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# Criminal Justice, Inc.

John Rappaport

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## DRAFT

### CRIMINAL JUSTICE, INC.

*John Rappaport\**

*To what extent can criminal justice be privatized? In the past decade, major retailers nationwide have begun to employ a private, for-profit system to settle criminal disputes. This Article examines what their decisions reveal about our public system of criminal justice and the concerns of the agents who populate it, the victims who rely on it, and the suspects whose lives it alters. The private policing of commercial spaces is well known, as is private incarceration of convicted offenders. This Article is the first, however, to document how private industry has penetrated new parts of the criminal process, administering deterrent sanctions to resolve thousands of shoplifting allegations each year.*

*Proponents of private justice claim that everyone wins. Critics (and the only court to opine so far) say it's blackmail. The Article takes a tentative middle ground: while "retail justice" is not the American ideal, it nonetheless may be preferable to public criminal justice, at least if certain conditions are met. This is because private justice subsists upon—and appears to mitigate—the severity of the public justice system. Indeed, cast in the light of public authorities' acquiescence, private justice can be seen as a novel form of decriminalization. Rather than cancel the private justice experiment, therefore, as one court is poised to do, the state should aim to foster optimal conditions for its success. The Article makes several recommendations to that end.*

*Extending the central analysis, the Article then shows how the study of private justice leads to fresh perspectives on some important criminal justice issues. It suggests, for example, that the costs to crime victims of assisting the prosecution may be a feature of the system, not a bug, if they encourage victims to invest in efficient crime-detering precautions. It also complicates legal academic models of police and prosecutorial behavior built on maximizing arrests and convictions. The Article concludes by identifying conditions that conduce to private criminal justice and speculating about the next frontiers.*

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## INTRODUCTION

Most shoplifters evade detection. And many of those who are caught are never punished. For decades, retailers have relied on a mixture of formal law enforcement and informal self-help—sending some suspected shoplifters to the police and others to the curb. Recently, a third option has emerged, raising serious questions about the interplay between public and private forces in American criminal justice. Retailers today can, in effect, assign their criminal complaints to a for-profit, specialist corporation like the Corrective Education Company (CEC).<sup>1</sup> This “retail justice company” extracts payment from the alleged offender in exchange for a “restorative justice” course and a promise not to call the police. The retailer pays nothing; in fact, in some cases, it reaps a portion of each suspect’s payment.

“Retail justice” is becoming a big business. CEC’s clients, for example, have included Walmart, Abercrombie & Fitch, Bloomingdales, DSW, and Burlington Coat Factory. CEC reports an enrollment rate of roughly ninety percent, yielding thousands of “students” each year. It offers discounts and payment plans for suspects who cannot finance the entire \$400-500 fee at once and “scholarships” for the poorest few. CEC claims its program saves retailers time and money, relieves pressure on an overburdened criminal justice system, and cuts recidivism by providing “life skills and motivation for reintegration.”<sup>2</sup> The City of San Francisco, in contrast, alleges that CEC is little more than an extortion racket preying on the City’s residents.<sup>3</sup>

There is no scholarly treatment, legal or otherwise, of this private “retail justice system.” Meanwhile, rhetoric imagining a state monopoly over enforcement of the criminal law persists.<sup>4</sup> This supposed monopoly

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<sup>1</sup> For a detailed description of CEC and one of its main competitors, with supporting sources, see *infra* Section I.C.

<sup>2</sup> CEC, <https://www.correctiveeducation.com> (last visited Aug. 7, 2017).

<sup>3</sup> See Complaint at 3, *People ex rel. Herrera v. Corrective Education Co.*, No. CGC-15-549094 (Cal. Sup. Ct. Nov. 23, 2015).

<sup>4</sup> See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 84-88 (2012) (discussing “the state’s monopoly on criminal justice”); Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 35 (“[T]here are parts of the criminal law where a single state actor ... has a meaningful monopoly on enforcement within a particular jurisdiction.”); Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1859 (1999) (“We are accustomed to seeing criminal law enforcement as an exclusive state prerogative.”); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 30 (1975) (“With few exceptions, there is a public monopoly—more precisely a series of public monopolies—of criminal-law enforcement.”); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 918 (2007) (“[T]he provisioning of criminal

is itself of relatively recent vintage.<sup>5</sup> And it's never been absolute: consider, for example, the local diner that lets the neighborhood vandal repay his debt by washing dishes,<sup>6</sup> or, less sanguine, the nation's history of violent vigilantism.<sup>7</sup> What is novel here, however, is the way that "private justice" has become routinized and institutionalized in a mass, for-profit industry, with buy-in from criminal justice actors.

Seminal work by Elizabeth Joh, Ric Simmons, David Sklansky, and others has documented the extent to which "private police" prevent and investigate crime and apprehend suspected offenders.<sup>8</sup> Separate research plumbs the private prison industry.<sup>9</sup> But private criminal *adjudication* and *sanctions* are *terra incognita*—or maybe El Dorado, mythical altogether.<sup>10</sup> "Shopkeepers do not always report those they have caught," one recent article begins, "but we have never heard of a shoplifter and storekeeper agreeing to a payment beyond restitution to settle the matter confidentially."<sup>11</sup> CEC and its competitors, on the storekeeper's behalf, do precisely that.

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justice services, at least beyond the field of law enforcement, remains the exclusive province of the state.").

<sup>5</sup> See Simmons, *supra* note \_\_, at 921-23, 971 (describing the historical evolution from private to public criminal law enforcement).

<sup>6</sup> See generally Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1131 (2011) (discussing various types of informal private bargaining between criminal offenders and victims).

<sup>7</sup> See, e.g., EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH* (1984); RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975).

<sup>8</sup> See, e.g., Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573 [hereinafter Joh, *Conceptualizing*]; Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004) [hereinafter Joh, *Paradox*]; Simmons, *supra* note \_\_; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

<sup>9</sup> See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401 (2014).

<sup>10</sup> "In the 16th and 17th centuries, Europeans believed that somewhere in the New World was a place of immense wealth known as El Dorado." Willie Drye, *El Dorado*, NAT'L GEOGRAPHIC, <http://www.nationalgeographic.com/archaeology-and-history/archaeology/el-dorado> (last visited Sept. 2, 2017).

<sup>11</sup> Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. \_\_ (forthcoming 2017), <https://ssrn.com/abstract=2921059>; see also, e.g., Simmons, *supra* note \_\_ (asserting that "[p]rivate criminal law ... is currently limited to the law enforcement stage of the process," *id.* at 911, and that "private entities perform ... none of the adjudication and almost none of the dispositions in the criminal justice system," *id.* at 936); Sklansky, *supra* note \_\_, at 1277 ("If we know little about the private police, we know even less about private adjudication."). One seemingly authoritative volume on "privatizing the United States justice system" is divided into three parts: police, adjudication, and corrections. While the sections on police

The Article begins, then, as a case study in the routinized, private settlement of a particular type of criminal dispute. The subject offense—shoplifting—is a minor one with “major economic and social consequences.”<sup>12</sup> The *New York Times* has called shoplifting “the nation’s most expensive crime.”<sup>13</sup> Retailers’ losses from shoplifting approached \$18 billion in 2016, or almost \$50 million every day.<sup>14</sup> The effects of shoplifting reach both far and deep. At least one in nine Americans shoplifts at some point in his lifetime;<sup>15</sup> more than ten million people have been picked up in the last five years alone.<sup>16</sup> Shoplifting is a “crime of moral turpitude” that can catalyze exclusion or deportation for a non-citizen offender.<sup>17</sup> And it famously triggered a life term for Gary Ewing, who left a municipal golf course pro shop with a trio of clubs tucked inside his pants leg.<sup>18</sup>

In addition to its parochial significance, this private justice industry raises and informs broader questions of legal theory and practice. The Article travels from the local to the global across four parts. Part I begins with a social history of shoplifting and review of the pertinent

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and corrections are predictably rich, the brief section on adjudication contains only two pages touching on criminal law, which propose that crime victims be permitted to hire attorneys to assist the prosecution. See Tim Valentine, *Private Prosecution*, in *PRIVATIZING THE UNITED STATES JUSTICE SYSTEM* (Gary W. Bowman et al. eds., 1992).

<sup>12</sup> See, e.g., Paul Cromwell & Brian Withrow, *The Dynamics of Petty Crime: An Analysis of Motivations To Shoplift*, in *CRIME TYPES* 242, 243 (Dean A. Dabney ed., 2d ed. 2013) (arguing that shoplifting “should be more widely and systematically studied”).

<sup>13</sup> Susan Konig, *Helping Shoplifters To Reform*, N.Y. TIMES, Sept. 29, 1996; see also RACHEL SHTEIR, *THE STEAL: A CULTURAL HISTORY OF SHOPLIFTING* 93 (2011) (calling shoplifting “one of the ‘most common but least reported crimes’ in the world” (quoting criminologist Ronald V. Clarke)).

<sup>14</sup> See RICHARD HOLLINGER & NAT’L RETAIL FED’N, *THE 2016 NATIONAL RETAIL SECURITY SURVEY* 7, 9 (2016), <https://nrf.com/resources/retail-library/national-retail-security-survey-2016>.

<sup>15</sup> Carlos Blanco et al., *Prevalence and Correlates of Shoplifting in the United States: Results from the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC)*, 165 AM. J. PSYCHIATRY 905, 909 (2008); see *id.* at 911 (advising that this estimate “may represent a lower boundary of the true prevalence of shoplifting”).

<sup>16</sup> *Shoplifting Statistics*, NAT’L ASS’N FOR SHOPLIFTING PREVENTION, <http://www.shopliftingprevention.org/what-we-do/learning-resource-center/statistics> (last visited July 27, 2017).

<sup>17</sup> See, e.g., Bill Ong Hing, WASH. POST, Dec. 29, 2002, at B7; John E. Hogan & Amy B. Herbold, *Collateral Consequences: The Potential for Deportation and Exclusion as a Result of a Municipal Court Shoplifting Conviction*, N.J. LAW., Dec. 2010, at 25.

<sup>18</sup> See *Ewing v. California*, 538 U.S. 11 (2003) (upholding a 25-to-life sentence under California’s recidivist statute).

criminological literature. The focus is on *who* offends, *why* they do it, and *how* industry and the legal system have traditionally responded. Each of these inquiries informs the normative analysis that follows in Part II: the “who” identifies the population principally affected by retail justice, necessary, among other things, to weigh distributive effects; the “why” helps predict how shoplifters would likely react to various deterrent measures; and the “how” reveals the baseline against which to evaluate retail justice. Part I then details how retail justice companies have changed the game of shoplifting enforcement.

Part II conducts an initial evaluation of the retail justice system. Judging by the tone of media coverage, some readers, I suspect, will hate the entire concept. Likewise, the sole judicial decision on point characterizes the “irreducible core of CEC’s program” as “textbook extortion under California law.”<sup>19</sup> When I first encountered retail justice in the popular press, I shared some of these impulses. Deeper reflection, however, has dulled this reflexive response.

The “criminal compromise agreement” (or “restorative justice agreement”) the parties sign is a contract that, according to the standard Pareto assumption, should make them better off. The Pareto assumption fails, however, where the conditions for efficient contracting are absent—if suspects are coerced or misinformed, for example, or if negative externalities, such as insufficient (or inefficient) general deterrence, result. Part II exhaustively—yet tentatively, given the state of our knowledge about the evolving industry—analyzes these potential “market failures,” sidelining some and flagging others for lawmakers’ attention. Part II also considers the potential distributive effects of retail justice—whether we should expect its harms and benefits to be visited equally upon different social groups. Part II’s recurring theme is that, while retail justice may not be ideal, it may be preferable to criminal justice nonetheless. Private justice, in fact, is the predictable result of, and a potential palliative for, aggressive policing and harsh criminal penalties. Part II concludes by explaining why justifications for prohibiting blackmail do not support a ban on retail justice.

The upshot of Part II is that the normative valence of retail justice depends upon empirical facts about its implementation and the environments in which it operates. Rather than ignoring retail justice or trying to stamp it out, lawmakers can direct their efforts to ensuring that it works fairly and efficiently. Part III makes recommendations toward this end, focused on retail justice companies’ communication

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<sup>19</sup> People ex rel. Herrera v. Corrective Education Co., No. CGC-15-549094, slip op. at 3 (Cal. Sup. Ct. Aug. 14, 2017) (order granting summary judgment in part).

with suspects, retailers' crime-prevention initiatives, and the collection and reporting of aggregate crime data that retail justice masks.

Part IV extends. It demonstrates how the study of private justice generates fresh perspectives on important criminal justice issues, such as the understudied role victims play in preventing crime.<sup>20</sup> Well-oiled criminal justice institutions, the Article contends, may actually discourage some victims from investing in socially desirable crime-detering precautions. In other words, we may *want* the criminal justice system to be costly for victims where it would be cheaper for victims to prevent crime by taking precautions than for the public authorities to capture and punish offenders. We also want to concentrate public resources where they won't reduce private incentives to take precautions, such as where victims cannot afford precautions or will suffer irreparable harm from crime, and thus will purchase precautions regardless of public enforcement.

Part IV also highlights what retail justice teaches us about police and prosecutorial preferences. Some critics claim that private justice usurps the prosecutor's charging prerogative. Yet retail justice companies operate with the knowledge and (at least tacit) approval of criminal justice authorities. Where retail justice reigns, prosecutors still exercise discretion—they simply do so at a wholesale rather than retail level. The arrangement resembles decriminalization more than abdication. That prosecutors are willing to forego so many easy cases, moreover, complicates academic models of prosecutors as conviction- (or conviction-rate-) maximizing actors.<sup>21</sup> The same is true for police and arrests.<sup>22</sup>

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<sup>20</sup> See Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299, 303-08 (1996) (criticizing legal scholarship's "perpetrator-centered perspective").

<sup>21</sup> See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 48-49 (2003); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106-07 (1968); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1128 (2008); George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U.L. REV. 98, 114 (1975); Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 143 (2009); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 337 (1990); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1045, 1071 (1972); Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47, 51 (2009); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50-51 (1988). Other models assume that prosecutors seek to maximize sentence-years. See, e.g., Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 357 (2006); Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM.

Finally, Part IV begins to generalize and speculates about the future of private justice. CEC's ambitious "vision is to reinvent the way crimes are handled, *starting with retail theft.*"<sup>23</sup> Part IV considers the conditions that conduce to a model of "offender-funded" private justice like CEC's, to start to identify where else the model might work. An "offender-funded" model is best supported, I argue, where a small number of victims each suffers a large number of low-level, non-violent harms, and the existing options for deterring those harms are flawed. I also suggest that other large institutions, like universities and employers, might support a distinct model of private justice in which they outsource *adjudication* rather than *sanctions*.

In the end, understanding private justice sharpens our view of the criminal justice system. And understanding the criminal justice system—in all its manifold institutions, including the unconventional ones at its margins—is an essential step toward fixing it.<sup>24</sup> To be sure, private justice sits uncomfortably in the contemporary criminal justice landscape. Its ends, however, may turn out to justify its means. After all, the public system's severity is the private alternative's sustenance. The way out of private justice, for those who so desire, is not to squelch it but to starve it. Mollifying the criminal justice system would reduce

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L. & ECON. REV. 379 (2005); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63 (1971); Jennifer F. Reinganum, *Sentencing Guidelines, Judicial Discretion, and Plea Bargaining*, 31 RAND J. ECON. 62, 69 (2000).

<sup>22</sup> See, e.g., INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 24-25 (2013), [http://www.brennancenter.org/sites/default/files/publications/REFORM\\_FUND\\_MASS\\_INCARC\\_web\\_0.pdf](http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf); Stephanos Bibas, *Improve, Dynamite, or Dissolve the Criminal Regulatory State?*, in THE NEW CRIMINAL JUSTICE THINKING 61, 61 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1695 (2010); Stephen D. Mastrofski et al., *Expectancy Theory and Police Productivity in DUI Enforcement*, 28 LAW & SOC'Y REV. 113, 117 (1994); Elina Treyger, *Collateral Incentives To Arrest*, 63 KANSAS L. REV. 557, 564 (2015); cf. Dhammika Dharmapala et al., *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure*, 45 J. LEGAL STUD. 105 (2016) (developing a model showing that police officers have unusually strong preferences for punishment, and thus derive utility from making arrests).

<sup>23</sup> Appellant's Opening Brief at \*11, *People ex rel. Herrera v. Corrective Education Co.*, No. A149195, 2017 WL 1366020 (Cal. Ct. App. Apr. 13, 2017), 2016 WL 6037455 (emphasis added).

<sup>24</sup> See Sharon Dolovich & Alexandra Natapoff, *Mapping the New Criminal Justice Thinking*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note \_\_, at 1 ("If we are to fix the current criminal system ... we need a complete and nuanced understanding of what exactly this system is: What social and political institutions, what laws and policies, does it encompass?").

both suspects' demand for private alternatives and the ability of private intermediaries to extract rents in the form of hush money.

## I. THE PATH TO PRIVATE JUSTICE

Leading economic and criminological theories struggle to explain the incidence of shoplifting because, unlike many crimes, shoplifting steamrolls race, class, age, and gender lines.<sup>25</sup> I thus begin, in Section A, with a brief social history of shoplifting and overview of the criminological literature, to sketch out a sense of who shoplifts and why. This discussion identifies the individuals potentially affected by retail justice and helps to predict how they will react to the incentives retail justice, or its alternatives, provide. In Section B, I describe how retailers and criminal justice authorities have traditionally responded to shoplifting, isolating the baseline against which to evaluate retail justice. In Section C, I detail how retail justice works and what it claims to accomplish.

### A. *Who Shoplifts, and Why?*

A caveat is required at the outset. It is difficult to determine, at any point in history, who is shoplifting and how much. Experts draw inferences from three imperfect sources: store apprehension statistics, criminal justice data, and self-report studies. Changes in the first two measures may reflect shifts in either commission *or* detection of shoplifting. Self-report studies may be more reliable, though respondents' incentives to over- or underreport may vary with cultural norms (over time or among social groups) or even the manner in which a survey is administered.<sup>26</sup>

Specifically, every era since the 1870s has experienced a supposed shoplifting "epidemic."<sup>27</sup> Yet it is unclear, in each period, whether people were shoplifting more or retailers were catching them more often. Similar difficulties plague the "who" question: there is a "range and variety of selective factors that bring about the [apprehension] of a shoplifter and perhaps bring him to official attention."<sup>28</sup> As one

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<sup>25</sup> See Cromwell & Withrow, *supra* note \_\_, at 242.

<sup>26</sup> See LLOYD W. KLEMKE, THE SOCIOLOGY OF SHOPLIFTING: BOOSTERS AND SNITCHES TODAY 7-9, 34-37 (1992).

<sup>27</sup> *Id.* at 19.

<sup>28</sup> MARY OWEN CAMERON, THE BOOSTER AND THE SNITCH: DEPARTMENT STORE SHOPLIFTING 25 (1964). Cameron's study of shoplifting in 1940s Chicago department stores found that black shoppers were "kept under much closer observation than whites" and adolescents were "under almost constant observation." *Id.* at 31. Such scrutiny biases upwards estimates of black and adolescent offending.

commentator put the point, due to “self-fulfilling prophecies” about criminality, “the shoplifting statistics ‘created’ by security personnel may not accurately reflect shoplifting reality.”<sup>29</sup>

I deal with these difficulties in two ways. First, where possible, I triangulate the facts by drawing upon multiple data types and sources. Second, I indicate where sources conflict, and hedge my descriptions accordingly.

## 1. A Century of Petty Theft

Shoplifting first captured public attention shortly after the Civil War, as department stores proliferated.<sup>30</sup> In this new retail setting, shop owners could no longer monitor the entire premises, forcing them to rely on clerks, who had relatively weaker incentives to prevent theft. At the same time, customers were now allowed to browse unsupervised and goods were moved to open display, making them easier to secret away.<sup>31</sup> Women were thought to do most of the pilfering.<sup>32</sup> “[F]emale fashion,” it was said, “afforded a lot of spacious hiding places for articles,” giving female thieves a kind of technological advantage over men.<sup>33</sup> Doubtless more important, department stores successfully cultivated an almost exclusively female customer base.<sup>34</sup>

Women charged with shoplifting often “accused the stores of permitting too much freedom; they became ‘over excited’ and over stimulated in the large stores,” which afforded them the “deplorable liberty’ to touch everything.”<sup>35</sup> Some medical experts agreed—items on

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<sup>29</sup> KLEMKE, *supra* note \_\_, at 120.

<sup>30</sup> See, e.g., ELAINE S. ABELSON, *WHEN LADIES GO A-THIEVING: MIDDLE-CLASS SHOPLIFTERS IN THE VICTORIAN DEPARTMENT STORE* 3 (1989); KERRY SEGRAVE, *SHOPLIFTING: A SOCIAL HISTORY* 3 (2001).

<sup>31</sup> See SEGRAVE, *supra* note \_\_, at 17-18.

<sup>32</sup> See *Pilfering from Stores*, N.Y. TIMES, Mar. 4, 1883, at 5 (quoting store owner who estimated, in 1883, that “[f]ully nineteen-twentieths” of shoplifters were female). The best academic treatment is ABELSON, *supra* note \_\_. Notorious shoplifters of the era included ladies with colorful pseudonyms like “light-fingered Sophie Lyons,” “Long Mary Moore,” “Frenchy Johnson,” “Black Lena” (who was white), and “Kid Glove Rosie.” See SEGRAVE, *supra* note \_\_, at 1-6.

<sup>33</sup> SEGRAVE, *supra* note \_\_, at 3 (“Women carried purses of various sizes, wore outfits with long voluminous skirts, and were often decked out in shawls, gloves and muffs.”); see also *id.* at 15 (“One woman had a hollow heel fashioned in her shoes, another had puffs of hair lacquered to extra stiffness, to act as a receptacle for small items.”).

<sup>34</sup> In 1904, for example, Macy’s estimated that as many as ninety percent of its patrons were women. Elaine S. Abelson, *The Invention of Kleptomania*, 15 SIGNS 123, 136 (1989).

<sup>35</sup> *Id.* at 139 (quoting Paul Dubuisson, *Les Voleuses des Grands Magasins*, 16 ARCHIVES D’ANTHROPOLOGIE CRIMINELLE 1, 349 (1901)).

open display, they argued, were temptations “better than Satan himself could devise.”<sup>36</sup> These women, moreover, were increasingly “well-to-do, of good character.”<sup>37</sup> Many retailers overlooked petty thefts by wealthy women or allowed the offenders to pay their way out of trouble.<sup>38</sup> Kleptomania—a “distinctive, irresistible tendency to steal,”<sup>39</sup> thought principally to afflict women—moved in and then out of fashion as a defense.<sup>40</sup> Yet all the way into the 1950s, the middle- or upper-class woman remained the archetypal offender.<sup>41</sup>

During the 1950s and ‘60s, shoplifting gradually came to be seen as an adolescent problem—initially still concentrated among females in the middle and upper class.<sup>42</sup> “[T]he under-21 group,” wrote one reporter, was then “on the greatest shoplifting spree in our history.”<sup>43</sup>

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<sup>36</sup> Patricia O’Brien, *The Kleptomania Diagnosis: Bourgeois Women and Theft in Late Nineteenth-Century France*, 17 J. SOC. HIST. 65, 72 (1983); see also MICHAEL B. MILLER, *THE BON MARCHÉ: BOURGEOIS CULTURE AND THE DEPARTMENT STORE, 1869-1920*, at 200-205 (1981) (describing nineteenth century medical opinion about the irresistible and degrading effects of department stores on human—especially female—morality).

<sup>37</sup> SEGRAVE, *supra* note \_\_, at 7; *id.* at 18-19; see also, e.g., *War on Shoplifters*, N.Y. TIMES, Feb. 15, 1908, at 3 (“The professional shoplifters don’t bother us much ... nor is it the poor people who rob the stores, in most cases.... [W]ell-to-do supposedly respectable women ... are those who prey upon the stores.” (quoting secretary of the Retail Dry Goods Association of N.Y.C.)).

<sup>38</sup> See SEGRAVE, *supra* note \_\_, at 7-8, 11.

<sup>39</sup> O’Brien, *supra* note \_\_, at 70 (quoting C.C.H. Marc, a French physician).

<sup>40</sup> See SEGRAVE, *supra* note \_\_, at 7-26. Individuals with kleptomania are now understood to constitute a small proportion of shoplifters and a very small fraction of the public. See, e.g., Brian L. Odlaug & Jon E. Grant, *Impulse-Control Disorders in a College Sample: Results from the Self-Administered Minnesota Impulse Disorders Interview (MIDI)*, 12 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY (2010) (finding that, although 28.6% of college students surveyed reported having stolen an item in their lifetime, only 0.4% met the DSM criteria for kleptomania).

<sup>41</sup> See, e.g., SEGRAVE, *supra* note \_\_, at 29-32; Alex J. Arieff & Carol G. Bowie, *Some Psychiatric Aspects of Shoplifting*, 8 J. CLINICAL PSYCHOPATHOLOGY 565 (1947); *Cracking Down on Shoplifters*, BUS. WK., Nov. 1, 1952, at 58, 61. Taking a slightly different position, Cameron argues, based on her 1940s downtown Chicago sample, that “well-to-do women shoplift in department stores considerably less frequently than middle- and lower-class women.” CAMERON, *supra* note \_\_, at 119.

<sup>42</sup> See, e.g., CAMERON, *supra* note \_\_, at 102; Gerald D. Robin, *Patterns of Department Store Shoplifting*, 9 CRIME & DELINQ. 163 (1963). For popular accounts, see Bill Davidson, *They Steal Just for the Hell of It*, SATURDAY EVENING POST, May 18, 1968, at 24; Fredelle Maynard, *The Housewives’ Crime*, GOOD HOUSEKEEPING, Oct. 1967, at 154. Sociologists had documented adolescent involvement in shoplifting much earlier. See, e.g., CLIFFORD R. SHAW, *THE NATURAL HISTORY OF A DELINQUENT CAREER* 57-58, 66-68 (1931).

<sup>43</sup> Earl Selby, *Youthful Shoplifting: A National Epidemic*, READER’S DIG., Apr. 1967, at 95. A 1965 FBI report called shoplifting the nation’s fastest growing form

Abbie Hoffman's *Steal This Book* ushered the trend into the 1970s,<sup>44</sup> when, for the first time, researchers also began to find that male offenders were outpacing females.<sup>45</sup> In the 1980s, the number of thefts *known to the police* skyrocketed, though the causes are unclear.<sup>46</sup>

Early research on the racial and ethnic breakdown of shoplifters is scarce. Many stores did not collect (or release) these data and the premier shoplifting datasets excluded them.<sup>47</sup> A handful of studies from the 1970s and '80s found similar patterns of shoplifting activity across racial groups of youth.<sup>48</sup> A single self-report study on adults found higher levels of general theft behavior among non-whites than whites.<sup>49</sup>

## 2. Contemporary Evidence

Shoplifting remains widespread today—recall that more than ten percent of the population has shoplifted at least once, generating \$50 million in losses each day. On the “who” question, the modern view may consist of the unhelpful observation that “there is no ‘typical shoplifter’”: “shoplifters come from varying social, age, and economic groups.”<sup>50</sup> Nevertheless, the best data support a few tentative generalizations. Two sources are especially useful: (1) sociologist Lloyd Klemke's review of the social science literature through 1992 and (2) the National Epidemiological Survey on Alcohol and Related Conditions

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of larceny, up ninety-three percent over five years. John Edgar Hoover, *Message from the Director*, FBI L. ENFORCEMENT BULL., Dec. 1965, at 1.

<sup>44</sup> ABBIE HOFFMAN, *STEAL THIS BOOK* (1971); *see also* MASS RETAILING INST., *STORE THIEVES AND THEIR IMPACT 7* (1973) (reporting, based on survey of 1,188 stores, that a majority of shoplifters were under 18). Roughly one quarter to one half of juveniles polled admitted to having pilfered. *Compare* Michael D. Geurts et al., *Researching Shoplifting and Other Deviant Customer Behavior, Using the Randomized Response Research Design*, 51 *J. RETAILING* 46 (1975); *Changing Morality: The Two Americas*, *TIME*, June 6, 1969, with NAT'L COALITION TO PREVENT SHOPLIFTING, *SHOPLIFTING AND THE LAW* 8 (1980), <https://www.ncjrs.gov/pdffiles1/Digitization/81811NCJRS.pdf>; Amin el-Dirghami, *Shoplifting Among Students*, 50 *J. RETAILING* 33, 33 (1973); Lloyd W. Klemke, *Exploring Juvenile Shoplifting*, 67 *SOC. & SOC. RES.* 59, 61 (1982).

<sup>45</sup> *See, e.g.*, Klemke, *supra* note \_\_, at 61 & tbl.1; *Shoplifting Keeps Pace with Inflation*, SECURITY MGMT., July 1978, at 29 exh.1. For a review of numerous additional studies from the 1970s and '80s, *see* KLEMKE, *supra* note \_\_, at 47-50.

<sup>46</sup> Because self-reported shoplifting statistics held steady in 1980s, Klemke concludes that the increase shown in [known thefts] is more likely to be a product of changes in apprehension and reporting practices than a real increase in shoplifting behavior.” KLEMKE, *supra* note \_\_, at 8.

<sup>47</sup> *See* KLEMKE, *supra* note \_\_, at 50-51.

<sup>48</sup> *See id.* at 54 (reviewing studies); Saul Astor, *Shoplifting: Far Greater Than We Know?*, SECURITY WORLD, Dec. 1969, at 12.

<sup>49</sup> *See* CHARLES R. TITTLE, *SANCTIONS AND SOCIAL DEVIANCE* 87 tbl.4.3 (1980).

<sup>50</sup> THOMAS BRAD BISHOP, *THE LAW OF SHOPLIFTING* 6 (2007).

(NESARC), a large-scale, nationally representative survey from 2001-2002.

First, “there is a great deal of consensus that shoplifting is most frequent in the early part of the life cycle and that it declines as individuals move through the life cycle.”<sup>51</sup> NESARC, for example, found that two-thirds of shoplifting cases occur before age fifteen.<sup>52</sup>

Second, contemporary evidence “appears to overwhelmingly support the conclusion that males are typically more active in shoplifting than females.”<sup>53</sup> NESARC found that nearly sixty percent of shoplifters were male.<sup>54</sup>

Third, “racial and ethnic patterns of who shoplifts” seem to “vary dramatically in different times and places.”<sup>55</sup> “The limited research on race and ethnic variations in shoplifting,” Klemke finds, “suggests that only minor differences are evident in the population at large.”<sup>56</sup> NESARC shows something slightly different: “Native Americans had higher odds [of shoplifting] than whites, although blacks, Hispanics, and Asian Americans had lower odds of shoplifting than non-Hispanic whites.”<sup>57</sup> Native-born Americans also reported shoplifting at higher rates than those who are foreign born.<sup>58</sup>

Finally, the bulk of the evidence suggests that middle-class individuals are most likely to shoplift. In NESARC, shoplifting “was significantly more common in individuals with at least some college education, among those with individual incomes over \$35,000 and family incomes over \$70,000, and ... less common among those with public insurance.”<sup>59</sup> Still, Klemke does find “slight to moderate inverse relationships between social class and shoplifting behavior,” suggesting the truly wealthy are infrequently involved.<sup>60</sup>

As for etiology, the evidence is mixed. Klemke, a sociologist, reads the evidence to support sociological explanations, while the psychiatrists interpreting NESARC emphasize psychiatric ones. “[I]t is highly likely,” Klemke begins, “that some shoplifters fit the pathological conception, others are best seen as societal victims, and many others fit

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<sup>51</sup> KLEMKE, *supra* note \_\_, at 44 (summarizing research).

<sup>52</sup> Blanco et al., *supra* note \_\_, at 911.

<sup>53</sup> KLEMKE, *supra* note \_\_, at 50 (summarizing research).

<sup>54</sup> Blanco et al., *supra* note \_\_, at 906 tbl.1.

<sup>55</sup> KLEMKE, *supra* note \_\_, at 55.

<sup>56</sup> *Id.* at 64.

<sup>57</sup> Blanco et al., *supra* note \_\_, at 909.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*; *see also* BISHOP, *supra* note \_\_, at i (“There are very few people stealing, as in *Les Misérables*, for a loaf of bread.”); CAMERON, *supra* note \_\_, at 119 (reporting that apprehensions were not concentrated on individuals from the “slum and ‘ghetto’ areas of Chicago”).

<sup>60</sup> KLEMKE, *supra* note \_\_, at 64.

the frugal customer conception”—that is, their motivation “is the same as for normal shopping: the acquisition of goods at minimum cost.”<sup>61</sup> But in general, Klemke writes, recent studies “conclude that most shoplifters are characterized by relatively normal psychological health and personalities that are indistinguishable from non-shoplifters.”<sup>62</sup> They are not professionals “boosting” goods for resale. Klemke concludes that sociological theories stressing the individual’s relationship to his environment can better explain who offends.<sup>63</sup>

The NESARC data, however, challenge the notion that shoplifters resemble non-shoplifters along psychiatric dimensions. Researchers found that “[t]he prevalence of all antisocial behaviors was higher among individuals with a history of shoplifting than among those with no self-reported history of shoplifting.”<sup>64</sup> And because many of the behaviors associated with shoplifting can be “understood as a manifestation of impulsivity,” the authors concluded, “our findings are most consistent with the understanding of shoplifting as a behavioral manifestation of impaired impulse control.”<sup>65</sup>

### *B. Private and Public Enforcement of Shoplifting Laws*

As societal understandings of who shoplifts and why have evolved, so have industry and state responses to the crime. In this Section, I trace the path that led to the creation of a market for retail justice companies. As I show, the enforcement model has long been shot through with ambivalence and discretion. Recognizing this reality is crucial when evaluating the changes that retail justice has wrought.

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<sup>61</sup> *Id.* at 78 (internal quotation marks omitted).

<sup>62</sup> *Id.* at 86 (emphasis omitted).

<sup>63</sup> On the structural (macro) level, there is some evidence consistent with strain theory, which views deviance as animated by frustration with barriers to economic success. *See id.* at 87-88, 93. On the individual (micro) level, both economic and non-economic motivations (e.g., peer pressure, sporting) seem to play a role. *See id.* at 88-93. And among juveniles, “shoplifting ... is more frequently committed by youth who are less strongly bound to the social order (family and school),” *id.* at 97, and whose peers endorse the behavior, *id.* at 97-105.

<sup>64</sup> Blanco et al., *supra* note \_\_, at 909. In addition, almost ninety percent of individuals with a history of shoplifting had received at least one psychiatric diagnosis, compared to around fifty percent among non-shoplifters. *Id.* at 910.

<sup>65</sup> *Id.* at 911; *see also* NAT’L COAL. TO PREVENT SHOPLIFTING, PROGRAM GUIDE (1980), <https://www.ncjrs.gov/pdffiles1/Digitization/74730NCJRS.pdf> (finding that, of 25,000 students who had shoplifted, seventy percent claimed to have decided to steal only once in the store).

## 1. Ambivalence and Innovation

From the earliest public reports of shoplifting, retailers have been fickle and ambivalent about formal law enforcement. Shoplifting hurts the bottom line, but overly aggressive enforcement can too. Wrongful arrests can trigger lawsuits,<sup>66</sup> and even legitimate ones might harm business by scaring away customers who fear being wrongly accused.<sup>67</sup> Many Progressive Era retailers, for these reasons, pressed charges only selectively.<sup>68</sup> They hired store detectives to help spot known shoplifters and pooled information with other stores.<sup>69</sup> Although retailers periodically resolved to toughen up,<sup>70</sup> they mostly released first-time suspects after making a record.<sup>71</sup> Wealthy women, in particular, were often able to buy their way out of prosecution.<sup>72</sup>

By the 1950s, retailers could take advantage of new loss-prevention technologies like closed-circuit cameras.<sup>73</sup> States, too, began to enact “merchant’s privilege” laws, shielding retailers from suit for false arrest as long as probable cause supported a suspect’s apprehension.<sup>74</sup> Within ten years, every state had one.<sup>75</sup> As crime rates then ballooned in the 1960s and ‘70s, states raised criminal penalties<sup>76</sup> and enacted “civil recovery” statutes authorizing retailers to obtain super-restitutionary damages.<sup>77</sup> Arrests rose, too,<sup>78</sup> despite lingering retailer ambivalence about justice system involvement.<sup>79</sup>

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<sup>66</sup> As early as 1878, the *New York Times* reported on a \$150 damages award to a woman who’d been wrongly accused of stealing a purse. *Editorial*, N.Y. TIMES, May 28, 1878, at 4.

<sup>67</sup> See *The Woman Who Pilfers*, *supra* note \_\_.

<sup>68</sup> One defense lawyer estimated in 1906 that, of the 4,000 individuals arrested for shoplifting in New York each year, only about 700 made it into court and only 50 were convicted. *Shoplifting in New York*, N.Y. TIMES, Jan. 2, 1906, at 15.

<sup>69</sup> See SEGRAVE, *supra* note \_\_, at 12.

<sup>70</sup> See, e.g., *War on Shoplifters*, *supra* note \_\_.

<sup>71</sup> One major trade group in New York amassed a database of 55,000 known shoplifters. See Maude Miner Hadden, *Shoplifters of Many Types Mingle with the Shoppers*, N.Y. TIMES, Dec. 17, 1933, sec. 9, at 16.

<sup>72</sup> See George C. Henderson, *Caught with the Goods!*, SUNSET MAG., Mar. 1927, at 40.

<sup>73</sup> See SEGRAVE, *supra* note \_\_, at 46, 48.

<sup>74</sup> See *id.* at 47.

<sup>75</sup> *Id.* at 58.

<sup>76</sup> See, e.g., NEV. ANTI-SHOPLIFTING COMM., WHAT TO DO ABOUT SHOPLIFTERS 5 (undated), <https://www.ncjrs.gov/pdffiles1/Digitization/40662NCJRS.pdf> (describing new statute authorizing up to ten years and \$5,000 if property stolen is worth more than \$100).

<sup>77</sup> See, e.g., 1976 Cal. Stat. 5047 (codified at Cal. Penal Code § 490.5).

<sup>78</sup> The number of shoplifting arrests essentially tripled between 1970 and 1976. *Tis the Season To Be Wary*, TIME, Dec. 12, 1977, at 22. And the number of retail thefts known to the police more than doubled between 1973 and 1980. KLEMKE,

By 1988, thirty states had passed civil recovery laws, many of which allowed retailers to seek punitive damages.<sup>80</sup> Retailers—or specialist firms that serviced them—sent formal demand letters to suspected offenders, followed, where necessary, by suit in small claims court.<sup>81</sup> For some retailers, civil recovery replaced criminal prosecution, but others sought both remedies simultaneously.<sup>82</sup> A 1998 survey found that retailers employed civil recovery around thirty percent of the time—roughly half the rate at which they sought criminal prosecution.<sup>83</sup>

## 2. The Persistence of Discretion

Retailers today remain reluctant to call the police, often opting instead to exploit their property rights to sanction suspected thieves.<sup>84</sup>

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*supra* note \_\_, at 8; *see also* *Rising Wave of Shoplifting—and No Solution in Sight*, U.S. NEWS & WORLD REP., Mar. 1970, at 56.

<sup>79</sup> *See, e.g.*, INST. FOR LOCAL SELF-GOV'T, PRIVATE SECURITY AND THE PUBLIC INTEREST 97 (1974) (“In our survey involving [private police], fully 80% reported there were certain types of criminal incidents which were *not* reported to the police. These included ... shoplifting .... According to the public police the most common practice in this private system of justice is to ... release suspected shoplifters or maintain private listings of known criminals, especially shoplifters.”); Leonard E. Daykin, *Your Profit May Be in the Customer’s Pocket*, PROGRESSIVE GROCER, Sept. 1968, at 60 (discussing survey of 2,000 grocers finding that 27.8% always prosecuted, 34% occasionally prosecuted, 27% seldom prosecuted, and 17.2% never prosecuted); *see also* Michael J. Hindelang, *Decisions of Shoplifting Victims To Invoke the Criminal Justice Process*, 21 SOC. PROBS. 580, 583 tbl.1 (1974) (finding an increasing rate of police referral during the 1960s).

<sup>80</sup> *See* Delany J. Stinson, *Attention Retailers: Civil Law Provides a Tonic*, SECURITY MGMT., Sept. 1988, at 129.

<sup>81</sup> *See id.* at 131.

<sup>82</sup> *See* RICHARD C. HOLLINGER ET AL., 1998 NATIONAL RETAIL SECURITY SURVEY: FINAL REPORT 34 (1998); *see also* Audrey Aronsohn, *Teaching Criminals the Cost of Crime*, SECURITY MGMT., May 1999, at 63, 64 (urging retailers to use both civil and criminal remedies whenever possible).

<sup>83</sup> HOLLINGER ET AL., *supra* note \_\_, at 34.

<sup>84</sup> *See, e.g.*, Joh, *Conceptualizing*, *supra* note \_\_, at 590 (“The private police department of Macy’s department store, in New York City, ... reported to the public police only fifty-six percent of the 1900 people accused of shoplifting that it processed in a single year through its private detention center.”). Walmart has banned some shoplifters from all 4,540 of its locations. *See* Al Norman, *Banned from 4,540 Walmarts*, HUFFPOST: THE BLOG (June 26, 2015), [http://www.huffingtonpost.com/al-norman/banned-from-4540-walmarts\\_b\\_7147414.html](http://www.huffingtonpost.com/al-norman/banned-from-4540-walmarts_b_7147414.html).

In some instances, retailers have allegedly exceeded their property rights and levied nonrestitutionary fines, but this practice appears to have been limited. *See, e.g.*, Brae Canlen, *Insecurity Complex*, CAL. LAW., June 1998, at 81 (“[S]everal parents and guardians of teenagers who were picked up for

But why? Theft, after all, is a classic, black-letter crime—a perfect fit, one might think, for criminal-justice-system attention. And retailers clearly regard shoplifting as a major problem.

I've already suggested a few possibilities, such as fear of suit for false arrest or of alienating customers.<sup>85</sup> Surely, though, these concerns were diminished by strong merchants' privilege protections and improved surveillance capabilities that lower the risk of false accusations; store security also have ways to minimize any visible disturbance when apprehending suspects.<sup>86</sup> I explore this question more deeply in Part II. It may be helpful, however, to give a preview here, to outline the problem that retail justice companies claim to solve.

The starting point is to appreciate the enormity of the challenge shoplifting presents. The sheer number of incidents in some major retailers is staggering. In four Florida counties, for example, Walmart stores—which, for some time, employed a “zero tolerance” policy—called the police 7,000 times in one year on suspected thefts.<sup>87</sup> A single Walmart store in Tulsa averages over 1,000 calls per year.<sup>88</sup> A flow of cases this large has two principal effects.

First, it strains criminal-justice-system resources. “It’s hard to dedicate the manpower to process misdemeanor shoplifters,” explained one police administrator.<sup>89</sup> A “typical theft costs the average police department over \$2,100 to process,” according to one account.<sup>90</sup>

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shoplifting” at Disneyland “claimed they were asked to pay a \$275 to \$500 fine to avoid criminal prosecution.”).

<sup>85</sup> See *supra* \_\_; see also Alan D. Axelrod & Thomas Elkind, Note, *Merchants' Responses to Shoplifting: An Empirical Study*, 28 STAN. L. REV. 589, 589-90 (1976) (describing retailers' stated reasons for caution, including “alienation of mistakenly accused customers, the possibility of injury to employees, ... the costs of surveillance,” and “fears of civil suits for false arrest and false imprisonment” (footnotes omitted)).

<sup>86</sup> See Robin, *supra* note \_\_, at 164.

<sup>87</sup> Zachary T. Sampson et al., *Walmart: Thousands of Police Calls. You Paid the Bill*, TAMPA BAY TIMES, May 11, 2016, <http://www.tampabay.com/projects/2016/public-safety/walmart-police>. Walmart generated fourteen percent of the Camden, South Carolina Police Department's reports in one recent measure, most of which were for shoplifting. Josh Sanburn, *Low Prices, High Crime: Inside Walmart's Plan To Crack Down on Shoplifting*, TIME, Aug. 15, 2016, <http://time.com/4439650/walmart-shoplifting-crime>.

<sup>88</sup> Shannon Pettypiece & David Voreacos, *Walmart's Out-of-Control Crime Problem Is Driving Police Crazy*, BLOOMBERG BUSINESSWEEK (Aug. 17, 2016), <http://www.bloomberg.com/features/2016-walmart-crime>.

<sup>89</sup> EMILY GOLD & JULIUS LANG, CTR. FOR COURT INNOVATION, *DIVERTING SHOPLIFTERS: A RESEARCH REPORT AND PLANNING GUIDE* 5 (2012), [http://www.courtinnovation.org/sites/default/files/documents/e11117410\\_Diverting-Shoplifters-508.pdf](http://www.courtinnovation.org/sites/default/files/documents/e11117410_Diverting-Shoplifters-508.pdf); see also Pettypiece & Voreacos, *supra* note \_\_ (“The constant calls from Walmart are just draining ....” (quoting Florida police captain)).

<sup>90</sup> GOLD & LANG, *supra* note \_\_, at 4.

Response times can be slow.<sup>91</sup> Nor is the bottleneck in the police alone: “There are courts in some of our markets,” explained the loss-prevention director at one major discount retailer, “that tell us not to bring them our casual shoplifters.”<sup>92</sup> Whatever the reason, “[f]or the criminal justice system players, low-level retail theft often occupies a large percentage of misdemeanor caseloads, clogging the desks of everyone involved.”<sup>93</sup> Not all shoplifting offenses are misdemeanors, moreover—in some states, the felony threshold zooms by quickly.<sup>94</sup>

Second, calling the police in every case taxes retailers as well. “By involving the public criminal justice system, the [retailer] loses control over the process, and the costs—both in time and money—to cooperate with the public police and courts can be significant.”<sup>95</sup> Retailers are reluctant to have their employees miss work to meet with the police or testify in court, for example.<sup>96</sup> All the more so because they receive no direct benefit from the offender’s punishment.

### 3. The Patterns of Discretion

In the absence of retail justice, the fate of many shoplifting suspects is thus determined not by an exercise of police or prosecutorial discretion, but rather by the retailer itself when deciding whether to alert the public authorities. On what basis do retailers make these important decisions?

Retailers have long employed “no-prosecution limits,” contacting the police only when the goods stolen exceed some minimal value threshold.<sup>97</sup> Even Walmart, which, as noted, famously employed a “zero tolerance” policy for many years, eventually adopted a dollar-value cutoff—before contracting with CEC.<sup>98</sup> Strict cutoffs aside, research finds that the value of the suspect’s take powerfully predicts whether the case goes public.<sup>99</sup> The quality of the evidence matters too,

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<sup>91</sup> See Diane Ritchey, *Walmart’s “Second Chance” Program for Shoplifters*, SECURITY, Nov. 1, 2016, <http://www.securitymagazine.com/articles/87549-walmarts-second-chance-program-for-shoplifters>.

<sup>92</sup> GOLD & LANG, *supra* note \_\_, at 5.

<sup>93</sup> *Id.* at 2.

<sup>94</sup> See SHTEIR, *supra* note \_\_, at 119.

<sup>95</sup> Simmons, *supra* note \_\_, at 925.

<sup>96</sup> See GOLD & LANG, *supra* note \_\_, at 4.

<sup>97</sup> See, e.g., Comment, *Shoplifting Law: Constitutional Ramifications of Merchant Detention Statutes*, 1 HOFSTRA L. REV. 295, 297 (1973).

<sup>98</sup> See Michael Barbaro, *Some Leeway for the Small Shoplifter*, N.Y. TIMES, July 13, 2006, at C1.

<sup>99</sup> See, e.g., Lawrence E. Cohen & Rodney Stark, *Discriminatory Labeling and the Five-Finger Discount*, 11 J. RES. CRIME & DELINQ. 25, 32 (1974); Melissa G. Davis et al., *Private Corporate Justice: Store Police, Shoplifters, and Civil Recovery*,

presumably because retailers are reluctant to incur the criminal justice system's costs where conviction is uncertain,<sup>100</sup> and because they continue to fear liability for wrongful arrest.<sup>101</sup>

Researchers disagree on whether and how personal characteristics of the suspect play a role.<sup>102</sup> All agree that women and men are referred to the police at similar rates.<sup>103</sup> Some have found that juveniles and senior citizens are treated leniently.<sup>104</sup> The evidence on race, however, is sharply conflicted.<sup>105</sup>

Class may influence retailer decisions as well. One of the most recent academic studies found that poorer suspects are referred to the police more frequently.<sup>106</sup> The motivation, however, may have been neither animus toward the poor nor empathy for the affluent. The study's authors conclude, instead, that "[s]tore police skim the affluent for civil recovery and ship the less affluent to the public criminal justice system."<sup>107</sup> Retailers, in other words, may view civil recovery as the first-best deterrent sanction, and resort to criminal justice, a second-best, only where civil recovery will be ineffectual because the suspect is insolvent. In this context, criminal law, just as economic analysis prescribes, essentially functions as tort law for the indigent.<sup>108</sup>

38 SOC. PROBS. 395, 402 (1991); Hindelang, *supra* note \_\_, at 583; Richard J. Lundman, *Shoplifting and Police Referral: A Reexamination*, 69 J. CRIM. L. & CRIMINOLOGY 395, 396 (1978).

<sup>100</sup> See, e.g., Davis et al., *supra* note \_\_, at 402.

<sup>101</sup> See, e.g., CAMERON, *supra* note \_\_, at 34; SEGRAVE, *supra* note \_\_, at 37.

<sup>102</sup> Disparate findings, of course, may reflect underlying variation among retailers. See, e.g., Dean G. Rojek, *Private Justice and Crime Reporting*, 17 CRIMINOLOGY 100, 109 (1979) ("The frequency of arrests, along with the age and sex of the alleged offenders were seen to fluctuate with almost wild abandon from store to store.").

<sup>103</sup> See, e.g., Cohen & Stark, *supra* note \_\_, at 35; Hindelang, *supra* note \_\_, at 583 & tbl.1; Lundman, *supra* note \_\_, at 397-98.

<sup>104</sup> See, e.g., Lundman, *supra* note \_\_, at 398. Others find no age effects. See, e.g., Cohen & Stark, *supra* note \_\_, at 36; Hindelang, *supra* note \_\_, at 592; Rojek, *supra* note \_\_, at 109.

<sup>105</sup> Compare CAMERON, *supra* note \_\_; Robin, *supra* note \_\_ (finding that black shoppers were both disproportionately apprehended and disproportionately referred to the police), with Cohen & Stark, *supra* note \_\_, at 34; Hindelang, *supra* note \_\_, at 591-92 (finding no significant race effects on referral rates when controlling for the value of the items stolen). Two additional papers that shared an author, Richard Lundman, also conflicted—the first found a race effect while the second did not. Compare Lundman, *supra* note \_\_, at 397, 399, with Davis et al., *supra* note \_\_, at 406.

<sup>106</sup> See Davis et al., *supra* note \_\_, at 406. *But cf.* Cohen & Stark, *supra* note \_\_, at 25.

<sup>107</sup> Davis et al., *supra* note \_\_, at 406.

<sup>108</sup> See Alon Harel, *Economic Analysis of Criminal Law: A Survey*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 10, 16 (Alon Harel & Keith N.

In fact, in a laboratory setting, with civil recovery out of the picture, retail security investigators were *more* likely to refer clean, well-dressed offenders for prosecution than dirty, poorly dressed ones.<sup>109</sup> “In accounting for this,” the study’s authors explain, “investigators commented that they were more likely to be sympathetic towards a shoplifter who appeared to need what he stole than towards a shoplifter who appeared to be quite able to pay for the items involved.”<sup>110</sup> Similarly, customers in a different, controlled study reported well-dressed shoplifters to store personnel twice as often as poorly dressed ones.<sup>111</sup>

### C. *The Rise of Retail Justice*

Where many observers saw a failing system of law enforcement—overtaxed, cumbersome, ineffectual, possibly discriminatory, and overly harsh toward those caught up in its net—entrepreneurs saw an opportunity for profit and Pareto improvement. The basic idea can be simply stated. Retail justice companies offer private settlement of criminal complaints. The crime victim assigns its complaint to the retail justice company, which extracts payment from the alleged offender in exchange for rehabilitative education and a promise not to contact the police. The payment—and possibly the “restorative justice” course—reduce the likelihood that the suspect will offend in the future, providing the same (type of) benefit to the victim that public law enforcement would. The payment and education are nonetheless preferable, from the suspect’s perspective, to contact with the criminal justice system. Neither the victim nor the public authorities spend anything. One leading company touts that the “program enables first-time offenders to correct their mistakes and avoid prosecution. Retailers can reallocate loss prevention resources and law enforcement

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Hylton eds., 2012) (noting that economic analysis leads to the conclusion that “monetary sanctions ... ought to be used in cases where the wrongdoer is wealthy, while imprisonment ought to be used only where monetary sanctions cannot be used due to insolvency of the wrongdoer”).

<sup>109</sup> See Andrey Feuerverger & Clifford D. Shearing, *An Analysis of the Prosecution of Shoplifters*, 20 CRIMINOLOGY 273, 285 (1982).

<sup>110</sup> *Id.*

<sup>111</sup> See Fred Fedler & Bert Pryor, *An Equity Theory Explanation of Bystanders’ Reactions to Shoplifting*, 54 PSYCH. REPORTS 746 (1984). As for what happens *after* the police become involved, see Kenneth Adams & Charles R. Cutshall, *Refusing To Prosecute Minor Offenses: The Relative Influence of Legal and Extralegal Factors*, 4 JUST. Q. 595, 604-05 (1987) (finding that race and gender significantly predict prosecutorial decisions to dismiss charges, though prior arrests and number of charged offenses are stronger predictors).

can focus their efforts in more effective ways for their individual communities.”<sup>112</sup>

Here’s how the process works at what appears to be the leading outfit, CEC. CEC is a Utah-based corporation with a national presence, founded by a pair of Harvard Business School graduates in 2010.<sup>113</sup> CEC has venture-capital backing and reports \$500,000 to \$1,000,000 in annual sales with no substantial debt.<sup>114</sup> CEC also boasts an impressive client list, which reportedly has included Walmart, Bloomingdales, DSW, Abercrombie & Fitch, Burlington Coat Factory, Whole Foods, American Apparel, Goodwill Industries, Sport Chalet, Kroger’s, Sportsman’s Warehouse, and H&M.<sup>115</sup>

Store security guards—not CEC personnel—retain responsibility for monitoring the retail premises and apprehending suspected shoplifters.<sup>116</sup> When a guard makes an apprehension, he brings the suspect to a private room and runs a check for criminal history, outstanding warrants, and prior apprehension.<sup>117</sup> Most suspects who are deemed “sufficiently low-risk” are given two options: resist, in which case the guard will call the police, or agree to pay \$400 to \$500 to enroll in CEC’s “restorative justice” course—and walk out the front door. CEC offers payment plans for those who cannot finance the entire fee at once and “scholarships” for the poorest few.<sup>118</sup> For years, suspects who enrolled also signed a “Criminal Compromise Agreement” and admitted

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<sup>112</sup> *Our Story – Origin of CEC*, CEC (Oct. 25, 2016, 5:49AM), <https://www.correctiveeducation.com/home/blog/our-story-origin-of-cec>.

<sup>113</sup> Leon Neyfakh, *Let’s Make a Deal*, SLATE (Feb. 16, 2015, 4:25PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/02/shoplifting\\_at\\_whole\\_foods\\_or\\_bloomingdale\\_s\\_pay\\_corrective\\_education\\_company.html](http://www.slate.com/articles/news_and_politics/crime/2015/02/shoplifting_at_whole_foods_or_bloomingdale_s_pay_corrective_education_company.html).

<sup>114</sup> *See Corrective Education Company Receives Funding from Decathlon Partners*, CEC (Feb. 24, 2015, 7:48PM), <https://www.correctiveeducation.com/home/blog/corrective-education-company-receives-funding-from-decathlon-partners>; *Corrective Education Co, LLC*, EXPERIAN COMMERCIAL RISK DATABASE, <http://www.experian.com/business-information/commercial-risk-database-plus.html> (last visited May 11, 2017).

<sup>115</sup> Appellant’s Opening Brief, *supra* note \_\_, at \*13; *see also* Neyfakh, *supra* note \_\_.

<sup>116</sup> *See* Neyfakh, *supra* note \_\_.

<sup>117</sup> *See* CEC, *supra* note \_\_ (“CEC Connect™ qualifies offenders through a database of 50 billion records and meets the most rigorous security and privacy standards.”).

<sup>118</sup> *See* Neyfakh, *supra* note \_\_ (“The company accepts credit cards, e-checks, and money orders, and while they offer a ‘scholarship’ program for people below the poverty line, . . . about 85 percent of offenders pay the full fee, and less than 2 percent qualify for a free ride.”).

guilt;<sup>119</sup> today, the contract is styled as a “Restorative Justice Agreement” and no confession is required.<sup>120</sup>

Around ninety percent of the 20,000 individuals presented with the choice during CEC’s first four years opted to enroll. An enrollee’s first actual contact with CEC is typically a call from a “life coach” who reaches out to “tell them about the course and make a payment plan.”<sup>121</sup> The core of CEC’s course, which most “students” take online over six to eight hours, was developed by a clinical psychologist and adapted by CEC “for the purpose of rehabilitating shoplifters.”<sup>122</sup> It “focuses on helping accused shoplifters develop life skills, so that they are less likely to reoffend in the future.”<sup>123</sup> On CEC’s own account:

There’s a chapter that helps them understand what could have happened if they’d gone through the traditional process. But after that, we give them skills and the ability to actually go out and get a job .... These people that are getting apprehended typically haven’t been taught the life principles of how to build a resume, how to be presentable in an interview. They haven’t been given the skills to understand what a budget is, never mind how to manage their money. So as they’re going through the course, they build their own resume, they build their own budget, a work-out plan, an eating plan.<sup>124</sup>

The retailer, for its part, saves time processing suspects, says CEC. “Studies have proven a 40% reduction in processing time when using CEC’s platform,” the company claims.<sup>125</sup> Until recently, the retailer also collected a cut of CEC’s fee, around \$40, each time it presented a suspect who enrolled.<sup>126</sup> CEC charges the retailer nothing for its services, which it touts as being “completely offender funded.”<sup>127</sup> “Law

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<sup>119</sup> See Appellant’s Opening Brief, *supra* note \_\_, at \*18. “[W]hen offenders are apprehended, they are shown a brief video about CEC before they’re sent home, which tells them that if they believe that are innocent, they should obtain legal counsel and fight whatever charges may come.” Neyfakh, *supra* note \_\_.

<sup>120</sup> Telephone Interview with Brian Ashton, CEO, CEC (Dec. 4, 2017).

<sup>121</sup> Neyfakh, *supra* note \_\_.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> CEC, *supra* note \_\_.

<sup>126</sup> Neyfakh, *supra* note \_\_. CEO Brian Ashton informed me that CEC has ended this practice. Telephone Interview with Brian Ashton, *supra* note \_\_.

<sup>127</sup> Neyfakh, *supra* note \_\_. CEC’s business model may have changed slightly since Neyfakh wrote. See CEC, *supra* note \_\_ (“CEC’s program is offender funded. The technology, database and professional services are all provided at little or no cost to the retailer.”).

enforcement agencies have also noticed our impact,” CEC maintains, “seeing as much as a 40 percent drop in the number of calls for service in their communities.”<sup>128</sup> Journalists have found even larger effects.<sup>129</sup>

CEC proudly advertises success in battling recidivism, claiming that it “reduces the likelihood that a shoplifter will come back to the store to steal again.”<sup>130</sup> “Less than 2% of shoplifters who complete the CEC educational program reoffend” at one of CEC’s retailers, “compared with estimates as high as 80% for those who do not participate in a restorative justice program.”<sup>131</sup> “CEC’s educational programs not only addresses [sic] behavioral issues, but provide life skills and motivation for reintegration,” the company’s website explains.<sup>132</sup> CEC is “continually reforming generations and changing lives, one day at a time,” it adds.<sup>133</sup> Indeed, CEC even offers testimonials from “graduates” who claim the program helped them “create new values, attitudes, and goals” and “achieve self-responsibility and self-worth.”<sup>134</sup>

Contracting with CEC commits retailers to sorting cases according to predetermined characteristics, without any on-the-scene discretion. In addition to the criminal-history screen, CEC permits retailers to set eligibility criteria including age and item value, but excluding race, gender, nationality, language ability, or related characteristics.<sup>135</sup> Suspects who are too young or too old,<sup>136</sup> and those whose thefts are too

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<sup>128</sup> *Our Story – Origin of CEC*, *supra* note \_\_; Cheryel Carpenter, *Restorative Justice Initiative Results in Three International Awards*, ARLINGTON POLICE DEPARTMENT (Oct. 25, 2017), <http://www.arlington-tx.gov/police/2017/10/25/restorative-justice-initiative-results-three-international-awards> (describing a Walmart Restorative Justice Initiative with CEC resulting in “more than a 50 percent reduction in theft calls for service and overall arrests”); Natalie Crofts, *1st Time Shoplifters Can Keep Clean Record with Help of Utah Company*, KSL.COM (Sept. 20, 2014, 4:25PM), <https://www.ksl.com/index.php?nid=148&sid=31774717> (quoting supportive commentary from Salt Lake City Police Department property crime detective).

<sup>129</sup> See, e.g., Deborah Knapp, *Walmart Cracks Down on Shoplifting by Taking Justice into Its Own Hands*, KENS5 (San Antonio) (Nov. 12, 2016, 11:31AM), <http://www.kens5.com/features/walmart-cracks-down-on-shoplifting-by-taking-justice-into-its-own-hands/351317792> (reporting, based on review of police records, drops of 33, 49, 56, and 72% at four Texas Walmart stores).

<sup>130</sup> Neyfakh, *supra* note \_\_.

<sup>131</sup> *Statement of Corrective Education Company*, CEC (June 8, 2016, 3:40AM), <https://www.correctiveeducation.com/home/blog/statement-of-corrective-education-company>; Telephone Interview with Brian Ashton, *supra* note \_\_.

<sup>132</sup> CEC, *supra* note \_\_.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (testimony of Eleanor).

<sup>135</sup> Telephone Interview with Brian Ashton, *supra* note \_\_.

<sup>136</sup> CEC uses a different “restorative justice” course for juveniles whom the retailer’s criteria do not exclude. See *Corrective Education Company Announces Exclusive Partnership with D.A.R.E. at National Retail Federation Convention*,

small, may be released, while suspects who steal high-value items may be referred to the police. Retailers set these criteria at the corporate level embedded in a “black box”—the security guard simply enters the suspect’s demographic information and the item value into a computer application and is instructed how to proceed.<sup>137</sup>

There is less public information about CEC’s competitors, like Turning Point Justice (TPJ), though enough to discern that the basic model seems similar.<sup>138</sup> TPJ was founded in 2012 by a former district attorney from Salt Lake County, Utah.<sup>139</sup> In an apparent effort to distinguish itself from CEC, TPJ touts a “restorative justice” program developed by the National Association of Shoplifting Prevention and used by courts—as part of *post*-arrest diversion programs—for over 20 years.<sup>140</sup>

## II. EVALUATING RETAIL JUSTICE

This Part pivots from description to evaluation. Sections A through C examine whether retail justice seems likely to harm suspects, victims, or the broader public, respectively. Throughout, I compare retail justice to the *actual* criminal justice system, warts and all. Section D then explains why justifications for prohibiting blackmail do not support a ban on retail justice.

### A. Are Suspects Worse Off?

Retail justice companies, critics argue, prey on vulnerable consumers, wielding the threat of criminal prosecution to extract confessions and hefty enrollment fees. The profit motive, moreover,

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CEC (June 29, 2015, 11:27AM), <https://www.correctiveeducation.com/home/blog/corrective-education-company-announces-exclusive-partnership-with-dare-at-national-retail-federation-convention>.

<sup>137</sup> *Id.*

<sup>138</sup> See TURNING POINT JUSTICE, <http://turningpointjustice.com/Home> (last visited July 25, 2017).

<sup>139</sup> *Leadership Team*, TURNING POINT JUSTICE, *supra* note \_\_.

<sup>140</sup> TURNING POINT JUSTICE, *supra* note \_\_. One other noticeable difference is that TPJ calculates restitution in each individual case, “which covers the cost of the item, any damages to the retailer’s loss prevention technologies, as well as the retailer’s time spent apprehending and processing the shoplifter.” *Retailers*, TURNING POINT JUSTICE, *supra*; see also *id.* (describing TPJ tool’s integration with existing civil demand services). TPJ may also screen cases differently, contacting the police not only for repeat offenders but also when “[t]he crime is committed for the purpose of resale or Organized Retail Crime,” “[t]he offender is physically aggressive or non-compliant,” or “[t]he offender appears to be mentally incompetent or under the influence of drugs or alcohol.” *Justice System*, TURNING POINT JUSTICE, *supra* note \_\_.

creates incentives for overzealous enforcement, the brunt of which disfavored groups or, worse yet, the innocent will bear.<sup>141</sup> Indeed, the City of San Francisco asserted the interests of its residents when it sued CEC in 2015, seeking to halt its operation.<sup>142</sup> And the trial court recently accepted the City's argument.<sup>143</sup> But are shoplifting suspects really better off without the retail justice alternative?

This Section begins to think through this question in three stages: First, is retail justice a "bad deal" for suspects in an economic sense, such that we should reject the standard assumption that, because suspects choose it, it makes them better off? Second, even if retail justice makes suspects better off in general, does it disadvantage particular groups of suspects, such as the poor or people of color? Third, does the retail justice model encourage overenforcement of shoplifting laws, potentially even ensnaring suspects who are legally or normatively innocent?

#### 1. Economic Efficiency: Is Retail Justice a "Bad Deal" for Suspects?

The "standard Pareto argument," applied here, is that retail justice "improves the situation" of the suspects who choose it.<sup>144</sup> The agreement suspects sign to enroll with CEC, for instance, is an offer to contract, which suspects are (at least formally) free to reject. Sure enough, in marketing their services, retail justice companies emphasize how they help offenders by sheltering them from the criminal justice system and extending to them the proverbial "second chance."<sup>145</sup>

The standard Pareto argument fails, however, where the conditions for efficient contracting are lacking.<sup>146</sup> I consider four possibilities. The first three correspond, sometimes loosely, to contract law's concepts of

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<sup>141</sup> See, e.g., Neyfakh, *supra* note \_\_ (reporting that all four public defenders interviewed were "pretty appalled" by CEC's business model, commenting that "[t]here's no judicial oversight, there are no constitutional protections, there's no due process," and that "it sounded like CEC was 'flirting with the crime of coercion in the second degree'"); see also Laird, *supra* note \_\_ (reporting that "some observers are skeptical," worrying that "the programs ... could ensnare innocent people without due process").

<sup>142</sup> See Complaint, *supra* note \_\_.

<sup>143</sup> People ex rel. Herrera v. Corrective Education Co., No. CGC-15-549094, slip op. at 3 (Cal. Sup. Ct. Aug. 14, 2017) (order granting summary judgment in part).

<sup>144</sup> Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 738 (2009).

<sup>145</sup> See, e.g., CEC, *supra* note \_\_; *Justice System*, TURNING POINT JUSTICE, *supra* note \_\_.

<sup>146</sup> Cf. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1940-49 (1992) (identifying circumstances in which "the assumption of efficient contracting" fails in the plea bargaining context).

undue influence, misrepresentation, and mistake of fact. The last entertains the notion that, even if retail justice benefits suspects individually, it harms them as a class by exploiting a collective action problem among them.

(a) *Undue influence*. — “Free consent is ... a predicate condition of presuming mutually valuable exchange.”<sup>147</sup> To many, this is the principal problem with retail justice: suspects pay the retail justice companies’ fees only under serious pressure from the threat of arrest and criminal prosecution. As a factual matter, the critique hits its mark—these suspects face an unenviable dilemma. But it does not follow that they are worse off for having to make the choice, or that retail justice companies should be prohibited from offering it to them.

“Even highly coercive threats are present in many types of legitimate economic bargaining.”<sup>148</sup> Duress, of course, is unlawful, but duress occurs only where the “offeror” “manufactures a false choice for the offeree”: “your money or your life.”<sup>149</sup> Yet retailers are perfectly free to call the police on suspected shoplifters; the choice is not “false” in the relevant sense. At bottom, the pressure on suspects originates not with the retailers or retail justice companies but rather the erratic and draconian criminal justice system suspects are desperate to avoid.<sup>150</sup>

The law also prohibits “undue influence,” where circumstances suggest that the pressured party’s assent “does not reflect his preference” or is “contrary to self-interest.”<sup>151</sup> I am skeptical this describes the retail justice landscape, though it may for particular pockets of the suspect population. Consider the dilemma from the perspective of a typical guilty suspect, who must weigh the cost of enrolling with a retail justice company and completing the required course, on the one hand, against the expected consequences of contact with the criminal justice system, on the other. The latter include the physical danger<sup>152</sup> and collateral consequences of arrest<sup>153</sup> and

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<sup>147</sup> ALAN DEVLIN, *FUNDAMENTAL PRINCIPLES OF LAW AND ECONOMICS* 186 (2015).

<sup>148</sup> James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 701 & n.162 (1984); see also Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1950 n.32 (1993).

<sup>149</sup> DEVLIN, *supra* note \_\_, at 187.

<sup>150</sup> The question of false choice reappears *infra* Section II.A(1)(d) in the discussion of suspects’ collective action problem. Some additional objections are dealt with there.

<sup>151</sup> DEVLIN, *supra* note \_\_, at 186.

<sup>152</sup> See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *ARREST-RELATED DEATHS 2003-2009*, <https://www.bjs.gov/content/pub/pdf/ard0309st.pdf> (estimating 700 arrest-related deaths annually); Cal. Dep’t of Justice, *Death in Custody: Arrest-Related*, <https://openjustice.doj.ca.gov/death-in-custody/arrest-related> (last visited Aug. 12, 2017) (reporting that twenty percent of all deaths in custody are arrest-related). Sandra Bland’s death is, for many, most salient. See

preventive detention<sup>154</sup> (*even if he's never prosecuted*); a dizzying array of costs and fees (*even if he's indigent*);<sup>155</sup> and the possibility of punishment,<sup>156</sup> with its attendant collateral consequences.<sup>157</sup>

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Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (July 23, 2015, 8:17PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/07/sandra\\_bland\\_is\\_the\\_bail\\_system\\_that\\_kept\\_her\\_in\\_prison\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html). Disease is also a concern. See, e.g., Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007) (describing the “increased risk” of disease acquisition in carceral institutions).

<sup>153</sup> See, e.g., Jeff Grogger, *Arrests, Persistent Youth Joblessness, and Black/White Employment Differentials*, 74 REV. ECON. & STATS. 100 (1992) (finding that arrests help explain persistent non-employment and the black/white employment gap); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313-15 (2016) (“Arrestees lose income during the arrest, and sometimes their jobs when they do not show up for work. They pay arrest fees, booking fees, and perhaps attorney’s fees .... An arrest can affect child custody rights, it can trigger deportation, and it can get a suspect kicked out of public housing. Over the long term, individuals with arrest records may have worse employment and financial prospects. And all of these consequences can occur even if the arrestee is never convicted of a crime.” (footnotes omitted)); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (describing how “immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials, among others” use arrest information adversely against arrestees).

<sup>154</sup> See, e.g., Cal. Dep’t of Justice, *Death in Custody: Booking & Pre-Trial*, <https://openjustice.doj.ca.gov/death-in-custody/pretrial> (last visited Aug. 12, 2017) (reporting that fifteen percent of all deaths in custody occurred among detainees awaiting arraignment or trial); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG., Aug. 13, 2015, at MM38 (describing a defendant who “lost three weeks of income, was subjected to brutal physical violence and missed Thanksgiving dinner with his family” before his charges were dismissed for lack of evidence). Pretrial detention can be lengthy even on minor charges. See, e.g., Steven B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2162 (2013) (“A woman in Mississippi charged with shoplifting spent eleven months in jail before a lawyer was appointed to her case, and three additional months before entering a guilty plea.”).

<sup>155</sup> For comprehensive taxonomies, see Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016) (describing “[p]rivate probation, bail fees, translation fees, indigent representation fees, dismissal fees, high interest rates, jail and prison costs, court fines, and community service charges”); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1185-96; see also Konig, *supra* note \_\_ (reporting court and legal fees for shoplifting cases in the hundreds or thousands of dollars).

<sup>156</sup> See, e.g., Ryan P. Sullivan et al., *Stolen Profits: Civil Shoplifting Demands and the Misuse of Neb. Rev. Stat. § 25-21.194*, 95 NEB. L. REV. 28, 32 (2016) (reporting that, in Florida, shoplifting a \$10 item could result in 60 days in jail and \$500 in fines and fees; in Nebraska, 6 months and \$1000). For thefts of costlier items, substantially larger penalties may obtain. See, e.g., VA. CODE § 18.2-103

It would be perfectly rational for a self-interested suspect to prefer the retail justice option. All the more so if he's risk averse and thus benefits from the certainty retail justice provides. In fact, it would be perfectly rational, though tragic, for an innocent suspect as well. While the probability of prosecution and conviction are presumably lower for an innocent suspect, they're not negligible,<sup>158</sup> and the consequences of arrest are just the same as for the guilty. Indeed, we've understood since Malcolm Feeley's famous tome that, for many accused misdemeanants, "the process is the punishment."<sup>159</sup>

The criminal justice system's severity, it is crucial to see, is the fertile soil that nourishes the retail justice industry. Public choice theory predicts as much. As Keith Hylton has explained in a related context, "[a] system of harsh punishments encourages rent-seeking (for example, bribe-taking) on the part of law enforcement officials."<sup>160</sup> "As the harshness of penalties increases," Hylton continues, "law enforcement agents have greater leverage with which to seek bribes, which can be demanded of the guilty and innocent alike."<sup>161</sup> Hylton is writing about *public* law enforcement agents, but private agents—with the power to stave off the public ones—can extract these rents as well.

(b) *Misrepresentation*. — Retail justice companies boast about the transformational power of their "restorative justice" programs—which, they say, drive down recidivism—even posting testimonials from

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(defining theft of \$200 or more as grand larceny); *id.* § 18.2-95 (authorizing grand larceny sentence of up to twenty years).

<sup>157</sup> See, e.g., John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 23-34 (2013) (cataloging consequences of misdemeanor convictions, including loss of the right to possess a firearm, serve in the military, receive public benefits, drive a car legally, and adopt a child); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Courts*, 45 U.C. DAVIS L. REV. 277, 298-99 (2011) (explaining that misdemeanor convictions can trigger deportation, loss of student-loan assistance, and eviction from public housing); see also *Argersinger v. Hamlin*, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring in the result) (listing social stigma, forfeiture of public office, disqualification from a licensed profession, and loss of pension rights).

<sup>158</sup> On the risks of wrongful conviction for misdemeanor defendants, see Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1328-50 (2012) (describing the criminal justice system's "high tolerance for wrongful petty convictions").

<sup>159</sup> See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); see also Bowers, *supra* note \_\_, at 1132-39.

<sup>160</sup> Keith N. Hylton, *Whom Should We Punish, and How? Rational Incentives and Criminal Justice Reform* 8 (B.U. Sch. of Law Law & Econ. Paper No. 17-18, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2982371](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982371).

<sup>161</sup> *Id.* at 9.

“students” describing their reformations.<sup>162</sup> These claims strike my ear as naïve, if not disingenuous. The pertinent “student” population, recall, has been cleansed of repeat offenders. Multiple studies have found that shoplifters seldom reoffend after they’re first apprehended,<sup>163</sup> meaning the baseline rate of recidivism is likely low. Of those who do steal again, most will escape detection.<sup>164</sup> Estimates of recidivism based on subsequent apprehension will therefore understate the true rate, potentially severely.<sup>165</sup> To draw the points together: it’s not a big accomplishment to get first-time shoplifters to desist and, in any event, likely more of them are recidivating than the studies detect.

To be sure, some CEC “students” are probably more serious criminals who’ve somehow managed to keep their records clean. But the evidence suggests that rehabilitating this population is an enormous challenge.<sup>166</sup> An eight-hour online course is no brace against the deep-seated personal and structural forces that precipitate serious criminality.<sup>167</sup> Nor, for what it’s worth, does CEC’s course appear to incorporate even the most basic elements of the “restorative justice”

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<sup>162</sup> See, e.g., CEC, *supra* note \_\_.

<sup>163</sup> See, e.g., CAMERON, *supra* note \_\_, at 150 (“Among pilferers who are apprehended and interrogated by the store police but set free without formal charge, there is *very little or no recidivism.*”); Cohen & Stark, *supra* note \_\_, at 30 (“[V]irtually no one continues shoplifting after being apprehended once ....” (emphasis omitted)); *Admit Your Guilt, Serve No Time*, PROGRESSIVE GROCER, Nov. 1991, at 8 (finding that only five percent of individuals who were apprehended for shoplifting and paid civil damages were later reapprehended). Klemke argues that “there are serious under-reporting biases in these studies.” KLEMKE, *supra* note \_\_, at 125; see Klemke, *supra* note \_\_, at 396 & tbl.1 (finding, using a self-report methodology, that forty percent of youths shoplifted again after having been apprehended). Of course, the same under-reporting biases likely infect the retail justice companies’ recidivism figures as well.

<sup>164</sup> See *Shoplifting Statistics*, *supra* note \_\_ (estimating that 1/48 shoplifters is apprehended).

<sup>165</sup> *A fortiori* if recidivism figures are based on subsequent *arrest* by the public police, as at least one CEC study appears to have been. See Neyfakh, *supra* note \_\_ (“When the company presented a law enforcement agency in Florida with a list of several hundred people in their jurisdiction who had completed the CEC course during the previous two years, they were told that less than 1 percent of the sample had since been arrested for any crime ....”).

<sup>166</sup> See, e.g., Bruce Western, *The Rehabilitation Paradox*, THE NEW YORKER, May 9, 2016, <https://www.newyorker.com/news/news-desk/the-rehabilitation-paradox>.

<sup>167</sup> See, e.g., Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155 (2004); Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259 (2001); John Paul Wright et al., *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, 5 PLOS MED. 732 (2008).

movement in whose flag it is wrapped.<sup>168</sup> All this raises the possibility that retail justice companies misrepresent the benefits they deliver in exchange for the fees they collect. If any such misrepresentation is inducing suspects to enroll, the Pareto assumption (that enrollment benefits suspects) may be misplaced.<sup>169</sup>

It seems to me doubtful, however, that this is the case. More likely, the retail justice companies' claims about recidivism are immaterial to suspects' decisions to enroll. Reliance is likely lacking. Indeed, in attacking CEC's business model, San Francisco alleges that people pay CEC's fees for no other reason than to avoid contact with the criminal justice system.<sup>170</sup> That hardly suggests suspects are being hoodwinked—quite the contrary. If suspects don't expect anything of value from the course—and would pay the fees even if no course were offered, for instance—then the retail justice companies defraud them of nothing if the course turns out to be worthless.

(c) *Mistake*. — A third potential “market failure” that could undermine the efficient-contracting assumption relates to asymmetric information. Maybe suspects choose retail justice, the argument goes, because they harbor misconceptions—which the retail justice companies exploit, if not foster—about their expected sanctions in the criminal justice system, particularly as first-time offenders.<sup>171</sup> Worse yet, some critics argue, retail justice companies afford none of the procedural rights criminal defendants enjoy—in particular, no judicial oversight and no assistance from counsel who might help them assess

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<sup>168</sup> One expert commented, for example, that retail justice “does not sound like a model for restorative justice.” Laird, *supra* note \_\_ (quoting Professor Mary Louise Frampton); *see, e.g.*, JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 11 (2002) (defining restorative justice as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future,” where the stakeholders are the victim, offender, and affected community, who deliberate about “what restoration means in a specific context”); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 303 (listing “victim-offender mediation, family group conference, and sentencing circles” as “the processes associated with restorative justice”). Although “restorative justice theory uniformly endorses[] restitution as the primary remedial response to criminal acts[,] [t]he specific amount and form of this restitution is usually agreed upon by both the victim and the offender through some form of mediation process.” Garvey, *supra*, at 307.

<sup>169</sup> *See* DEVLIN, *supra* note \_\_, at 188.

<sup>170</sup> *See* Complaint, *supra* note \_\_, at 10.

<sup>171</sup> A court may be reluctant to allocate the risk of mistake to the suspect given the circumstances in which his agreement is sought, *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 154 (AM. LAW INST. 1981), creating the possibility that the resulting contract is voidable by the suspect, *cf. id.* § 153.

their odds before paying to enroll.<sup>172</sup> If suspects understood the prosecutor was unlikely to pursue charges, for instance, they'd have little reason to pay the fee. Indeed, San Francisco's legal theory hinges partly on the purported leniency of its criminal justice system, which, it says, belies the threatening messages CEC delivers to shoplifting suspects.<sup>173</sup> (CEC appears to have tempered its messaging since the lawsuit was filed, now saying less about what suspects can expect if they decline to enroll.<sup>174</sup>)

This line of argument suggests an important limit on the circumstances in which retail justice can be assumed beneficial based on suspect choice. The more retail justice companies exploit the misapprehensions of their "students" about the criminal justice system, the better the case for regulating their activity. The risk may be highest where local justice is most lenient, suggesting, among other things, that retail justice companies should tailor their messaging to local legal context.

The point should not be overstated, however. Even factoring in the possibility of diversion, non-prosecution, and other exercises of mercy, the criminal justice system in most jurisdictions *is* something to be feared and avoided at virtually any cost. An arrest alone can be devastating, even in San Francisco.<sup>175</sup> As for procedural protections, we ought not glamorize this aspect of the criminal process either. Most misdemeanor prosecutions, argues Alexandra Natapoff in her searing exposé, "baldly contradict the standard due process model of criminal adjudication," lacking "the evidentiary and procedural protections that are supposed to ensure the guilt of the accused."<sup>176</sup> Perhaps most shockingly, there is "compelling evidence that ... petty offenders in particular[] often do not get counsel *even when they are legally entitled*

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<sup>172</sup> See, e.g., Neyfakh, *supra* note \_\_; cf. Brown, *supra* note \_\_, at 1972.

<sup>173</sup> See Complaint, *supra* note \_\_, at 1. Note that risk-averse suspects may prefer retail justice even where its expected sanctions are slightly higher, if criminal-justice-system contact brings more uncertainty.

<sup>174</sup> See Appellant's Opening Brief, *supra* note \_\_, at \*16-\*17.

<sup>175</sup> On the consequences of arrest generally, see *supra* notes \_\_. Regarding San Francisco specifically, a pending class action lawsuit alleges that the City's implementation of its bail schedule effects an unconstitutional wealth-based detention scheme. One of the lead plaintiffs, Riana Buffin, was allegedly arrested for theft from a department store and, unable to pay her \$30,000 bail, held for forty-six hours before the prosecutor decided not to file charges, causing her to lose her job at the Oakland airport. See Third Amended Class Action Complaint at 6-7, *Buffin v. City of S.F.*, No. 15-CV-4959 (YGR) (N.D. Cal. May 27, 2016), 2016 WL 3587128.

<sup>176</sup> Natapoff, *supra* note \_\_, at 1315, 1316.

to it.”<sup>177</sup> Those who do get an attorney may receive only a few minutes of consultation before entering a plea.<sup>178</sup> Judicial oversight is scarce.<sup>179</sup> Yet the collateral consequences of conviction attach just the same.<sup>180</sup> I could be wrong, but my suspicion is that more people underestimate than overestimate the criminal justice system’s horrors.<sup>181</sup>

(d) *Collective action / externalities.* — Finally, it may be that, while any particular suspect, viewed in isolation, benefits from an expanded choice set, the class of suspects as a whole is actually harmed. That is, retail justice companies may appear to help suspected shoplifters only by exploiting a collective action problem that prevents them from banding together in resistance. Oren Bar-Gill and Omri Ben-Shahar have modeled the point in the plea bargaining context.<sup>182</sup> The basic intuition is that, if all defendants could agree to insist on trial, they would overwhelm the criminal justice system and prosecutors would be forced to forego prosecution in many cases.<sup>183</sup> As Bar-Gill and Ben-Shahar note, “[p]lea bargains are contracts with externalities: each defendant who accepts a plea frees prosecutorial resources to pursue other defendants.”<sup>184</sup>

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<sup>177</sup> *Id.* at 1341 (emphasis added); *see id.* at 1340-42. The constitutional rule, evidently honored in the breach, mandates counsel whenever incarceration is imposed. *See* *Scott v. Illinois*, 440 U.S. 367 (1979).

<sup>178</sup> *See, e.g.*, Natapoff, *supra* note \_\_ (describing misdemeanor representation as often “a formality,” *id.* at 1342, “better described as facilitating the guilty plea rather than checking the merits of the case,” *id.* at 1343); Lisa C. Wood et al., *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, LITIG., Winter 2016, at 20 (asserting that “attorneys engage in meet-and-plead dispositions in courtrooms across the country”).

<sup>179</sup> *See, e.g.*, Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1138 (2017) (lamenting “wrongful and pressured convictions by plea agreements without any judicial oversight”); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 747-48 (2016) (“Reams of scholarship look at the lack of judicial oversight at every stage of the process, from plea bargains to sentencing decisions, and waivers that make pleas virtually unreviewable by appellate courts.”); *see also* *United States v. Baldwin*, 399 U.S. 66, 69 (1970) (reserving jury trial right to crimes punishable by more than six months imprisonment).

<sup>180</sup> *Cf.* Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016) (arguing that courts should consider collateral consequences in determining which procedural protections to afford a defendant).

<sup>181</sup> *Cf., e.g.*, Kirk R. Williams et al., *Public Knowledge of Statutory Penalties: The Extent and Basis of Accurate Perception*, 23 PAC. SOC. REV. 105 (1980) (concluding that the general public underestimates the severity of sanctions). Perceptions may vary by social class, depending upon the extent of peer contact with the system.

<sup>182</sup> Bar-Gill & Ben-Shahar, *supra* note \_\_.

<sup>183</sup> *See id.* at 739.

<sup>184</sup> *Id.* at 743.

In fact, Bar-Gill and Ben-Shahar’s argument may in some ways be stronger in this context than in its original setting. Bar-Gill and Ben-Shahar rightly acknowledge, in the plea bargaining context, that prosecutors’ budgets are endogenous, and may increase if plea bargaining were abolished, allowing prosecutors to pursue more cases.<sup>185</sup> In the context of retail theft, we can actually observe the counterfactual—the world without retail justice. We know that, in the absence of retail justice, retailers and prosecutors in fact have declined to prosecute many suspects.

At the same time, the *arrest* rate in this counterfactual world is still fairly high.<sup>186</sup> And the threat of even more arrests—if suspects were to boycott retail justice—is more credible than the threat of more prosecutions in the case of plea bargaining, as arrests are cheaper than prosecutions. This matters because the expected costs of an arrest alone—with its concomitant physical risk and collateral consequences<sup>187</sup>—are likely higher for most suspects than the costs of paying a retail justice company and completing its course. All the more so once we factor in the chance of prosecution conditional on arrest, and if we think most suspects presented with the dilemma, all of whom pass a criminal-history check, are risk averse.<sup>188</sup>

## 2. Equality: Are Certain Groups of Suspects Worse Off?

Even if retail justice is a good deal for most suspects, concerns may persist if its effects are discriminatory on the basis of race, class, or some other morally irrelevant characteristic. Notice that one’s conclusion on the former issue frames the latter: if retail justice is a “good,” we should ensure that it’s not being reserved to the privileged classes; if retail justice is a “bad,” however, our concern is that it’s being forced upon disfavored groups. Based on the foregoing analysis, I proceed on the former assumption: that retail justice is generally beneficial because it prevents harmful contact with the criminal justice system.

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<sup>185</sup> *Id.* at 769.

<sup>186</sup> *Shoplifting Statistics*, *supra* note \_\_ (reporting fifty-percent arrest rate).

<sup>187</sup> *See supra* notes \_\_.

<sup>188</sup> Whether retail justice companies coerce suspects may depend on how we envision suspects’ fate in the absence of retail justice. Should we focus on the “normal or usual course of events” for suspects in a statistical sense, *see, e.g.*, Robert Nozick, *Coercion*, in *PHILOSOPHY, POLITICS, AND SOCIETY* 101, 116 (Peter Laslett et al. eds., 1972), or the suspect-specific question of “what would have happened in *this* case,” *see, e.g.*, Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1642 (1993)? Even Altman acknowledges that, when making broad policy decisions, we may need to protect the welfare of the many suspects and sacrifice the few. *See id.* at 1650.

The appropriate baseline for an analysis of distributive effects is the manner in which the criminal justice system distributes criminality within the large pool of individuals who cause others harm. Sociologist John Hagan distinguishes between “suite” criminals, whose harmful and immoral acts are frequently treated as noncriminal matters, and “street” criminals, whose similarly motivated conduct is branded as deviant.<sup>189</sup> A similar dynamic marks the early history of retail theft, where “kleptomania” or private payments shielded well-to-do ladies from the criminal justice system, while poorer offenders went to jail.<sup>190</sup> Some contemporary shoplifting research suggests that lower-class offenders continue to be treated more harshly than wealthier ones, and there may be age and race effects as well.<sup>191</sup>

Against this baseline, retail justice companies appear, at first blush, to promote equality by “leveling up,” extending to low-status individuals the lenient treatment previously withheld from them.<sup>192</sup> Retail justice, that is, shelters not “suite” criminals but “street” criminals, and not just wealthy shoplifters, but poor ones as well. And on its face, at least, it applies even-handedly to suspects of every race and gender.<sup>193</sup>

There are, however, reasons to be cautious in this assessment. I quickly sketch out five. Of the five, three, I believe, can be safely put to bed, in the weak sense that they do not reveal retail justice to be worse than the system that operates in its absence. The same may be true of the remaining two, but I am less confident. (Accordingly, I will recommend in Part III that lawmakers require retail justice companies to collect data that will facilitate close monitoring of these distributive effects.)

The first concern stems from the fact that shoplifting is a “middle-class crime.” One might worry that retail justice coddles the middle class while neglecting the truly poor—who may commit other forms of theft—replicating the regressive class dynamic Hagan describes, just lower down the economic ladder. Yet, if the research is to be believed, retailers *already* favor the middle class over the poor.<sup>194</sup> Perhaps more important, shoplifting is a “middle-class crime” only in the sense that the middle class is *overrepresented* in the population of offenders. In

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<sup>189</sup> See generally JOHN HAGAN, WHO ARE THE CRIMINALS? (2012).

<sup>190</sup> See *supra* \_\_.

<sup>191</sup> See *supra* \_\_.

<sup>192</sup> Cf. JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 10 (2003).

<sup>193</sup> See Landes & Posner, *supra* note \_\_, at 41 (“[S]elective or discriminatory enforcement ... would be eliminated under a regime of private enforcement. The law would be enforced against everyone who violated it and enforcement would not place a particular ... individual at an unfair disadvantage.”).

<sup>194</sup> See *supra* \_\_.

absolute number, more shoplifters hail from the lowest income bracket than any other.<sup>195</sup>

Second, shifting from public to “offender-funded” private justice transfers the costs of shoplifting, in a rough sense, from taxpayers to suspects. This cost structure may disproportionately burden the poorest suspects. More than that, retail justice may simply be inaccessible to the very poor, who cannot afford the enrollment fees. Retail justice companies purport to make their programs accessible to all through a combination of payment plans, discounts, and “tuition scholarships.” CEC says that ninety percent of suspects presented with the option choose to enroll. But we don’t know why the other ten percent do not or, relevant here, how many decline due to financial constraints.

The premise of this second point is false, however: public justice, too, makes its “users” foot the bill. “As criminal justice costs have skyrocketed,” Laura Appleman observes, criminal justice institutions have begun to impose “fees and fines at every turn,” and thus “the burden to fund the system has fallen largely on the system’s users, primarily the poor or indigent.”<sup>196</sup> Just as the fees paid to retail justice companies disproportionately harm the poorest suspects, so, too, do the criminal justice system’s fees.<sup>197</sup> Even publicly funded counsel is no longer free in most jurisdictions.<sup>198</sup> Those who truly cannot pay spend years fighting their debts or, worse yet, are jailed for nonpayment, leading observers to lament the return of debtors’ prisons.<sup>199</sup>

Third, it’s not known where, geographically, retail justice companies operate. We do know that they service retailers frequented by both the wealthy (e.g., Bloomingdales) and less well off (e.g., Walmart). But we don’t know *which* Walmart stores, for example, use their services. If the stores are situated primarily in (relatively) wealthier regions, or areas with racial demographics that skew white, then retail justice may be sheltering those populations disproportionately, with economically or racially regressive effects. And because it’s private industry that’s choosing whom to protect, there’s no obvious mechanism through which an angry public can hold the responsible parties to account.

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<sup>195</sup> See Blanco et al., *supra* note \_\_, at 906 tbl.1 (reporting that 43.95% of shoplifters have personal income under \$20,000 and 22.37% have family income under \$20,000).

<sup>196</sup> Appleman, *supra* note \_\_, at 1485.

<sup>197</sup> See *id.* (“[F]unding of the criminal justice system has disproportionately fallen on those least able to pay.”).

<sup>198</sup> See, e.g., Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009); Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014).

<sup>199</sup> See, e.g., Appleman, *supra* note \_\_, at 1489-92.

Note, however, that we are not especially demanding of our criminal justice institutions in this respect. While selective enforcement and prosecution are prohibited, courts have made discrimination virtually impossible for defendants to prove.<sup>200</sup> And we certainly don't demand equality *across* jurisdictions as opposed to *within* them. If the criminal justice authorities in heavily black City A decide to enforce shoplifting laws to the hilt, for instance, while mostly white City B's authorities are far more lenient, a black shoplifting defendant in City A cannot point to City B in support of a selective-prosecution claim. (That's not to say the law has this right, however, and, in Part III, I advocate data collection that would permit review of precisely this type of disparity within retail justice.)

And now for the two concerns I can't quite put to rest: One is that the retail justice apparatus may enable or encourage store security to be more aggressive in ways that bear disproportionately on disfavored groups. This is not inevitable—one can imagine a world in which store security do not change how they patrol when retailers shift from public to private justice. If retail justice companies pay retailers or security firms for each enrollee, however, these payments may, as San Francisco alleges, “encourage[] security companies ... to target not just individuals who may have shoplifted, but those who are most likely to fear getting turned over to the police” (who, presumably, are most likely to enroll).<sup>201</sup>

It's not entirely clear what San Francisco has in mind as the target population. The dynamics are complex. Different social groups may dread police contact for different reasons—the fear of physical mistreatment (perhaps highest among young black males), for example, versus the fear of deep social and professional embarrassment (perhaps highest among wealthy, middle-aged, white professionals), versus the fear of deportation (for undocumented immigrants). One might just as well assume security guards would target individuals they think are most likely to be able to pay retail justice enrollment costs—those who appear to have money to spare. Data collection is necessary to resolve this concern with any confidence.

Finally, there is the fact that, after querying both internal and public records, retail justice companies refer repeat offenders to the

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<sup>200</sup> See *United States v. Armstrong*, 517 U.S. 456, 463 (1996); Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 318-19 (2007).

<sup>201</sup> Complaint, *supra* note \_\_, at 2; see *id.* at 5 (“At particular risk of exploitation are those individuals who a security guard perceives would be most likely to buckle under CEC's high-pressure tactics, perhaps out of fear of being turned over to law enforcement.”).

police. This is a sensible approach to deterrence: prior sanctions failed, suggesting the need for harsher medicine. Yet the practice bakes in whatever biases infected earlier interactions with enforcement authorities. If we believe the police (public or private) disproportionately target black men, for example<sup>202</sup>—or that customers are more likely to report apparent thefts by blacks than whites<sup>203</sup>—then a suspect’s prior record depends in part on his race. By relying on this measure, the retail justice companies discriminate as well.

How this compares to the alternative, however, is an empirical question. Relative to a retailer employing a zero-tolerance policy, which calls the police on *every* suspected shoplifter, retail justice companies may fare poorly. But zero-tolerance policies appear to be rare. More often, retailers make discretionary decisions, or apply some simple rules of thumb, to determine when to make the call. Given the discretion involved—and that one rule of thumb in fact has been to call the police on repeat offenders—it would not be surprising if bias played more, not less, of an important role where retail justice is absent. Retail justice companies, in other words, introduce (or perhaps exacerbate) one potential bias (from prior police interactions) but eliminate another (from the discretionary decision of when to call the police). I suspect that the latter bias swamps the former, but I cannot be sure. Again, more data are necessary to answer this question.

### 3. Overenforcement: The Costs of Casting a Wider Net

The profit motive, critics contend, creates incentives for overzealous enforcement of the law, possibly sweeping in innocent as well as guilty defendants. San Francisco’s lawsuit alleges, in this vein, that CEC’s

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<sup>202</sup> For evidence suggesting that rates of shoplifting are similar across racial groups, see *supra* notes \_\_\_. For evidence that members of racial minority groups are nonetheless apprehended for shoplifting at disproportionate rates, see, for example, Cohen & Stark, *supra* note \_\_\_, at 33 fig.1 (finding that black and Mexican American shoppers were apprehended out of proportion with their presence in the shopping public); see also George Won & George Yamamoto, *Social Structure and Deviant Behavior: A Study in Shoplifting*, 53 SOC. & SOC. RES. 45, 52 tbl.vi (1968) (same for native Hawaiians); NAT’L COAL. TO PREVENT SHOPLIFTING, *supra* note \_\_\_ (discussing survey of 3,550 retailers in which 46% opined that racial minorities were more prone to shoplift than whites).

<sup>203</sup> Cf. Max C. Dertke et al., *Observer’s Reporting of Shoplifting as a Function of a Thief’s Race and Sex*, 94 J. SOC. PSYCHOL. 213, 217 (1974) (finding no statistically significant difference in white customers reporting thefts by black versus white thieves, but that, when prompted to confirm having witnessed a theft, thefts by blacks were confirmed more often).

“payment structure creates a powerful incentive to pressure people to enroll in CEC, regardless of the evidence, if any, of their guilt.”<sup>204</sup>

Academics have debated the basic point for decades. In the 1970s, Gary Becker and George Stigler sketched out a system in which private citizens investigate crimes, apprehend and try suspected offenders, and retain the proceeds, such as fines convicted defendants pay.<sup>205</sup> William Landes and Richard Posner countered that the public monopoly on criminal law enforcement may be preferable because it enables “discretionary nonenforcement” of the law by prosecutors. Discretionary nonenforcement is an efficient way to temper the (inevitable) overinclusivity of criminal statutes without creating loopholes for defendants.<sup>206</sup>

Decades later, the Landes-Posner notion of “discretionary nonenforcement” became the linchpin of Ric Simmons’ argument to prohibit (most) private criminal settlements, like the ones retail justice companies facilitate. Simmons argues that private criminal settlements should be illegal because “they remove the prosecutor from the settlement process.”<sup>207</sup> “[T]he prosecutor,” Simmons reasons, “plays a critical role in selecting which cases should be prosecuted, how they should be charged, and what sentence is appropriate.”<sup>208</sup> “[T]he parties who negotiate a private criminal settlement,” in contrast, “do not practice discretionary nonenforcement.”<sup>209</sup>

As a descriptive matter, I disagree that retail justice companies usurp the prosecutorial role or edge prosecutors out of the picture. Prosecutors simply exercise their discretion at the wholesale level. They are not unaware of what retail justice companies are doing;<sup>210</sup> indeed, at least some prosecutors actively encourage it.<sup>211</sup> Prosecutors

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<sup>204</sup> Complaint, *supra* note \_\_, at 2.

<sup>205</sup> Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974).

<sup>206</sup> Landes & Posner, *supra* note \_\_, at 38-41.

<sup>207</sup> Simmons, *supra* note \_\_, at 1131.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1187.

<sup>210</sup> Telephone Interview with Brian Ashton, *supra* note \_\_ (explaining that CEC “always” informs police and prosecutors when they enter a new jurisdiction).

<sup>211</sup> See *CEC Inform*, CEC, <https://correctiveeducation.com/home/cec-inform> (last visited Sept. 15, 2017) (“The States Attorneys [sic] office is supportive of any Retailer’s decisions to implement a Restorative Justice Program.” (quoting Eighth Judicial Circuit of Florida)); Jessica Pishko, “*Restorative Justice*” for Shoplifting? A Court Calls It Extortion, THE MARSHALL PROJECT (Oct. 30, 2017, 7:00AM), <https://www.themarshallproject.org/2017/10/30/restorative-justice-for-shoplifting-a-court-calls-it-extortion> (“Law enforcement ... is supportive in most states ....”); cf. Carpenter, *supra* note \_\_ (“Walmart and CEC have been incredible partners in looking at innovative ways to reduce criminalization and look for alternative methods in dealing with the ongoing issues related to misdemeanor thefts ....”)

bent instead on preserving their monopoly might instigate civil or criminal investigation of retail justice companies,<sup>212</sup> publicly threaten to prosecute shoplifters notwithstanding their participation in the programs, or possibly lobby for mandatory reporting requirements.<sup>213</sup> In a sense, San Francisco’s lawsuit, which seeks to rout retail justice companies from the jurisdiction, is the exception that proves the rule.<sup>214</sup>

This descriptive point, even if correct, does not resolve any normative concerns about overenforcement, however—most significantly, whether retail justice encourages the enforcement of shoplifting laws against innocent suspects, as San Francisco alleges. In thinking through this problem, it helps to distinguish between “actually innocent” defendants, who have not in fact violated the law, and “normatively innocent” defendants, who “did it ... [but] did not thereby offend the public’s moral code.”<sup>215</sup> Normative innocence is a state of “relative blameworthiness,” resulting from a normative judgment of whether the defendant “*ought* to be charged.”<sup>216</sup>

There are powerful disincentives for store security to target *actually* innocent individuals. The prospect of tort liability for false imprisonment and related harms undoubtedly looms large, especially where, as is common, surveillance video has captured the pertinent events. Retailers, for their part, wish to avoid the negative publicity wrongful accusations bring about. Indeed, this pair of concerns has long been thought to motivate retailers’ relatively lax approach toward shoplifting detection. I see no persuasive evidence that the incentives retail justice creates, at least to date, are strong enough to turn the tide.

The harder question concerns the effects of retail justice on *normatively* innocent suspects, where the prospect of increased enforcement seems more plausible. The evidence I have seen, however, suggests that these suspects are rare. In their discussion of

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(quoting police chief); Knapp, *supra* note \_\_ (“Our department and departments across the country are in favor of programs that are like this ....” (quoting police official)).

<sup>212</sup> See Pishko, *supra* note \_\_ (“The prosecutor ... strongly disagreed with Walmart’s use of CEC programs, arguing that they are ‘open to abuse’ and should be illegal”; “he asked the State Attorney General’s office to investigate.”).

<sup>213</sup> Cf. Simmons, *supra* note \_\_, at 960 (“[A] private criminal justice system will only exist—and can only be effective—at the suffrage of the criminal justice system.”).

<sup>214</sup> Even in San Francisco, I’m told, CEC operated with the knowledge of the District Attorney, as opposed to the City Attorney who filed suit. Telephone Interview with Brian Ashton, *supra* note \_\_.

<sup>215</sup> Bowers, *supra* note \_\_, at 1658 (quoting AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 90 (1997)) (alterations in original).

<sup>216</sup> *Id.*

overenforcement, Landes and Posner were concerned with prohibited conduct “that the legislature ... did not in fact want to forbid.”<sup>217</sup> Their examples involve “minor infractions of the traffic code” and “violations of building-code provisions that, if enforced, would prevent the construction of new buildings in urban areas.”<sup>218</sup> Likewise, in his writings on normative innocence, Josh Bowers focuses on “petty crimes that typically lack concrete victims,” many of which are “*mala prohibita* offenses.”<sup>219</sup> Bowers gives examples like “an indigent man ... arrested for hopping a turnstile to get to his first day of work” and “an elderly man ... arrested for selling ice pops without a license on a hot summer day.”<sup>220</sup>

As sympathetic as some shoplifters surely are, few, if any, of them are normatively innocent under these frameworks. There can be little doubt that the legislature did intend to criminalize even small-ticket retail thefts by individuals in great need. Nor is shoplifting merely a victimless, regulatory offense. That so many shoplifters historically have escaped prosecution very likely reflects judgments about prosecutorial resource constraints and priorities rather than judgments about normative innocence the retail justice companies now upset. Indeed, Bowers concludes that prosecutors typically *ignore* issues of normative innocence in petty-crime cases “because of keen institutional pressures to charge reflexively.”<sup>221</sup>

A separate overenforcement concern involves concededly guilty suspects. If the profit motive of retail justice motivates more aggressive enforcement of shoplifting laws—or greater efficiency enables it—then retail justice may feed the beast of overcriminalization. For example, a retailer that, before contracting with a retail justice company, only rarely called the police, may now sanction a much larger percentage of suspected shoplifters. This is troubling for those who believe that society’s principal criminal justice problem is not underenforcement but its opposite.

There are several reasons, however, that the overcriminalization argument is more complicated, and probably weaker, than it first appears. As an initial matter, the very fact that we have criminalized shoplifting suggests that, setting aside enforcement costs, the efficient level of shoplifting is zero.<sup>222</sup> That more guilty individuals are

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<sup>217</sup> Landes & Posner, *supra* note \_\_, at 38.

<sup>218</sup> *Id.*

<sup>219</sup> Bowers, *supra* note \_\_, at 1659, 1666.

<sup>220</sup> *Id.* at 1658.

<sup>221</sup> *Id.* at 1661.

<sup>222</sup> See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1548-50 (1984).

sanctioned, the argument goes, moves us closer to that ideal, and cannot count as a demerit for retail justice.<sup>223</sup>

Readers unpersuaded by that line of argument might consider two additional points. First, as I mentioned earlier, retailers that work with retail justice companies—at least with CEC—specify eligibility criteria including age and item value.<sup>224</sup> I’m informed that many retailers do not turn over to CEC suspects whom, based on these criteria, they would not have referred to the police.<sup>225</sup> Retail justice, in other words, does not necessarily lead retailers to cast a wider net. Second, even if some retailers *do* now cast a wider net, the consequences of being ensnared, which involve no criminal-justice-system contact, are less severe.<sup>226</sup> To put the point differently, we might just as well say that the net has narrowed in the sense that fewer, rather than more, shoplifting suspects will enter the criminal justice system.

### B. Are Victims Worse Off?

It might seem odd that retailers, which long have lamented the scourge of shoplifting, would abandon the criminal justice system in favor of a more lenient, private alternative. Why wouldn’t retailers want the strongest deterrent sanctions available?<sup>227</sup> Is it possible that, in opting for retail justice, retailers actually act against self-interest?

It’s possible, but unlikely. These retailers are sophisticated entities that contract for retail justice under conditions of calm with ample information. The interesting question is not *whether* retail justice

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<sup>223</sup> See Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43, 62 (1992) (“That the ‘victim’ [of incriminatory blackmail] may be made worse off by the prohibition of blackmail is irrelevant for the obvious reason that crimes do not ordinary deserve to be concealed.”); *cf. id.* (“[D]isclosure is in fact that morally preferred state of affairs.”).

<sup>224</sup> See *supra* \_\_.

<sup>225</sup> Telephone Interview with Brian Ashton, *supra* note \_\_.

<sup>226</sup> Conditional on having been apprehended, the suspect’s expected sanctions must be less than in the criminal justice system, or else he will reject any private settlement offer. Private sanctions, in theory, should reflect the probability that the prosecutor would decline to prosecute. *Cf. Brown, supra* note \_\_ (demonstrating that “allowing blackmail will not necessarily overdeter when prosecutors exercise discretion to decline prosecution of the blackmailee’s crime,” *id.* at 1957, because “the probability of prosecution can affect the blackmailer’s demand,” *id.* at 1956).

<sup>227</sup> I am assuming here that criminal punishment generally tends to deter shoplifting. I address the possibility that it doesn’t, *see, e.g.,* Lloyd W. Klemke, *Does Apprehension for Shoplifting Amplify or Terminate Shoplifting Behavior?*, 12 LAW & SOC’Y REV. 391, 401 (1978), in Section II.C(2)(a), *infra*.

makes retailers better off but *why* it seems to do so. I've touched on some possibilities above, but a deeper exploration is now in order.

As an initial matter, it's not actually clear that the premise of the question I've posed—that is, that retailers are embracing a more lenient approach—is true. The reasons recall the immediately preceding discussion of overenforcement. It does seem fair to assume that, in an individual case, criminal sanctions inflict more disutility than the retail justice companies' fees and coursework.<sup>228</sup> From the prospective offender's viewpoint, however, the relevant question concerns not the actual but rather the expected sanctions in each system. Expected sanctions, of course, fold in not only the anticipated magnitude of sanctions, but also the likelihood of apprehension and the likelihood of sanctions conditional on apprehension.

Because the mechanism for apprehension—the retailer's private police—is held constant across the two systems, the likelihood of apprehension should be roughly constant as well. It may be slightly higher in the retail justice setting if the private police use time they save processing offenders to apprehend additional suspects,<sup>229</sup> or if they're given financial incentives to procure retail justice “students.”<sup>230</sup> The likelihood of sanctions conditional on apprehension likely rises with the shift to retail justice, but inconsistently across retailers, depending upon the criteria used to establish eligibility for enrollment.

All things considered, then, retail justice likely substitutes weaker but more certain sanctions for stronger, less certain ones. Retail justice companies also dispense sanctions more swiftly.<sup>231</sup> Empirical research consistently finds the deterrent effect of sanctions to stem more from certainty and celerity than severity.<sup>232</sup> Accordingly, the retail justice companies' claims to effective deterrence may be more plausible than

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<sup>228</sup> Although the retail justice companies would likely resist the characterization of their fees as “sanctions,” from the offender's perspective, certainly they are that. *Cf.* KLEMKE, *supra* note \_\_, at 128 (“These more positive approaches may still be viewed as punishment by involuntary subjects ....”); Levmore & Fagan, *supra* note \_\_, at 2-3. Otherwise, we'd expect there to be a market, outside the setting discussed here, for the “restorative justice” courses the retail justice companies administer.

<sup>229</sup> See *Retailers*, TURNING POINT JUSTICE, *supra* note \_\_ (claiming this benefit).

<sup>230</sup> See, e.g., Complaint, *supra* note \_\_, at 2 (alleging that CEC paid private police firms ten dollars per enrollee).

<sup>231</sup> See *Justice System*, TURNING POINT JUSTICE, *supra* note \_\_ (emphasizing the program's “immediate consequences that are consistently applied and proportionate to the offense committed”).

<sup>232</sup> See, e.g., Michael Tonry, *An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony*, in DETERRENCE, CHOICE, AND CRIME (Daniel S. Nagin et al. eds. forthcoming 2018), <https://ssrn.com/abstract=2981749> (summarizing research).

they initially appear.<sup>233</sup> (The comparative claims may be misleading nonetheless, given the low baseline rates of recidivism for first-time shoplifters who are apprehended.<sup>234</sup>)

In any event, regardless which system better deters potential shoplifters, the choice to opt for retail justice does make one thing clear: retailers believe their return on investment in deterrence is higher in the private than the public system. But this, too, might seem odd, for economists have long regarded crime deterrence as a classic public good.<sup>235</sup> Government must provide a criminal justice system, the argument goes, precisely because private parties will view the returns as insufficient to motivate adequate investment in deterring crime. This is because private actors cannot capture all the benefits of their expenditures on deterrence—if I hire a security guard to patrol in front of my house at night, my next-door neighbors benefit as well, with no obligation to contribute.<sup>236</sup>

In fact, retailers have already paid taxes to finance the police, prosecutors, courts, and prisons. Why bypass these public institutions? Retailers that opt out cannot, of course, demand a tax refund. The obvious answer might be the kickback from retail justice companies, where available, but I suspect this is ultimately a sideshow; many retailers continue to work with CEC even absent this minor remuneration. The better explanation is that, notwithstanding that retailers have paid taxes, prosecution of shoplifters in the criminal justice system remains costly and inefficient from the retailers' perspective. The taxes paid are sunk costs, and what drives retailers are the costs of going forward.

Assisting in the public prosecution of shoplifting suspects is costly to retailers in several ways.<sup>237</sup> Employees may need to testify or sit for interviews with police detectives during business hours. The merchandise in question may languish in evidence lockers, unavailable for sale. Frequent visits from the police, to take suspects into custody, could drive away other customers who see the police as a threat, or as a signal that criminal activity is afoot. Retailers may even be reluctant to

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<sup>233</sup> Cf. Levmore & Fagan, *supra* note \_\_, at 15 (“There will, therefore, be cases where private agreements provide more deterrence than the criminal law and it is for this reason that the law ought to tolerate some experimentation with private agreements in lieu of criminal charges.”).

<sup>234</sup> See *supra* \_\_.

<sup>235</sup> See, e.g., Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181, 1201 (1994) (describing the “widely held belief that protection [from crime] is a pure public good”).

<sup>236</sup> See *id.* at 1202 n.55.

<sup>237</sup> See, e.g., Joh, *Conceptualizing*, *supra* note \_\_, at 590.

lose the business of the suspected shoplifter himself, who may double as a paying customer.

What the retailers receive from the criminal justice system in return, moreover, often proves too paltry to justify the costs. In many jurisdictions, shoplifting is a low-priority crime. Police response to calls can be slow—requiring the retailer to maintain prolonged custody over the suspect—and prosecution infrequent.<sup>238</sup> The criminal justice system simply doesn't provide a service valuable enough—or deterrence strong enough—to justify the costs of participating in it. Of course, the quantity of criminal justice resources available to fight shoplifting is not fixed. In theory, the state could respond to these constraints by sending help. Indeed, some police departments have hired additional officers specifically to respond to calls from Walmart.<sup>239</sup> Yet this seems not to be the norm.

In addition, just as in the initial public-good analysis, the retailer cannot capture all the benefits of its expenditures on deterrence here, inside the criminal justice system, either. A retailer's participation benefits other outlets the suspect may have targeted. In other words, because victims are required to expend resources (beyond background taxation) to obtain deterrence through the criminal justice system, and because those expenditures produce positive externalities, the criminal justice system has not solved the public-good problem after all.

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To nail down the point, and to tee up the next Section's analysis, consider who bears the costs of shoplifting under three different systems of law enforcement.<sup>240</sup> In the first, retailers do nothing other than expel red-handed shoplifters with a warning. They then attempt to shift the costs of their inventory "shrinkage"—which are relatively high, given their lackluster effort at deterrence—onto their customers in the form of increased prices. To the extent that market competition prevents them from transferring all the expenses, this do-nothing approach effectively allocates the costs of shoplifting to the retailers and their customers together.

The second approach—criminal prosecution of some suspects—spreads the costs more widely. Here, the taxpayers bear the expense of the justice system's deterrence-producing institutions, partially offset by "user fees" collected from suspects and defendants. Retailers assume

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<sup>238</sup> See Lorelei Laird, *Retail Justice: Are Private Education Programs for Shoplifters a Second Chance—or Extortion?*, ABA J., June 2016, at 18.

<sup>239</sup> See Barbaro, *supra* note \_\_; Pettypiece & Voreacos, *supra* note \_\_ (describing an officer known to his colleagues as "Officer Walmart").

<sup>240</sup> I set aside the costs of the private police, which are constant.

the costs of assisting the prosecution as well as the residual costs of shrinkage, some of which they pass through to their customers.

Finally, consider the retail justice model. Retail justice, recall, is entirely “offender funded.” The taxpayers bear no enforcement costs because the criminal justice system’s institutions are not involved in any way. The retailers bear no enforcement costs, either, as they simply hand off suspects to the retail justice companies. In fact, the retailers may make money in the form of kickbacks. The net effect is to shift costs from retailers, customers, and taxpayers onto the suspects themselves. It’s not hard to understand why retailers would prefer this option. And it looks appealing from society’s perspective as well, if it produces deterrence more efficiently.<sup>241</sup>

### C. *Is Society Worse Off?*

This last point turns out to be considerably more complex than it first appears. This Section contemplates the effects of retail justice on social welfare beyond the interests of suspects and victims. It begins with a discussion of the social costs of crime, focusing on prevention and enforcement costs, before pivoting to consider the somewhat more diffuse (though potentially still significant) effects of decreased transparency.

#### 1. The Social Costs of Crime

Society’s goal, within a utilitarian framework, is to minimize the total social costs of crime, which include the direct costs incurred by victims plus the costs of prevention and enforcement.<sup>242</sup> In some settings, private settlement of criminal disputes would raise concerns about insufficient general deterrence, if victims settle for too little.<sup>243</sup> Underdeterrence seems unlikely here, where the “fine” is a multiple of the average shoplifting take,<sup>244</sup> and where retailers have continued contact with the offenders. Especially outside the biggest cities, individuals who shoplift from major retailers likely continue, out of practical necessity, to patronize those same stores in the future. This means retailers at least partly internalize the expected costs of

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<sup>241</sup> See Levmore & Fagan, *supra* note \_\_, at 3 (arguing that private settlement can deter wrongdoers at lower cost than the legal system).

<sup>242</sup> See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207 (1968).

<sup>243</sup> Cf. Landes & Posner, *supra* note \_\_, at 42.

<sup>244</sup> See Clint Rainey & Allegra Hobbs, *Been Caught Stealing*, N.Y. MAG., Dec. 8, 2013, <http://nymag.com/news/intelligencer/topic/shoplifting-2013-12s> (reporting average retail theft of \$129).

monitoring and recidivism, motivating them to seek socially efficient levels of deterrence.<sup>245</sup>

The more interesting issue concerns prevention and enforcement costs. Retail justice companies may minimize these costs *to retailers*, but they do so partly by externalizing them—that is, by shifting them to suspects. This cost externalization may, in some cases, create incentives for retailers that are perverse from society’s perspective. The crucial point is that the availability of a costless (or even profitable) mechanism for adjudicating and sanctioning shoplifting encourages retailers to favor enforcement when prevention (i.e., victim precautions) might deter crime more efficiently.

The choice between prevention and enforcement is ubiquitous in society, yet the pertinent legal literature is surprisingly thin.<sup>246</sup> Potential victims often employ the two strategies simultaneously. I rely on the criminal justice system to deter home invasions by catching and punishing burglars, for example, but I also lock my door. The hard question concerns the socially optimal level of precautions—should I not only lock my door but also build a moat? Victims, it turns out, commonly take too few or too many precautions, depending on the circumstances.

Victims overinvest in precautions that generate negative externalities, such as diverting crime toward other victims.<sup>247</sup> Victims *underinvest*, in contrast, in precautions that generate *positive* externalities, such as deterring crime against other victims.<sup>248</sup> The classic example involves competing precautions against auto theft: The Club, a pole-like device that locks the steering wheel, and Lojack, a radio transmitter that lets police locate a stolen car. The Club merely displaces crime to other owners. Not so for Lojack—in fact, because potential thieves can’t tell which cars have Lojack, Lojack reduces theft

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<sup>245</sup> See Levmore & Fagan, *supra* note \_\_, at 13-14.

<sup>246</sup> See, e.g., Ben-Shahar & Harel, *supra* note \_\_; Harel, *supra* note \_\_; Robert A. Mikos, “Eggshell” Victims, *Private Precautions, and the Societal Benefits of Shifting Crime*, 105 MICH. L. REV. 307 (2006). There is also a pertinent economics literature. In addition to papers cited elsewhere, see Ann P. Bartel, *An Analysis of Firm Demand for Protection Against Crime*, 4 J. LEGAL. STUD. 443 (1975); Omri Ben-Shahar & Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions Against Crime*, 11 J.L. ECON. & ORG. 434 (1995); Charles T. Clotfelter, *Private Security and the Public Safety*, 5 J. URB. ECON. 388 (1978); Steven Shavell, *Individual Precautions To Prevent Theft: Private Versus Socially Optimal Behavior*, 11 INT’L REV. L. & ECON. 123 (1991).

<sup>247</sup> See Ben-Shahar & Harel, *supra* note \_\_, at 309-11. *But see* Mikos, *supra* note \_\_, at 310 (arguing that crime diversion or displacement is socially beneficial because it shifts crime away from “eggshell victims,” who suffer relatively high levels of harm and thus invest more in precautions).

<sup>248</sup> See Ben-Shahar & Harel, *supra* note \_\_, at 311-12.

for every car that might have Lojack. The predictable result? “People buy too many Clubs and not enough Lojacks.”<sup>249</sup>

Familiar precautions for retailers include strategic lighting and store layout, security cameras, greeters, well-spaced personnel, item placement (with small, valuable items out of customer reach), and security tags.<sup>250</sup> Retailers employ these precautions to varying degrees, and they seem to make a difference. Indeed, data from observational studies of customers show great variance among stores in rates of shoplifting. One interpretation of these data is that “certain characteristics of stores should ... be considered as an important variable influencing the amount of shoplifting that occurs.”<sup>251</sup> “Certain stores,” that is, “may be viewed as prime targets for shoplifting because of the nature or quality of merchandise, or because they are seen as having poor security.”<sup>252</sup>

While it’s hard to be sure, there is reason to think at least some retailers employ these measures too sparingly. In an echo of Victorian-era rhetoric about the devilish temptations of department stores, that’s certainly the sense one gets when reading media coverage of Walmart’s enormous demands on the police. Walmart, some experts say, “lays out its stores in a way that invites trouble and often doesn’t have enough uniformed employees to make sure everything runs smoothly.”<sup>253</sup> Its stores “can feel messy and disheveled,” allowing “troublemakers to

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<sup>249</sup> BARRY NALEBUFF & IAN AYRES, *WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL* 24 (2006); see Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998).

<sup>250</sup> See, e.g., KLEMKE, *supra* note \_\_, at 130-33; SHTEIR, *supra* note \_\_, at 171-95.

<sup>251</sup> KLEMKE, *supra* note \_\_, at 10 (discussing Abigail Buckle & David P. Farrington, *An Observational Study of Shoplifting*, 24 BRITISH J. CRIMINOLOGY 63 (1984)).

<sup>252</sup> *Id.* For direct evidence that precautions reduce shoplifting, see David P. Farrington et al., *An Experiment on the Prevention of Shoplifting*, in 1 CRIME PREVENTION STUDIES 93 (Ronald V. Clarke ed., 1993) (finding that electronic tagging caused a lasting decrease in shoplifting, store redesign caused an immediate decrease that wore off, and uniformed guards had no effect); M. Patrick McNees et al., *Shoplifting Prevention: Providing Information Through Signs*, 9 J. APPLIED BEHAV. ANALYSIS 399 (1976) (finding that both general and item-specific signage reduced theft).

<sup>253</sup> Sampson et al., *supra* note \_\_; see also Pettypiece & Voreacos, *supra* note \_\_ (quoting police criticism of Walmart’s theft-prevention efforts); Scott E. Wolfe & David C. Pyrooz, *Rolling Back Prices and Raising Crime Rates? The Walmart Effect on Crime in the United States*, 54 BRIT. J. CRIMINOLOGY 199 (2014) (finding that crime fell more slowly in the 1990s in counties in which Walmart built stores). More generally, see Ian J. Abramson, *Shoplifting: Fastest-Growing, Hardest-To-Control Crime*, VOLUME RETAIL MERCHANDISING, Feb. 1983, at 2 (blaming retailers for “creating an atmosphere for impulse buyers without adequate security,” and thereby “encouraging possible customers to indulge in ‘impulse shoplifting’”).

rationalize that the company doesn't care."<sup>254</sup> Journalists found that Walmart stores call the police far more often than Target stores in the same jurisdiction, even when controlling for store size and hours of operation.<sup>255</sup> This discrepancy suggests that there is ample room within a successful business model for greater investment in precautions. And given that most shoplifting is situational and impulsive, rather than premeditated, such investment ought to reduce aggregate theft rather than merely displace it.<sup>256</sup>

Most often, as in my home-invasion example, the prevention-enforcement question concerns the allocation of crime-deterrence responsibility between *private* victims and *public* authorities.<sup>257</sup> In the retail justice context, however, the analysis differs. As noted, retail justice companies permit retailers to shift deterrence-related costs from themselves (and their customers) to suspects. Whether this makes society better off depends on whether retailers or suspects are the "least cost avoiders." It's tempting to think that the answer is obvious—it must be suspects, who can avoid the costs simply by refraining from offending (or arousing suspicion). But this misapprehends the real issue.

As Alon Harel argues, "[t]he identification of the criminal as the 'cheaper cost avoider' does indeed mean that it is socially desirable that criminals avoid carrying out crimes. But given the persistence of criminal activity, the salient question is *who* should bear the costs of preventing such activity."<sup>258</sup> In the traditional case, again, we compare the cost of victim precautions with the cost of *state* enforcement.<sup>259</sup>

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<sup>254</sup> Sampson et al., *supra* note \_\_; see CHARLES FISHMAN, THE WAL-MART EFFECT 203-04 (2006) (describing Walmart's shopping environment).

<sup>255</sup> See Sampson et al., *supra* note \_\_; see also Pettypiece & Voreacos, *supra* note \_\_ (similar).

<sup>256</sup> See *supra* note \_\_. See generally Rob T. Guerette & Katie J. Bowers, *Assessing the Extent of Crime Displacement and Diffusion of Benefits: A Review of Situational Crime Prevention Evaluations*, 47 CRIMINOLOGY 1331, 1357 (2009) (reviewing 102 studies and concluding that "crime displacement seems to be the exception rather than the rule, and it is sometimes more likely that diffusion of crime-control benefit will occur").

<sup>257</sup> See generally Keith N. Hylton, *Optimal Law Enforcement and Victim Precaution*, 27 RAND J. ECON. 197 (1996).

<sup>258</sup> Harel, *supra* note \_\_, at 1198-99. For a different way of framing the issue, see Hylton, *supra* note \_\_ (defining "offender precaution" to include "the profits forgone by an offender who chooses not to commit a crime," *id.* at 198 n.9, and arguing that "[i]f victim precaution is cheaper than offender precaution (or forbearance), then an optimal punishment policy might require more precautionary effort from victims and less from offenders," *id.* at 198-99 (footnote omitted)).

<sup>259</sup> See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 239 (7th ed. 2007) ("Even though the criminal can avoid the injury to the victim at a lower cost than the victim can, throwing responsibility onto the victim might minimize aggregate

Here, instead, we compare the cost of victim precautions with the cost of *retail justice* enforcement—which, of course, is ultimately financed by suspects’ fees. Costs in the retail justice model include the expense of developing and administering the “restorative justice” course, the creation and maintenance of supportive technology,<sup>260</sup> and the time spent by suspects taking the course. It seems plausible that these costs exceed the expense to a retailer of some of the common precautions mentioned above. In sum, while retail justice may reduce enforcement costs relative to the criminal justice system, victim precautions might—in some situations, even if not in many—reduce them even further.

## 2. Transparency

By operating wholly outside official institutions, retail justice, some critics argue, undermines “the community’s collective interest in the administration of justice as a public event that binds and defines us.”<sup>261</sup> More concretely, retail justice frustrates public oversight of the criminal process, deprives citizens of valuable information about offenders in their midst, and silences the public condemnation that, on some theories, differentiates the criminal process from all others. I consider these three critiques in turn. I then discuss the effects of retail justice on official crime data.

Notice that, without secrecy, the retailer and suspect never reach a bargain—secrecy is what the suspect pays for. For these transparency considerations to win out, then, the benefits of publicity must outweigh any welfare gains already discussed.<sup>262</sup>

(a) *The Publicity Norm in Criminal Cases.* — The public jury trial remains the gold standard for American criminal justice. In reality, however, it is the trial’s rarity, not its quality, that makes it precious. Only a fraction of shoplifting charges lead to public trials; prosecutors drop some cases, divert others, and plead out most of the rest. Plea bargaining nominally takes place under the auspices of a public system, but the deals themselves are struck behind closed doors. Increasingly,

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social costs. It costs something, though very little, to lock one’s car—less than it would cost the criminal justice system to bring the thief to justice.”).

<sup>260</sup> See, e.g., CEC, *supra* note \_\_ (last visited Oct. 18, 2017) (describing program technologies available on multiple computer platforms).

<sup>261</sup> Brown, *supra* note \_\_, at 1967; see, e.g., Neyfakh, *supra* note \_\_; Complaint, *supra* note \_\_, at 15.

<sup>262</sup> See Levmore & Fagan, *supra* note \_\_, at 3 (“Information is valuable, to be sure, but the higher price a party pays for secrecy might deter misbehavior as successfully as any legal remedy, and the latter normally comes at greater social cost.”).

the public is excluded even from the parts of the plea process that are supposed to be transparent.<sup>263</sup>

It turns out, then, that the public's ability to audit the criminal process by observing its institutions at work is illusory, at least in the mine-run misdemeanor case. Indeed, I have criticized plea bargaining for precisely this reason.<sup>264</sup> It's far from clear that the shift from plea bargaining to retail justice meaningfully exacerbates the problem. At most, the difference is one of degree.

On the second point—that retail justice deprives the public of useful information about offenders, preventing, for example, the identification of potentially troublesome recidivists<sup>265</sup>—the realities of criminal justice once again blunt the critique. Recall, first, that, in a world without retail justice, many retailers call the police infrequently, often banishing suspected offenders from the store instead. Of the suspects who are arrested, many will escape formal charges or obtain diversion, leaving behind records of questionable utility for tracking repeat offenders.<sup>266</sup>

Moreover, retail justice companies keep records for precisely this purpose—to identify and screen out repeat offenders. To be sure, unless retailers pool information, this technique will catch only shoplifters who reoffend at the same retailer or another retailer that contracts with the same retail justice company, so coverage is admittedly imperfect.<sup>267</sup> But the system likely captures a great number of cases, and the ones that slip through the cracks probably present little serious danger.<sup>268</sup>

Confidentiality of offense records, however, has another implication that's not so easily minimized. Confidentiality may inadvertently increase statistical discrimination against black males seeking

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<sup>263</sup> See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

<sup>264</sup> See John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 198 (2015).

<sup>265</sup> This is a point Levmore and Fagan stress. See, e.g., Levmore & Fagan, *supra* note \_\_, at 2-3; see also Murat C. Mungan, *The Scope of Criminal Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW, *supra* note \_\_, at 51, 57 (“Criminal law ... has the function of producing information concerning a convict's attitude towards the rest of society and his preferences.... Hence, criminal law may allow other members of society to alter their behavior towards the ex-convict and take low-cost targeted precautions against him.”).

<sup>266</sup> See, e.g., KLEMKE, *supra* note \_\_, at 128; Konig, *supra* note \_\_.

<sup>267</sup> See Grover C. Trask, California's Business Community Restorative Justice Precomplaint Education Program for Petty Theft Offenders 3 (July 31, 2013), <https://www.correctiveeducation.com/home/uploads/BBK%20White%20Paper%20MJM%20Edits%2013.07.31.pdf>.

<sup>268</sup> See Blanco et al., *supra* note \_\_, at 901 tbl.2 (showing that individuals who self-report shoplifting report low rates of violent behavior).

employment.<sup>269</sup> If prospective employers—particularly retailers, one might think—cannot be confident whether an applicant has shoplifted, they may rely on less accurate and more odious proxies for criminality, such as race. Landlords, colleges, and other institutions that screen for criminal records may do the same. In short, even if confidentiality helps black males who have shoplifted once, the evidence suggests it harms black males whose records are clean, with the net effect dependent upon “the size of each effect and the size of the respective groups they affect.”<sup>270</sup>

The third transparency concern: Henry Hart famously theorized that conduct is “criminal” precisely when (and because) it incurs the “moral condemnation of the community.”<sup>271</sup> Retail justice precludes the collective act of public disdain.<sup>272</sup> Is this a serious knock against it?

We might ask first whether, in the most practical sense, retail justice dampens the message of *condemnation* the legislature sought to convey by criminalizing shoplifting. This is an empirical question and, for reasons related to the discussion of deterrence above, it’s not clear the answer is yes. If, absent retail justice, the criminal prohibition against shoplifting is grossly underenforced, then retail justice, by potentially reaching more offenders, may actually amplify rather than muffle the criminal law’s message in a practical sense—at least to the principal audience whose behavior it’s designed to control. One thing retail justice companies do, after all, is underscore the social harms that shoplifting inflicts.<sup>273</sup> And this seems, significantly, to satisfy retailers’ retributive appetite.

Still, the administration of retail justice involves no *public* disapproval of the offender. It’s reasonable to assume this is a problem. For one thing, holding all else equal, it weakens deterrence.<sup>274</sup> It also interferes with “one of the state’s most important tasks in articulating and enforcing the criminal law: declaring societal norms in public and labeling as ‘criminal’ the behavior that runs afoul of them.”<sup>275</sup> Yet

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<sup>269</sup> See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, \_\_ Q.J. ECON. \_\_ (forthcoming 2017); Harry J. Holzer, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006).

<sup>270</sup> Agan & Starr, *supra* note \_\_, at \_\_.

<sup>271</sup> See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

<sup>272</sup> See Simmons, *supra* note \_\_, at 1165-66; Brown, *supra* note \_\_, at 1970-71 (arguing that private settlement of criminal matters is inappropriate because it removes the official sanction and condemnation of the state).

<sup>273</sup> See, e.g., *C.A. Partnership Program*, TURNING POINT JUSTICE, *supra* note \_\_.

<sup>274</sup> See Hylton, *supra* note \_\_, at 13 (“[E]xposure of a crime is a separate punishment by itself.”).

<sup>275</sup> Brown, *supra* note \_\_, at 1970-71.

maybe that's the wrong inference to draw. Perhaps the stronger inference is that the public authorities, which (San Francisco aside) seem at least complicit in the operation of retail justice, don't believe that most first-time shoplifters *deserve* public condemnation.

As Part I showed, the historical record reflects longstanding ambivalence toward the offense. Legislatures could, after all, enact mandatory reporting statutes to ensure the private police send every suspected shoplifter to the public system. But they don't. Nor has any made a move to ban retail justice from the marketplace.<sup>276</sup> Perhaps, then, it's best to conceptualize what's happening here as a novel species of decriminalization. There are entirely sensible reasons one might favor such a policy, including the belief that it will reduce, rather than elevate, the rate of subsequent criminal offending.<sup>277</sup>

(b) *Crime Data.* — A somewhat different concern is that retail justice distorts official crime data. Every suspect retail justice companies poach is a statistic that won't show up in public data recording offenses known to the police, let alone arrests or convictions. Jurisdictions in which retail justice companies thrive will therefore publish crime rates that are artificially depressed. Shoplifting is reported in official FBI crime data as "larceny-theft," which, in turn, constitutes the largest component of the umbrella category "property crime."<sup>278</sup>

To be sure, even absent the effects of retail justice, selective reporting and prosecution plague official shoplifting data.<sup>279</sup> Various shoplifting "epidemics," for instance, may not have been epidemics at all but rather the manifestation of changes in retailer behavior, i.e.,

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<sup>276</sup> The Minnesota legislature, however, is reportedly considering the question. Carpenter, *supra* note \_\_.

<sup>277</sup> See, e.g., CAMERON, *supra* note \_\_, at 165 (arguing that there may be "a strong argument in favor of keeping pilferers out of jail lest they receive there the kinds of knowledge and emotional support they need to become 'successful' commercial thieves"); Klemke, *supra* note \_\_, at 401 (finding that apprehension and police contact each increased subsequent shoplifting among juveniles); see also Samuel Walker, *Reform the Law: Decriminalization*, in *DEVIANT BEHAVIOR* 678, 679 (Edward J. Clarke ed., 7th ed. 2008) (describing the theory that "any contact with the system ... imposes a 'criminal label' on the individual," who "internalizes the label and proceeds to act out the role, committing additional and more serious crimes").

<sup>278</sup> See Fed. Bureau of Investigation, U.S. Dep't of Justice, *Larceny-theft*, *CRIME IN THE UNITED STATES*, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/property-crime/larcenytheftmain> (last visited Oct. 26, 2017); *id.*, *Property Crime*, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/property-crime> (last visited Oct. 26, 2017).

<sup>279</sup> This is a point Mary Owen Cameron rightly stressed in her influential 1964 work. See CAMERON, *supra* note \_\_, at 23-24.

increases in the rate of apprehension and police referral.<sup>280</sup> To some extent, though, this dynamic exists for all but the most serious crimes, which are reported and prosecuted more consistently.<sup>281</sup> There's no reason to think these background measurement errors are distributed unevenly across jurisdictions in any significant way. Retail justice, in contrast, concentrates and magnifies the effects. If a small city's Walmart switches from an aggressive police referral policy to CEC, for example, the drop in official property crime statistics could be instantaneous and significant without any change in the underlying crime rate.

Crime data are central to a variety of personal and policy decisions in contemporary society.<sup>282</sup> Families consult crime rates when choosing where to settle.<sup>283</sup> Academics use them to research the determinants of crime and potential solutions.<sup>284</sup> Governments allocate funds with crime rates in mind.<sup>285</sup> Police officials are evaluated partly on their ability to drive crime down.<sup>286</sup> When retail justice distorts crime data, it warps these personal and policy decisions too. That's not to say the effect cuts in any clear direction—it depends on local needs and incentives. Law enforcement, for example, may support retail justice where it perceives the benefits from depressing crime rates to outweigh the cost of resources foregone—or vice versa.

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<sup>280</sup> See, e.g., KLEMKE, *supra* note \_\_, at 8; Hindelang, *supra* note \_\_, at 584 (finding that, due to changes in the rate at which retailers called the police, the police would have observed a 32% increase in shoplifting from 1963 to 1968 even if the number of offenders hadn't changed).

<sup>281</sup> See JAYNE E. ROBINSON & MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008, at tbl.91 (2011), <https://www.bjs.gov/content/pub/pdf/cvus/current/cv0891.pdf> (estimating that 41.9% of crimes are reported).

<sup>282</sup> See generally MODERNIZING CRIME STATISTICS 85-102 (Janet L. Lauritsen & Daniel L. Cork eds., 2016).

<sup>283</sup> See, e.g., *Crime Statistics*, CITY-DATA, <http://www.city-data.com/crime> (last visited Aug. 2, 2017).

<sup>284</sup> See CAMERON, *supra* note \_\_ (asserting that “the operation of private police represents a challenging problem in the field of criminology,” *id.* at 61, because of its effect on crime statistics, which are the “basic data on which theories of crime causation are built,” *id.* at 174).

<sup>285</sup> See MODERNIZING CRIME STATISTICS, *supra* note \_\_, at 91-94.

<sup>286</sup> See generally JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION (2012) (describing incentives for police to manipulate crime statistics).

*D. Isn't This Blackmail?*

According to the California court ruling on San Francisco's lawsuit, CEC's business model is "textbook extortion."<sup>287</sup> Whether that determination is correct as a matter of California law is a question better left to other fora. Answering it, in any event, would not resolve the legality of retail justice under other states' blackmail statutes.<sup>288</sup> The more fruitful inquiry is whether the *justifications* for prohibiting blackmail support banning retail justice. What makes this tricky is the substantial dissensus on whether and why blackmail should be illegal in the first place.<sup>289</sup> It would take a lengthy detour to address the competing theories, or even just the leading ones, so I take license to jump immediately to what seems to me the literature's strongest candidate.

The theorist who comes closest, in my view, to supporting a ban on retail justice is James Lindgren. Lindgren understands blackmail as "the seeking of an advantage by threatening to press an actual or potential dispute that is primarily between the blackmail victim and someone else."<sup>290</sup> Crime-exposing blackmail, to Lindgren, thus consists of "bargaining with the state's chip,"<sup>291</sup> which is "unfair in that the threatener uses leverage that is less his than someone else's."<sup>292</sup> It also "involves suppressing the state's interests."<sup>293</sup> Lindgren, that is, "would outlaw blackmail because it harms third parties"—here, the state—"by compromising their rights."<sup>294</sup>

I am inclined to cast my lot with Lindgren's critics, including Jennifer Gerarda Brown and Ric Simmons, who observe that "the blackmailer 'appropriates' the state's leverage but also creates some deterrence value that inures to the benefit of the general public."<sup>295</sup>

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<sup>287</sup> People ex rel. Herrera v. Corrective Education Co., No. CGC-15-549094, slip op. at 3 (Cal. Sup. Ct. Aug. 14, 2017) (ordering granting summary judgment in part).

<sup>288</sup> Cf. Simmons, *supra* note \_\_, at 1141 ("[M]ost states prohibit incriminating blackmail altogether, but a few allow the practice in limited circumstances." (footnote omitted)).

<sup>289</sup> See Mitchell N. Berman, *Blackmail*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 37, 37 (John Deigh & David Dolinko eds., 2011) ("What, if anything, justifies the criminalization of blackmail, and what should be the contours of the offense, have long been among the most delighting and devilish puzzles of criminal law theory.").

<sup>290</sup> Lindgren, *supra* note \_\_, at 703.

<sup>291</sup> *Id.* at 702; cf. Landes & Posner, *supra* note \_\_, at 43.

<sup>292</sup> Lindgren, *supra* note \_\_, at 703.

<sup>293</sup> *Id.* at 672.

<sup>294</sup> Brown, *supra* note \_\_, at 1963.

<sup>295</sup> *Id.* at 1965.

“Nothing is actually being ‘stolen’ from the state,” in other words; rather, the blackmailer “is advancing the state’s goals (at least part of the way) and saving the state money.”<sup>296</sup>

One can also read Lindgren as concerned with the blackmailer’s unjust gain rather than the blackmail victim’s loss.<sup>297</sup> Indeed, I suspect this reading, more than any other theory, captures our intuition about what seems wrong with retail justice: even if we posit that retail justice benefits suspects, victims, and society more broadly (by efficiently deterring shoplifting), why should retail justice companies be permitted to profit from appropriating the state’s leverage?

As Mitchell Berman has argued, however, and as Lindgren later conceded,<sup>298</sup> Lindgren’s unjust-gain theory is better at *describing* blackmail than *justifying its prohibition*. “Lindgren provides no *reason*,” Berman writes, “why use of someone else’s leverage for individual gain should be made unlawful, let alone criminal.”<sup>299</sup> “Furthermore,” Berman adds, “if the use of such leverage *is* wrongful, it’s not clear why the *squandering* of another’s chips—by deciding neither to threaten nor to make a given disclosure—is not likewise wrongful and thus properly criminalizable.”<sup>300</sup>

### III. SUMMARY AND RECOMMENDATIONS

Close examination of retail justice paints a finer picture than popular press accounts can afford. Even a casual observer can compile a laundry list of qualms about the industry, as I did when I first

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<sup>296</sup> Simmons, *supra* note \_\_, at 1156. Indeed, it is not completely clear that Lindgren would oppose the retail justice model. Lindgren allows that “permit[ting] one to threaten exposure of a ... crime when honestly seeking restitution in a matter related to the exposure ... may be an appropriate rule” under his theory, “since the threatener’s personal interest is likely to be substantial when the claim pressed is related to the information threatened to be exposed.” Lindgren, *supra* note \_\_, at 715. The issue, to Lindgren, would largely turn on whether the retail justice companies’ fees exceed “any reasonable restitution.” *Id.*

<sup>297</sup> See JOEL FEINBERG, HARMLESS WRONGDOING 363 n.45 (1988); Brown, *supra* note \_\_, at 1963-64.

<sup>298</sup> James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975, 1988 (1993).

<sup>299</sup> Berman, *supra* note \_\_, at 54 (emphasis added); see also Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83, 83-85 (1988) (arguing that an undeserved gain is insufficient, in a liberal society, to justify criminalization where there is no corresponding harm); cf. HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 26 (2004) (arguing that unjust enrichment is not a legal argument but a “loose framework as well as an invitation for normative inquiry”); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001) (similar).

<sup>300</sup> Berman, *supra* note \_\_, at 54-55.

encountered it. But no shorter is the list of (well-founded) grievances about *public* criminal justice. After careful reflection, I am not persuaded that retail justice is clearly worse than its public counterpart, and in several important respects it may be better.

This conclusion holds, however, only if certain conditions—suggested in the preceding discussion and crystallized in this Part—are met. The normative valence of retail justice, that is, depends upon empirical facts about how it is implemented and the environments in which it operates. Rather than ignoring retail justice or trying to stamp it out, lawmakers can help ensure that it operates fairly by regulating it in the following respects.

First, in most circumstances, the availability of retail justice makes many shoplifting suspects better off by allowing them to opt out of the criminal justice system, with all its dangers and lingering legal consequences. The exceptional case is one in which the suspect harbors misconceptions about the criminal justice system—believing the expected sanctions to be harsher than they really are—and thus artificially inflates the benefits of avoidance. So, while retail justice should not be prohibited under the banner of protecting suspects’ interests, the state should ensure that retail justice companies do not mislead suspects about the severity of the criminal justice option. If resources for enforcing this anti-fraud rule are scarce, they should be focused on jurisdictions in which criminal justice is particularly lenient, where the risk of misapprehension is highest.<sup>301</sup>

Second, in many settings, society might prefer retail justice to criminal justice because it generates deterrence more efficiently. Essentially, the “tuition” fees suspects pay to retail justice companies serve as fines that are administered at lower cost than criminal justice sanctions. If, however, retailers could prevent crime even more cheaply by investing in precautions, then retail justice allows retailers to pursue private gains at the expense of social welfare, and should be curtailed. The difficulty is how to identify these settings. One possibility is to require retailers to demonstrate compliance with industry best practices for loss prevention as a condition on opting into retail justice.<sup>302</sup> In the long run, one could even imagine a municipal “loss

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<sup>301</sup> A more aggressive approach might be to require *Miranda*-style warnings that inform the suspect about the rate at which prosecutors in the jurisdiction pursue charges against first-time shoplifters, the range and distribution of sentences upon conviction, and the procedural rights available to arrestees and defendants.

<sup>302</sup> See, e.g., Loss Prevention Found., *How Loss Prevention Audits Are Used*, LPM INSIDER (July 17, 2017), <http://losspreventionmedia.com/insider/inventory-shrinkage/lp101-how-loss-prevention-audits-are-used-2> (“The purpose [of a loss-prevention audit] is to reinforce guiding principles and practices that should

prevention code,” akin to a fire code, applicable to retailers above a certain size.

Third, because it buries criminal violations, retail justice distorts official crime data. Given the great interest in, and manifold uses of, these data in contemporary society, states should require retail justice companies to publish aggregate data about the cases they process. One analogy is the Clery Act,<sup>303</sup> which regulates the reporting of campus crime. While colleges and universities are not required to call the local police whenever they learn about crimes committed on campus, the Clery Act does obligate them to keep and disclose information about certain offenses. Institutions subject to the Clery Act must track and publish crime statistics and maintain public logs with details about each such incident brought to their attention.<sup>304</sup> Clery Act offenses are more serious than shoplifting; nevertheless, given the volume and economic impact of retail theft, reasonable people (say, prospective business owners) may value aggregate shoplifting data in planning their affairs.<sup>305</sup>

Fourth, the distributive effects of retail justice are ultimately indeterminate. Many of the potential racial and economic biases that concern critics of retail justice manifest to the same degree in the criminal justice system. It is possible that retail justice could exacerbate bias—for instance, by incorporating (and then replicating) bias from suspects’ prior interactions with the police. Yet this is true only if *this* bias is stronger than the biases of retailers that exercise discretion in determining when to call the police, many of which may look at the suspect’s record *in addition to* other personal characteristics. This seems unlikely, though vigilance is appropriate given the stakes. Data reporting by retail justice companies should therefore include information on the race and gender of suspects, as well as the locations of operation, to allow for state and public monitoring of disparate impacts.

Finally, because, under ordinary circumstances, retail justice has the potential to make everyone better off, prosecutors should refrain from enforcing blackmail laws against the retail justice industry, absent particularized concerns including those flagged throughout Part II. In

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already be familiar to those being audited and evaluate compliance with known standards of performance.”).

<sup>303</sup> Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 104 Stat. 2384 (1990) (codified at 20 U.S.C. § 1092(f)).

<sup>304</sup> *See id.*

<sup>305</sup> *See, e.g.,* MODERNIZING CRIME STATISTICS, *supra* note \_\_\_, at 98 (“Businesses may use UCR crime data to learn about the nature and extent of problems in the cities or communities in which they operate or are considering for expansion or relocation opportunities.”).

the long run, if the retail justice experiment is successful, lawmakers might consider amending blackmail laws, where necessary, to ensure they do not prohibit the practice.

#### IV. EXTENSIONS

Beyond its parochial significance, the study of retail justice generates fresh perspectives on some important criminal justice issues. This Part draws out several such points. Section A extracts lessons for institutional design from the discussion in Section II.C of victims' incentives to take precautions. Section B demonstrates how retail justice challenges conventional views about police and prosecutorial motives. Finally, Section C speculates about the possible next frontiers of private criminal dispute resolution.

##### *A. Lessons for Criminal Justice System Design*

Recall the conclusion that, while retail justice may reduce the sum of prevention and enforcement costs relative to the criminal justice system, victim precautions might reduce costs even further. This insight extends in interesting directions. Most economically minded legal scholarship on criminal justice, as noted earlier, analyzes offenders' incentives alone. Only a handful of writers discuss the role of victim precautions in reducing crime. They have emphasized the ways in which the substantive criminal law is, or could be, used to encourage efficient precautions. For example, the tendency of the criminal law to punish attempts more leniently than completed crimes can be understood as a way of discouraging excessive private investment in precautions, which, by thwarting some completed crimes, turn them into mere attempts.<sup>306</sup>

What is true of the substantive criminal law is also true of criminal procedure and the design of criminal justice institutions. Just as the rules of criminal law can alter victims' incentives to invest in precautions, so can other aspects of the criminal process. When returns on participation in the criminal justice system increase sufficiently from the victim's perspective, the victim will begin to rely on the criminal justice system where previously he would have invested in precautions—even where precautions remain more cost-effective from

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<sup>306</sup> See Ben-Shahar & Harel, *supra* note \_\_, at 341-42; see also Harel, *supra* note \_\_, at 1211-26 (discussing provocation, the “no retreat” rule, and the classification of property crimes).

society's vantage point. Precautions and public law enforcement are substitutes, as others have noted.<sup>307</sup>

This substitution effect, in turn, generates two observations. First, in contexts in which cost-effective precautions against crime are available, a criminal process that is costly and cumbersome from the victim's perspective—while doubtless frustrating to the victim—may be socially beneficial if it encourages victims to invest in efficient precautions.<sup>308</sup> Second, wholly apart from the many other downsides of an overweening criminal justice system,<sup>309</sup> an outsized apparatus may have the additional, unrecognized disadvantage of discouraging certain victims from taking socially efficient precautions. There are important (and illuminating) limits on the reach of this argument, which I will address, but first let me illustrate the basic point.

Suppose the police in my neighborhood excel at catching bicycle thieves—they have ample manpower and spare no expense in tracking down a stolen bike. Suppose they've also made it simple for me to file a bicycle-theft report via a smartphone application. In this world, it'd be sorely tempting not to spend money on a professional-grade lock for my bike and not to go out of my way to find a rack every time I need to park. If my bike disappears, I'll file a report and the police will get my bike back—using taxpayer resources far greater than the lock and minor route deviations would have cost me.

Now suppose there's no convenient smartphone app—to file a theft report, I have to get myself to the police station, wait in line, provide ownership documentation, and fill out a bunch of paperwork. That lock and those bike racks start to look much more attractive, a salutary development from society's perspective. Similarly, suppose that filing a report remains easy but the likelihood of recovery is greatly reduced because the police department is resource-constrained. Again,

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<sup>307</sup> I am not the first to make this observation, *see, e.g.*, Charles T. Clotfelter, *Public Services, Private Substitutes, and the Demand for Protection Against Crime*, 67 AM. ECON. REV. 867 (1977); Tomas J. Philipson & Richard A. Posner, *The Economic Epidemiology of Crime*, 39 J.L. & ECON. 405 (1996), but it has received little attention in criminal justice scholarship.

<sup>308</sup> A similar point may hold for criminal-procedure protections like the reasonable-doubt rule, which reduce expected returns on victim participation in the criminal process.

<sup>309</sup> *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 43-45, 50-52 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf) (documenting direct government spending on the criminal justice system along with costs imposed on offenders' families and communities); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

investment in private precautions begins to sound more appealing, which is socially beneficial.

That the criminal justice system and private precautions are substitutes tells us something not only about the size or type of criminal justice system we might want, but also how to allocate enforcement resources within that system. More specifically, the desire to avoid distorting victim incentives supplies an argument for directing enforcement resources toward certain victims and crimes rather than others. Regarding victims, there is no concern about reducing investment incentives among individuals who lack the resources to make the investments in the first place. In other words, while a cheap, effective criminal process may reduce investment in socially efficient precautions among the wealthy (like retailers), it's unlikely to affect the spending patterns of the poor. The debate about whether the criminal law is over- or underenforced in poor communities—especially poor communities of color—is fraught and complex.<sup>310</sup> I mean to suggest only that the victim-precaution angle supplies one argument in favor of those who would prefer greater enforcement in these settings.

Just as the substitution argument may apply to some victims but not others, the same is true for crimes. Here, too, it makes sense to allocate criminal justice enforcement resources where they will not lead victims to forego spending on socially efficient precautions. In some contexts, for example, there may be no accessible, efficient precautions because available precautions are ineffective or unduly expensive (in either financial or personal terms). In other contexts, the private harms of victimization—which ordinarily are not compensated through the criminal process—may be so substantial that victims will continue to take precautions even when law enforcement is effective and inexpensive for the victim.

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The preceding discussion may help make sense of public hostility toward Walmart's heavy demands on the criminal justice system. As a taxpayer, Walmart is entitled to some basic level of public protection, regardless whether it takes socially efficient precautions to prevent crime on its premises. But when it begins to make excessive demands on the criminal justice system—demands, perhaps, beyond those it would make if it *did* take efficient precautions—then continuing to meet those demands begins to look more like (regressive) redistribution

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<sup>310</sup> See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197; David Thacher, *The Distribution of Police Protection*, 27 J. QUANTITATIVE CRIMINOLOGY 275 (2011).

than merely spreading the costs of crime across the tax base.<sup>311</sup> At this point, it only seems right that Walmart itself, or the consumers who choose to patronize it, pay the excess. By reducing the value of criminal justice assistance to Walmart, we may encourage Walmart to shift its deterrence strategy away from enforcement and toward prevention.

### B. Police and Prosecutorial Motives

Acquiescence in retail justice, I argued in Section II.C.2, may best be understood as an exercise, rather than abdication, of police and prosecutorial discretion. It's discretion at the wholesale level. But *why* are the public authorities exercising their discretion in this way? Put differently, what can acquiescence in retail justice tell us about police and prosecutorial preferences and priorities?

Legal scholars tend to assume that prosecutors seek to maximize either their convictions or conviction rates, often because these are thought to be the measures by which they are evaluated for promotion or election.<sup>312</sup> The retail justice story challenges this position. Most shoplifting cases are easy wins for prosecutors—the stolen goods are recovered and surveillance footage captures the offender in the act. Plea deals come quickly. Prosecutors fixated on collecting convictions would be foolish to cut off this flow of easy wins. Likewise, if police aimed to maximize arrests, as some maintain,<sup>313</sup> why wouldn't they push hard against, rather than encourage, an arrangement that steals easy ones out from under their gaze?

What retail justice suggests instead is something like a crime-control model of prosecutorial and police behavior. As long as they're assured that retailers are taking care of the problem, and not allowing thieves to run rampant through their stores, prosecutors and police seem generally content to focus their attention and resources on other problems. Again, this is not because there aren't arrests to be made and convictions to be counted—there are (and cheap ones). But the resources are better spent elsewhere. This behavior seems less consistent with a conviction-(rate-) or arrest-maximizing hypothesis than with models in which the goal is to maximize social welfare or deterrence subject to a budget constraint.<sup>314</sup>

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<sup>311</sup> See Harel, *supra* note \_\_, at 1207-08 (discussing an “equal costs” model for distribution of protection).

<sup>312</sup> See *supra* note \_\_.

<sup>313</sup> See *supra* note \_\_.

<sup>314</sup> See, e.g., Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 295-96 (1983). It's also consistent with a model in which law enforcement authorities maximize both social welfare and their own career prospects. See, e.g., Edward L. Glaeser et al., *What Do Prosecutors Maximize? An*

### C. *The Next Frontiers*

Recall CEC's ultimate vision: "to reinvent the way crimes are handled, *starting with* retail theft." If retail theft is just the beginning for the industry, what's next? Put another way, what characteristics of the retail setting have fostered these private justice institutions, and are there other settings that share the same traits? Several conditions, it seems to me, conduce to the particular model of "offender-funded" private justice the retail justice companies embody. The claim is not that each of these conditions is strictly necessary on its own, but rather that, the more that are satisfied, the more likely it is that "offender-funded" private justice will work.

First, the stakes are low in the typical shoplifting case—the average take is \$129.<sup>315</sup> This allows retail justice companies to extract fees sufficiently high to deter future thefts and thus protect victim and third-party interests. Given offenders' solvency limits, the same is unlikely to be true for more serious crimes.<sup>316</sup> Moreover, because retailers at least partly internalize the risks of recidivism, they are unlikely to opt for private justice where it would underdeter;<sup>317</sup> police and prosecutors would be less likely to step aside in such a case as well.

Second, shoplifters are typically nonviolent. Were the contrary true, private justice companies might be more reluctant to take responsibility for suspects because of physical safety risks to their employees and potential future victims.<sup>318</sup> Any concerns about underdeterrence would be heightened as well.

Third, shoplifting has identifiable victims, in contrast with so-called "victimless" crimes like drug use or prostitution. Victims are the most obvious candidates to initiate the private-justice process.<sup>319</sup> Moreover, shoplifting victims often know who the offenders are. I don't mean "often" in an absolute sense, if it's true that shoplifters are apprehended only one time in forty-eight. But where an offender's identity will ever be known, the chances are high the victim knows it through in-store

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*Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 288 (2000). Sticking it to shoplifters probably never made any cop or prosecutor's career.

<sup>315</sup> See Rainey & Hobbs, *supra* note \_\_\_\_.

<sup>316</sup> See Landes & Posner, *supra* note \_\_\_, at 42; Levmore & Fagan, *supra* note \_\_\_, at 13, 15.

<sup>317</sup> See *supra* \_\_\_\_.

<sup>318</sup> See Brown, *supra* note \_\_\_, at 1940.

<sup>319</sup> See Landes & Posner, *supra* note \_\_\_, at 32 (discussing the need for a system of bounties to create incentives for private enforcement of laws prohibiting "victimless" crimes).

surveillance—only infrequently will police investigation supply the information.<sup>320</sup>

Fourth, a relatively small number of victims each suffers a huge number of thefts. This reduces transaction costs by allowing private justice companies to profit from contracting with a few major clients. Were the number of incidents much lower and dispersed among victims, not only would transaction costs rise, but also private justice companies might need to raise enrollment fees. This would reduce the rate at which suspects enrolled, as private justice became unaffordable or, at the least, less appealing relative to the criminal justice system. It might also heighten the sense that private justice companies are exploiting suspects, attracting state attention.

Finally, shoplifting victims have few appealing options for sanctioning offenders other than calling the police. “Offender-funded” private justice is, in a sense, a method of outsourcing sanctions. In some settings, the nature of the relationship between offender and victim will allow for flexible and tailored (nonlegal) sanctions internal to the relationship. This is not the case for retailers and their arms-length customers.

Where else, then, might these conditions be present? The retail setting itself supplies one obvious example, as shoplifting is not the only prevalent form of retail theft. Theft by employees only narrowly trails shoplifting as the leading source of inventory shrinkage.<sup>321</sup> The average take is higher for employees than shoplifters,<sup>322</sup> which might suggest the need for a higher fee to achieve adequate deterrence. At the same time, the employment relationship allows the employer to monitor its employees especially closely, achieving some deterrence through means other than the fee.

It’s possible that many retailers prefer to use job-related sanctions—such as demotions, job transfers, or pay reductions—to punish employees who steal. This could explain why CEC’s employee-targeted program appears to be slow to launch.<sup>323</sup> But it’s also not implausible to

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<sup>320</sup> *Cf. id.* at 31-32.

<sup>321</sup> See HOLLINGER & NAT’L RETAIL FED’N, *supra* note \_\_, at 9.

<sup>322</sup> See Rainey & Hobbs, *supra* note \_\_ (\$715).

<sup>323</sup> CEC seems to be trying to penetrate the employment market. In 2014, the company announced a program called “CEC Return” to help retailers address employee theft. See CEC, *Corrective Education Company Announces CEC Return, a Restorative Justice Education Program That Addresses Employee Theft*, MARKETWIRED (Oct. 13, 2014, 09:22AM), <http://www.marketwired.com/press-release/Corrective-Education-Company-Announces-CEC-Return-Restorative-Justice-Education-1956856.htm>. There is little information available about CEC Return. In 2016, the company then premiered a program called “CEC Retain,” “an employee engagement offering used to prevent employee theft and more fully engage new employees.” See *Corrective Education Company (CEC) Expands Its*

imagine employers that would prefer to keep discipline separate from the terms and conditions of employment, to maximize the chances of restoring and preserving a successful employment relationship.

Another example might be a landlord who oversees a large number of rental units in an urban setting. The landlord, just by the odds, likely encounters all sorts of nonviolent, low-level offenses on her properties, including drug use (or distribution) and noise violations. Doing nothing may be unappealing, as these crimes likely depress rental values, making the landlord a “victim” of even so-called “victimless” crimes. Calling the police, as in the retail environment, may be time-consuming, ineffectual, and frightening to current or prospective tenants. Eviction is surprisingly expensive.<sup>324</sup> Compared to these more traditional options, an “offender-funded” model of private justice has a certain appeal.

There is also the possibility of a different, plausible model of for-profit private justice. Instead of outsourcing *sanctions*, private justice could outsource *adjudication*. Consider two examples. University disciplinary committees frequently adjudicate student crimes committed on campus—from the mundane, like vandalism, to the explosive, like sexual assault.<sup>325</sup> The school’s continuing relationship with its students makes available sanctioning mechanisms—like academic probation or suspension—that may be preferable to what an external provider (including a court) can offer. If, however, a private justice company can adjudicate cases more efficiently, schools might pay them to handle this part of the process.

Likewise, many employers—not just retailers battling employee theft—handle on-the-job crimes in-house.<sup>326</sup> It’s possible that some

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*Product Line and Sales Team*, CEC (June 16, 2016, 6:28AM), <https://www.correctiveeducation.com/home/blog/corrective-education-company-cec-expands-its-product-line-and-sales-team>.

<sup>324</sup> See, e.g., Lucas Hall, *The True Cost of Eviction Is More than \$5,000*, LANDLORDOLOGY (Apr. 21, 2016), <https://www.landlordology.com/cost-to-evict-tenant>; see also MATTHEW DESMOND, *EVICTED 114* (2016) (pegging cost at \$600 in low-income areas of Milwaukee in 2008-2009).

<sup>325</sup> See, e.g., Collin Binkley et al., *College Disciplinary Boards Impose Slight Penalties for Serious Crimes*, COLUMBUS DISPATCH, Nov. 23, 2014, <http://www.dispatch.com/content/stories/local/2014/11/23/campus-injustice.html> (“Colleges ... use campus disciplinary boards to pass judgment on students accused of violent crimes, including rape and assault. Sometimes, schools handle crime and punishment without ever reporting violations to police. Most cases never go to court.”); see *id.* (discussing cases involving trespassing, theft, and property destruction).

<sup>326</sup> See, e.g., C.D. SHEARING & P.C. STENNING, *PRIVATE SECURITY AND PRIVATE JUSTICE: THE CHALLENGE OF THE 80S* 31 (1983) (“Systems which have been established within industry and commerce for disciplining workers are the epitome

would prefer to outsource adjudication, and then impose job-related sanctions on those found guilty. Of course, nothing would stop an employer (or university) from outsourcing *both* adjudication and sanctions. The decision presumably would turn on a comparison of the sanctioning alternatives, likely focusing on cost-effectiveness, including consequences for the future of the relationship.

#### CONCLUSION

Legal scholars long have focused on the role of police and prosecutors as gatekeepers for the criminal justice system.<sup>327</sup> How these actors exercise their discretion determines who escapes the criminal justice system's net and who is entangled within it. This Article highlights how late to the game police and prosecutors can be—the stationhouse phone rings only when the private gatekeepers that precede them place the call. In these settings, the question is not *whether* an individual suspected of crime will enter the justice system, but rather *which* justice system—public or private—will assess his guilt and administer any necessary sanctions.

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of ... 'systems of private justice' and are increasing supplanting the criminal justice process ... as the means of dealing with crime in industry.”).

<sup>327</sup> See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP POL. & CIV. RTS. L. REV. 369, 369 (2010) (describing prosecutors as the “key gatekeepers who ration criminal justice”); J.J. Prescott & Charlie Gerstein, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 272, 276-78 (2015) (describing how police exercise of the discretionary power to arrest shapes criminal justice outcomes).