and even lethal consequences, even if in theory they can be “immortal.” They can be forced to pay debilitating fines or suffer harm to their reputation. When convicted they can lose the government licenses that make doing business possible; for example, a company can be suspended or even barred from entering into contracts with the federal government.

The federal rule for corporate criminal liability is powerful and long-standing. In its 1909 decision in New York Central & Hudson River Railroad v. United States, the Supreme Court held that a corporation could be constitutionally prosecuted for a federal crime under a broad rule. The rule is simple: an organization can be convicted based on the criminal conduct of a single employee. That standard comes from a rule called the master-servant rule or respondeat superior—“let the master answer” in Latin—which makes the master responsible for the servant’s acts. Under that rule, an employer was responsible for an employee’s wrongs if those wrongs were committed in the scope of employment and at least in part to benefit the employer. As the Court suggested in New York Central, the master or corporation may be in the best position to make sure employees are properly supervised to prevent lawbreaking. The Court emphasized “the interest of public policy,” since giving companies “immunity” from criminal prosecution would make it hard to “effectually” prevent “abuses.” Rather than spend time on theoretical questions about when and whether corporations should constitute legal persons, I focus on whether corporate prosecutions are actually effective in preventing crime. Many have debated corporate personhood, including in response to the Court’s ruling in Citizens United v. Federal Election Commission (2010) that the First Amendment protects corporations against regulation of election spending. To understand corporate prosecutions, though, what matters is not Citizens United but rather the strict master-servant rule from the less well-known New York Central case.

Today, a corporation is a “person” under federal law, as are other types of business organizations. The very first section of the U.S. Code, with definitions that apply to all federal laws, including those dealing with crimes, defines a person to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” As a result, federal prosecutions may be brought against any type of organization. The U.S. Sentencing Commission Guidelines Manual uses the word organization because the guidelines cover criminal sentences for all kinds of companies, including partnerships not formally incorporated by a state. Prosecutors convict giant multinational corporations such as Siemens, large domestic public corporations with millions of shareholders, and mom-and-pop companies with just a few owners or only one owner.

In theory, a corporation can be prosecuted for just about any crime that an individual can be prosecuted for (except for crimes with heightened intent, such as homicide). In practice, corporations are prosecuted for crimes likely to take place in a business setting, such as accounting fraud, banking fraud, environmental violations, foreign bribery, money laundering, price fixing, securities fraud, and wire fraud. Important corporate prosecutions are chiefly brought by federal prosecutors, in contrast to prosecutions of smaller-scale corporate crimes or prosecutions of individuals, which are overwhelmingly brought at the local level.

Data on Corporate Prosecutions

Over the past decade, there has been an increase in the size and importance of federal prosecutions of corporations, though not in the number of cases brought. One of my goals in writing this book was to uncover and present data explaining how corporations are actually prosecuted. As Figure 1.1 illustrates, the data that I have gathered show a large spike in corporate criminal fines over the past few years.
In the past, given the modest sentences for companies, it was often not worth the effort to prosecute them. Corporate fines grew after 1991, when the U.S. Sentencing Commission, a group convened by Congress to write rules for sentencing federal criminals, adopted the first sentencing guidelines specifically designed for corporations. More resources were also devoted to corporate prosecutions in response to Enron and other corporate scandals that shook the United States in the early 2000s, prompting the Department of Justice to form an Enron Task Force and later a Corporate Fraud Task Force (now called the Financial Fraud Enforcement Task Force). Figure 1.1 shows total fines for the approximately 3,500 companies convicted from 1994 to 2009. It includes data from the Sentencing Commission for the earlier period, but from 2001 to 2012 the more dramatic rise in fines is shown in the data that I collected by hand from more than 2,250 court dockets and corporate prosecution agreements.

To understand what has really changed, we need to look behind the aggregate data displayed in Figure 1.1. The bulk of those corporate fines were actually paid in a small number of blockbuster cases, such as the Siemens case. For example, the large spike in 2009 is because the pharmaceutical giant Pfizer paid a then-record fine of nearly $1.2 billion. That single fine made up about half of the total for that year. Other massive antitrust cases, foreign bribery cases, and illegal pharmaceutical sales cases involve fines in the hundreds of millions. There is still more about corporate prosecutions that those totals do not capture. The criminal fines are only a fraction of the costs imposed on companies. For example, as part of criminal settlements, companies were required to pay billions more to victims of fraud. Also not reflected in the fines are structural reforms that prosecutors require companies to adopt to prevent future crimes.

What is clear from the reported activity of prosecutors is that over the past decade they have embraced a new approach: deferred prosecution agreements. Prosecutors enter agreements that allow the company to avoid a conviction but which impose fines, aim to reshape corporate governance, and bring independent monitors into the boardroom. The rise of such deferred prosecution agreements, and non-prosecution agreements, in which no criminal case is even filed, means that the official Sentencing Commission statistics on corporate convictions, as shown in Figure 1.1, fail to capture many of the most important cases. Corporate fines are up, but the big story of the twenty-first century is not corporate fines or convictions but prosecutors changing the ways that corporations are managed. Prosecutors now try to rehabilitate a company by helping it to put systems in place to detect and prevent crime among its employees and, more broadly, to foster a culture of ethics and integrity inside the company. This represents an ambitious new approach to governance in which federal prosecutors help reshape the policies and culture of entire institutions, much as federal judges oversaw school desegregation and prison reform in the heyday of the civil rights era in the 1960s and 1970s.

What initially attracted me to studying these corporate agreements with prosecutors was that, as a former civil rights lawyer, I was surprised to see prosecutors taking on for themselves the hard work of changing institutions. I have spent years researching wrongful convictions and DNA exonerations in individual criminal cases, in which errors may implicate larger problems in our criminal justice system. I turned my attention to the very different world of corporate prosecutions because a single prosecution of a company such as Siemens can have enormous repercussions in the U.S. and the global economy, particularly since other industry actors will be watching and nervous about whether they might be next. I quickly learned, however, that there is not much information out there about when or how corporations are prosecuted.

There is no official registry for corporate offenders, nor is there...
an official list of deferred prosecution and non-prosecution agreements by federal prosecutors. I decided to create these resources. Over the years, with invaluable help from the UVA Law Library, I created a database with information on every federal deferred prosecution or non-prosecution agreement with a company. In one place or another, this information was publicly available, but I wanted to put it together in order to learn who these firms were, what they did, what they were convicted of, and how they were punished.

There have been more than 250 such prosecution agreements entered over the past decade. I made this database available online as a public resource, and it remains the most authoritative and complete source. I then amassed a second and much larger archive of more than 2,000 federal corporate convictions, mostly guilty pleas by corporations, and placed these data online as well. These data have real limitations; although prosecutors pound their chests when bringing the largest corporations to justice, in many other cases no charges are brought. We have no way to know how often prosecutors decline to pursue charges against corporations—they do not usually make those decisions public—except when they enter non-prosecution agreements. We do not know how often corporations commit crimes, as the government does not keep data on corporate crime, which is hard to detect and to define.

More than 250 federal prosecutions since 2001 have involved large public corporations. These are the biggest criminal defendants imaginable. Prosecutors have taken on the likes of AIG, Bristol-Myers Squibb, BP, Google, HealthSouth, JPMorgan, KPMG, Merrill Lynch, Monsanto, and Pfizer. Such Fortune 500 firms can and do mobilize astonishing resources in their defense. The Siemens case illustrates the titanic scale of the power plays at work in federal corporate prosecutions, making them unlike anything else in criminal justice.

**Convicting Siemens**

The story of the prosecution of one of the world’s biggest corporations began in one of the world’s smallest countries—the principality of Lichtenstein. In early 2003, a bank in Lichtenstein owned by the royal family was having auditors review its records. The bank auditors noticed something strange: millions of euros were bouncing around between Panama, Lichtenstein, and the British Virgin Islands. The bank secrecy laws in Lichtenstein, like those in Switzerland, make banks an attractive place for some people to keep money. Auditors were on the lookout for unusual transactions that might be the work of terrorists or other criminals trying to take advantage of this secrecy to engage in money laundering. They noticed odd transactions between offshore companies, including large sums going into an account of an offshore firm called Martha Overseas Corp. That company was incorporated in Panama, but it was controlled by an executive of Siemens working in Greece—and the money going into the account was coming from another offshore company, one based in the British Virgin Islands and controlled by another executive of Siemens.

The bank informed Siemens of this problem in 2004 and began to block these money transfers. They also notified bank regulators in Germany and Switzerland, who in turn contacted regulators in Austria and Italy. Two years later, German police appeared on The Banker’s doorstep in Munich and seized documents from more than thirty Siemens offices.

Still, there are good reasons to worry whether the right corporations are being prosecuted and whether the punishments fit the crimes. Prosecutors say that they target the most serious corporate violators. Yet the fines are typically greatly reduced in exchange for little oversight. If one justification for prosecuting a company in the first place is egregiously bad compliance, then one wonders why so little is typically done to deter or correct it. Are these prosecutions really helping to reform corporate criminals? Which compliance programs actually work? We simply do not know. While there are no silver-bullet solutions to these vexing problems, there are concrete ways to improve matters, including by insisting on more stringent fines, imposing ongoing judicial review, monitoring, and mandating transparency.

Corporate prosecutions upend our assumptions about a criminal justice system whose playing field is tilted in favor of the prosecution. It is admirable that prosecutors have taken on the role of David in prosecuting the largest corporations—but if they miss their shot at Goliath, the most serious corporate crimes will be committed with impunity. The surge in large-scale corporate cases shows how federal prosecutors have creatively tried to prevent corporate malfeasance.
at home and overseas, but real changes in corporate culture require sustained oversight of management, strong regulators, and sound rules and laws. Congress enacts new criminal laws intended to bolster regulations, but it is perennially unwilling to provide adequate resources to many agencies to carry out enforcement of those regulations. That is why prosecutors can fill an important gap—and when they do prosecute a corporation, they can wield the most powerful tools. A broader political movement toward greater corporate accountability more generally, with stronger regulations and enforcement, could make prosecutions far less necessary. But if we take as a given the larger dynamics of our economic and political system, modest changes could improve the role criminal cases play in the larger drama.

Corporate criminal prosecutions serve a distinct purpose—to punish serious violations and grossly deficient compliance—and this purpose is not served if companies obtain kid-glove non-prosecution deals in exchange for cosmetic reforms. Corporate convictions should be the norm, and in special cases in which prosecutors defer prosecution, they should impose deterrent fines and stringent compliance requirements. A judge should carefully supervise all corporate agreements to ensure their effective implementation. Sentencing guidelines and judicial practices could be reconsidered, but prosecutors themselves can revitalize the area by adopting a new set of guidelines to strengthen the punishment reserved for the most serious corporate criminals.

Although I propose reforms, my main goal in this book is to describe the hidden world of corporate prosecutions. Corporate crime deserves more public attention. What is particularly chilling about the problem is that corporate complexity may not only enable crime on a vast scale but also make such crimes difficult to detect, prevent, and prosecute. We need to know much more. When we ask if some companies are being treated as “too big to jail,” it is not enough to ask whether the largest firms are so important to the economy that they are treated as immune from prosecution. We also need to ask whether individuals are held accountable. We need to evaluate whether the corporate prosecutions that are brought are working.

We need to look beyond the press releases announcing eye-catching fines and ask whether adequate criminal punishment is imposed and whether structural reforms are working.

The Banker feared that although Siemens was punished, most others would not face the same consequences. He may have been right to worry. After all, not only do prosecutors regularly offer leniency, but we do not know how many corporate crimes go undetected or unprosecuted. As The Banker put it: “The Eleventh Commandment is: ‘Don’t get caught.’”

THE SUBSTANCE OF FALSE CONFESSIONS

62 Stan. L. Rev. 1051 (2010)

False confessions present a puzzle: How could innocent people convincingly confess to crimes they knew nothing about? For decades, commentators doubted that a crime suspect would falsely confess. For example, John Henry Wigmore wrote in his 1923 evidence treatise that false confessions were “scarcely conceivable” and “of the rarest occurrence” and that “[n]o trustworthy figures of authenticated instances exist....” That understanding has changed dramatically in recent years, as, at the time of this writing, postconviction DNA testing has exonerated 252 convicts, forty-two of whom falsely confessed to rapes and murders. There is a new awareness among scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations. Scholars increasingly study the psychological techniques that can cause people to falsely confess and have documented how such techniques were used in instances of known false confessions.

This Article takes a different approach by examining the substance of false confessions, including what was said during interrogations and how confessions were litigated at trial. Doing so sheds light on the phenomenon of confession contamination. Police may, intentionally or not, prompt the suspect on how the crime happened so that the suspect can then parrot back an accurate-sounding narrative. Scholars have noted that “on occasion, police are suspected of feeding details of a crime to a compliant suspect,” and have described several well-known examples. However, no one has previously stud-
ied the factual statements in a set of false confessions.

The set of forty cases that this Article examines has important limitations. As will be developed further, false confessions uncovered by DNA testing are not representative of other false confessions, much less confessions more generally. These forty cases cannot speak to how often people confess falsely. Nor can these examples themselves tell us whether reforms, such as recording interrogations, prevent more false convictions than they discourage true confessions. But these data provide examples of a very troubling problem that deserves further study.

In the cases studied here, innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. Exonerees told police much more than just “I did it.” In all cases but two (ninety-seven percent—or thirty-six of the thirty-eight—of the exonerees for whom trial or pretrial records could be obtained), police reported that suspects confessed to a series of specific details concerning how the crime occurred. Often those details included reportedly “inside information” that only the rapist or murderer could have known. We now know that each of these people was innocent and was not at the crime scene. Where did those details, recounted at length at trial and recorded in confession statements, come from? We often cannot tell what happened from reading the written records. In many cases, however, police likely disclosed those details during interrogations by telling exonerees how the crime happened. Police may not have done so intentionally or recklessly; the study materials do not provide definitive information about the state of mind of the officers. Police may have been convinced the suspect was guilty and may not have realized that the interrogation had been mishandled.

An illustrative case is that of Jeffrey Deskovic, a seventeen-year-old when he was convicted of rape and murder. Deskovic was a classmate of the fifteen-year-old victim, had attended her wake, and was eager to help solve the crime. Deskovic spoke to police many times and was interrogated for hours over multiple sessions, including a session in which police had a tape recorder, but turned it on and off, only recording thirty-five minutes. During one discussion, he “supposedly drew an accurate diagram,” which depicted details concerning “three discrete crime scenes” which were not ever made public. He never actually confessed to raping or murdering the victim, but he offered other details, including that the victim suffered a blow to the temple, that he tore her clothes, struggled with her, held his hand over her mouth, and “may have left it there a little too long.” In his last statement, which ended with him in a fetal position and crying uncontrollably, he reportedly told police that he had “hit her in the back of the head with a Gatoraid [sic] bottle that was lying on the path.” Police testified that, after hearing this, the next day they conducted a careful search and found a Gatorade bottle cap at the crime scene.

The trial transcripts highlight how central these admissions were to the State’s case. DNA tests conducted by the FBI laboratory before the trial excluded Deskovic, providing powerful evidence that he was not the perpetrator. The district attorney asked the jury to ignore that DNA evidence, speculating that perhaps the victim was “sexually active” and “romantically linked to somebody else” who she had sexual relations with shortly before her rape and murder. After all, “[s]he grew up in the eighties.” There was no investigation or DNA testing conducted to support this conjecture, either by the prosecution or the defense.

Instead, the district attorney emphasized in closing arguments the reliability of Deskovic’s statements, noting that after he told police about the Gatorade bottle, “it was found there,” and this was a heavy weapon, “not a small little bottle.” Detectives “did not disclose any of their observations or any of the evidence they recovered from Jeffrey nor, for that matter, to anyone else they interviewed.” They kept their investigative work nonpublic for the simple reason ... that [if a suspect] revealed certain intimate details that only the true killer would know, having said those, and he arrested could not then say, “Hey, they were fed to me by the police, I heard them as rumors, I used my common sense, and it’s simply theories.” The district attorney told the jury to reject the suggestion that Deskovic was fed facts, stating, “Ladies and gentlemen, it doesn’t wash in this case, it just doesn’t wash.”

Deskovic was convicted of rape and murder and served more than fifteen years of a sentence of fifteen years to life. In 2006, new DNA testing again excluded him, but also matched the profile of a murder convict who subsequently confessed and pleaded guilty. Now that we know Deskovic is innocent, how could he have known those “intimate details”? The District Attorney’s postexoneration inquiry
noted:

Much of the prosecution’s effort to persuade the jury that Deskovic’s statements established his guilt hinged on the argument that Deskovic knew things about the crime that only the killer could know.... Given Deskovic’s innocence, two scenarios are possible: either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community.

This confession was contaminated, either by police leaking facts or feeding them. Given the level of specificity reportedly provided by Deskovic, the second and more troubling possibility, that the officers disclosed facts to him, seems far more likely. Yet during the trial, the police and the prosecutor not only denied having told Deskovic those facts, such as the presence of the Gatorade bottle cap and the depiction of the crime scene, but were emphatic they did not leak those facts to the media or to anyone else, such as other high school students interviewed. Whether the police acted inadvertently or intentionally, in hindsight we know that they provided an inaccurate account. Deskovic has commented, “[b]elieving in the criminal justice system and being fearful for myself, I told them what they wanted to hear.” Deskovic is currently suing for civil rights violations caused by a “veritable perfect storm of misconduct by virtually every actor at every stage of his investigation and prosecution....” The suit alleges that police disclosed facts to him.

The Deskovic case illustrates how false confessions do not happen simply by happenstance. They are carefully constructed during an interrogation and then reconstructed during any criminal trial that follows. Constitutional criminal procedure does not regulate this critical phase of an interrogation. The Constitution requires the provision of initial Miranda warnings and then requires that the bare admission of guilt have been made voluntarily. That admission of guilt, while important, is only a part of the interrogation process. The “confession-making” phase may be far more involved. Much of the power of a confession derives from the narrative describing how the crime was committed. For a person to confess in a convincing way, he must be able to say more than “I did it.” Police are trained to carefully test the suspect’s knowledge of how the crime occurred by assessing whether the suspect can freely volunteer specific details that only the true culprit could know.

That confession-making process was corrupted in the cases studied in this Article. This Article examines the substance of the confession statements, how they were litigated at trial, and then on appeal. Just as in Deskovic’s case, in almost all of the cases that resulted in trials, detectives testified that these defendants did far more than say “I did it,” but that they also stated they had “guilty” or “inside” knowledge. Only two of the thirty-eight exonerees, Travis Hayes and Freddie Peacock, relayed no specific information concerning the crime. Hayes was still convicted, although DNA testing conducted before trial excluded him and his co-defendant. Peacock was mentally disabled and all he could say to the police about the crime was “I did it, I did it.” The other thirty-six exonerees each reportedly volunteered key details about the crime, including facts that matched the crime scene evidence or scientific evidence or accounts by the victim. Detectives further emphasized in twenty-seven cases—or seventy-one percent of the thirty-eight cases with transcripts obtained—that the details confessed were nonpublic or corroborated facts. Detectives sometimes specifically testified that they had assiduously avoided contaminating the confessions by not asking leading questions, but rather allowing the suspects to volunteer crucial facts.

The nonpublic facts contained in confession statements then became the centerpiece of the State’s case. Although defense counsel moved to exclude almost all of these confessions from the trial, courts found each to be voluntary and admissible, often citing to the apparent reliability of the confessions. The facts were typically the focus of the State’s closing arguments to the jury. Even after DNA testing excluded these people, courts sometimes initially denied relief, citing the seeming reliability of these confessions. The ironic result is that the public learned about these false confessions in part because of the contaminated facts. These false confessions were so persuasive, detailed and believable that they resulted in convictions which were often repeatedly upheld during appeals and habeas review. After years passed, these convicts had no option but to seek the DNA testing finally proving their confessions false.

Why does constitutional criminal procedure fail to regulate the substance of confessions? Beginning in the 1960s, the Supreme Court’s Fifth and Fourteenth Amendment jurisprudence shifted. The
Court abandoned its decades-long focus on reliability of confessions. Instead, the Court adopted a deferential voluntariness test examining the “totality of the circumstances” of a confession. The Court has since acknowledged “litigation over voluntariness tends to end with the finding of a valid waiver.” Almost all of these exonerees moved to suppress their confessions, and courts ruled each confession voluntary. The Court supplemented the voluntariness test with the requirement that police utter the Miranda warnings, which if properly provided, as the Court puts it, give police “a virtual ticket of admissibility.” All of these exonerees waived their Miranda rights. All lacked counsel before confessing. Most were vulnerable juveniles or mentally disabled individuals. Most were subjected to long and sometimes highly coercive interrogations. Nor is it surprising that they failed to obtain relief under the Court’s deferential voluntariness inquiry, especially where the confessions were powerfully—though falsely—corroborated.

The Court has noted that “the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk” of constitutional violations. These false confessions shed light on dangers of coercion during interrogations, but they also provide examples of a different problem in which the line blurred is that between truth and fiction. When custodial interrogations are not recorded in their entirety, one cannot easily discern whether facts were volunteered by the suspect or disclosed by law enforcement. Before they obtained DNA testing and without complete recordings of their interrogations, these exonerees could not prove that they did not volunteer inside knowledge of the crime.

A series of reforms could orient our criminal system towards the substance of confessions. First, constitutional criminal procedure could regulate reliability, though such constitutional change may be unlikely. An understanding of the vulnerability of confessions to contamination can also inform courts reviewing trials postconviction, particularly in cases involving persons vulnerable to suggestion, such as juveniles and mentally disabled individuals whose false confessions are studied here. Second, unless interrogations are recorded in their entirety, courts may not detect contamination of facts, especially when no DNA testing can be performed. In response to some of these false confessions, state legislatures, police departments, and courts have increasingly required videotaping of entire interrogations. Third, additional police procedures can safeguard reliability, such as procedures intended to assure against contamination, assess suggestibility, and avoid postadmission coercion.

**THE CONSTITUTIONAL STANDING OF CORPORATIONS**

163 U. Pa. L. Rev. 95 (2014)

During the oral arguments in *Citizens United v. Federal Election Commission*, Justice Sonia Sotomayor commented that it would seem as if the Supreme Court had “imbued a creature of State law,” the corporation, “with human characteristics.” In *Citizens United*, the Court ruled that the First Amendment prohibited restrictions on political speech of corporations. Like no other prior decision, *Citizens United* elevated the importance of the question whether corporations and other types of organizations can assert constitutional rights. That was until the Court decided *Burwell v. Hobby Lobby Stores, Inc.*, in which three for-profit closely held corporations challenged contraceptive coverage under the Affordable Care Act of 2010. In *Hobby Lobby*, at oral arguments, Justice Kennedy posited: “You say profit corporations just don’t have any standing to vindicate the religious rights of their shareholders and owners.” Yet in its decision, the Court did not address the standing requirements directly, stating that because corporations protect those “associated with a corporation in one way or another,” a for-profit firm can assert free exercise rights and can itself claim to have sincere “religious beliefs.”

Are corporations “persons” with standing to assert constitutional rights? The Court in *Citizens United* gingerly avoided addressing the issue directly; and in *Hobby Lobby*, the Court avoided the First Amendment issue, relying instead on statutory rights under the Religious Freedom Restoration Act of 1993 while evading the question of corporate standing. As I will explore in this Article, real missteps in both decisions could have been avoided by directly addressing these questions. Corporations and other types of organi-
zations have long exercised a range of constitutional rights, including those found under the Contracts Clause, Due Process Clause, Fourteenth Amendment Equal Protection Clause, First Amendment, Fourth Amendment, Fifth Amendment Takings and Double Jeopardy Clauses, Sixth Amendment, and Seventh Amendment.

Corporate constitutional litigation is pervasive. While perhaps the most significant, *Citizens United* and *Hobby Lobby* are by no means the only recent high-profile constitutional cases involving corporate litigants. Take a few prominent examples: (i) shareholders of AIG filed two derivative actions claiming that during the global financial crisis, the government’s bailout of AIG was a taking in violation of the Fifth Amendment; (2) the Southern Union Corporation successfully won a Supreme Court victory asserting its Sixth Amendment right to have aggravating facts proven to a jury when prosecuted for environmental crimes; and (3) the Court held that the Goodyear Dunlop Corporation’s subsidiaries in Turkey, France, and Luxembourg were not “essentially at home” in North Carolina under its Due Process Clause test for general jurisdiction. Those constitutional claims have little in common with each other, but just those examples indicate the sheer breadth and importance of corporate constitutional litigation.

Responding to the long list of corporate constitutional rights the Supreme Court has already recognized, Justice Stevens went one step further in his *Citizens United* dissent to note “[u]nder the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.” Justice Stevens suggested, no doubt tongue in cheek, that having recognized First Amendment rights, the Court would be obligated for the sake of consistency to extend all other constitutional rights to corporations. The Court has not extended all constitutional rights to corporations or to organizations more generally, such as associations, partnerships, and limited liability companies. Corporations cannot vote, and the Court has ruled that they are not citizens under the Fourteenth Amendment. Corporations lack Fifth Amendment self-incrimination rights, Article IV Privileges and Immunities Clause rights, and Due Process Clause liberty rights. Some constitutional rights are individual-centered and not plausible as rights of corporations. Unsurprisingly, courts have not recognized a right of corporations to serve on juries, run for public office, marry, procreate, or travel.

What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory. The closest the Court has come to touching the third rail of this jurisprudence was to suggest that certain “purely personal” constitutional rights cannot be exercised by corporations. Even when the Court recognizes that a corporation does enjoy a constitutional right, it generally does so without discussion. In *Citizens United*, for example, the Court did not discuss whether a corporation is a pure creature of state law, as Justice Sotomayor suggested; a “real entity” that can exercise all or most of the legal rights of an individual person; or an aggregate entity that helps groups of people realize their interests. The Court noted the difficulty in categorizing firms, which range from media companies to small closely held corporations to large public companies, and recognized that they exist for a wide range of purposes. In *Hobby Lobby*, the majority called it “quite beside the point” that the plaintiffs were for-profit organizations incorporated separately from their owners, blithely offering that without the action of human beings, a corporation “cannot do anything at all.”

Legal scholars have long found the Supreme Court’s lack of a coherent approach or engagement with theoretical questions concerning the nature of the firm deeply disturbing, calling the Court’s rulings “ad hoc,” “right-by-right,” “arbitrary,” “sporadic,” inconsistent, and incoherent. Scholarly objections to the Court’s rulings concerning corporate constitutional rights have only increased post-*Citizens United*.

In this Article, I part company with the many cogent critics of the Supreme Court’s rulings, but also with those who conversely argue that in *Citizens United* (and perhaps now in *Hobby Lobby*), the Court has finally recognized corporations as “real entity[ies].” The Court adopts a consistent approach, but the approach proceeds right-by-right, rather than by starting with a theory of organizations or corporations as constitutional actors.

... One could imagine that each right might apply in different ways to individuals and organizations, or apply to only some types of organizations. Instead, the Court keeps constant the substantive content of rights when litigated by organizations. The Court largely avoids organizational theory and focuses on constitutional theory.
The Supreme Court’s approach should be grounded in the doctrine of standing, a body of law flowing from the case-or-controversy requirement of Article III, which vests the federal judiciary with the “Power” to decide “Cases” and “Controversies.” The Court has defined the general test for standing as a question whether the organization itself can claim a “concrete injury,” or an “injury in fact,” that is separate from any injury to a third party. The Court has explained that “the injury must affect the plaintiff in a personal and individual way.” Conceived as a question of standing, rather than a question of what an organization is and whether it “has” a constitutional right, the analysis is simple: once an organization has Article III standing to litigate a constitutional question, the merits analysis proceeds as for an individual litigant.

The Supreme Court has set out two doctrines of Article III standing—associational and organizational standing—that, together with the prudential doctrine of third-party standing, explain when and whether entities can litigate constitutional rights. Corporations are separate legal entities that have standing to assert rights on behalf of the entity itself. Tracking the organizational standing test, a court is most likely to view corporations as having Article III standing to assert a constitutional right when that right relates to the economic interests. In contrast, associations and religious organizations have broad standing to litigate injuries of their members. The Court has also set out related prudential standing doctrines that sharply limit the ability of third parties to assert rights on behalf of another. Thus shareholders can only assert rights derivatively in the name of the corporation, and conversely, the corporation cannot litigate the separate rights of shareholders or other constituents, like officers or employees. Those Article III tests, I argue, best explain the existing doctrine, even if some of the earlier decisions predated the Court’s modern Article III decisions and do not frame their reasoning in Article III terms.

This approach toward corporate constitutional standing is normatively preferable, and I sharply criticize the Supreme Court’s decision in Hobby Lobby for not only ignoring Article III and prudential third-party standing entirely but also for using casual language in the opinion that suggests that even outside the context of a closely held family-owned corporation, the distinctions between associations, religious organizations, and for-profit corporations simply do not matter to the analysis. Separating the question of Article III standing from the merits importantly avoids advisory opinions on constitutional claims, and such caution is particularly warranted when an entity seeks to litigate a constitutional right. One person does not normally have standing to assert the liberty interest of another. Why a corporation can assert the religious beliefs of its owners is a puzzle not clearly answered in Hobby Lobby. A careful Article III standing analysis could have more narrowly (if not defensibly) explained the result in the case, if limited to the circumstances of a closely held family-owned corporation and if the owners did not themselves have standing to sue. That the Court did not engage in any such analysis not only adds fuel to the criticism of its free exercise and corporate constitutional rights jurisprudence but also to the malleability of its Article III jurisprudence.

As Justice Frankfurter famously remarked, “The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene.” Corporate litigation has long reshaped the content of constitutional rights, from the Lochner era to modern Commerce Clause jurisprudence. Where the corporation is the litigant, one may ask different constitutional questions, examine different facts, and perhaps reach different answers. Understanding the contours of the approach across different areas, from civil procedure to criminal procedure to speech, can help us understand the future direction of corporate constitutional litigation. I describe in Part IV how several key rulings by the Court, in part due to developments in underlying substantive law, now stand on thinner ice.

Finally, I conclude by exploring how the treatment of corporate constitutional standing helps illuminate something double-edged about constitutional rights more generally: few are framed as purely “individual” rights. Constitutional rights are framed generally, often imposing limitations on the government or recognizing general privileges or immunities, but not by creating individual-specific tests. Moreover, some of the most effective constitutional rights may be precisely those not limited by individual circumstances, and therefore readily exercised by organizations. At the same time, however, such rights may poorly protect individual dignitary interests. Individuals have long sought protection by seeking to have associa-
tions litigate to challenge constitutional violations. However, litigation by organizations can also conflict with individual interests and undermine individual rights. The *Hobby Lobby* decision contains dicta suggesting that courts need not adhere to well-established categories of Article III standing, opening the door to all manner of ill-advised corporate standing. That specter provides all the more reason to scrutinize corporate assertions of constitutional standing carefully if and when corporations act at the expense of individual rights.

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