

PRIVATE ALTERNATIVES TO CRIMINAL COURTS: THE
FUTURE IS ALL AROUND US

RESPONSE TO PROFESSOR JOHN RAPPAPORT

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INTRODUCTION

In his important article, *Criminal Justice, Inc.*, Professor John Rappaport identifies the establishment of a new and novel institution: a private company retained by retail stores to dispose of cases involving shoplifting claims.¹ Still in its infancy, this new development has spawned two private for-profit, specialist companies since 2010: the Corrective Education Company (CEC) and Turning Point Justice (TPJ).² CEC alone handles thousands of shoplifting cases annually,³ and if some legal technicalities are overcome, these companies may be handling significantly more in the coming years.

Both companies have the same business model, which Rappaport calls “Criminal Justice, Inc.” (CJ Inc.): Store security guards apprehend shoplifters, but instead of handling matters themselves or calling the police, the guards determine program eligibility according to strictly defined criteria and inform those eligible that they will be contacted by representatives of the CJ Inc. companies.⁴ In the subsequent call, CJ Inc. promises that the store will not call the police in exchange for a “tuition” payment to enroll in an online class on how to avoid crime.⁵ Retailers, which include large national chains with aggregate annual sales in the billions of dollars, pay nothing for this service.⁶

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1. See John Rappaport, *Criminal Justice, Inc.*, 118 *Colum. L. Rev.* 2251, 2272–76 (2018).

2. See *id.* at 2272, 2276.

3. See *id.* at 2274.

4. See *id.* at 2273.

5. See *id.* at 2274.

6. See *id.* at 2272–73, 2275.

This new development, Rappaport tells us, may transform the way shoplifting is handled. In this Response, I place CJ Inc. in a broader context, point to other similar developments earlier and elsewhere, and imagine the future of criminal adjudication in a world of “CJ Incs.” After highlighting Rappaport’s central findings, I examine the model from two perspectives. First, I consider CJ Inc. from a historical and comparative perspective to show it is not so new: This sort of self-help is a time-honored practice found across all stratified societies. Second, I explore this phenomenon in light of practices common in many segmented societies. Here, too, there is a substantial body of research on legal pluralism, which shows that alternatives to governmental systems of social control are common, even in criminal law matters, and even in modern societies. The introduction of CJ Inc. into contemporary American stores is one more instance of creative adaptation within segmented institutions. The examination of social control in stratified and segmented societies reveals a great deal about the nature and the limits of the criminal law, the limits of the state’s ostensible monopoly on the enforcement of criminal law, and the possible future of CJ Inc. and other related developments.

In this Response, I show that Rappaport has identified something of a paradigm case in the amalgamation of stratified and segmented structures that facilitate opportunities for expanded forms of private criminal justice administration. If I am correct, the implications for the expansion of CJ Inc. are enormous. Part I examines the social dimension of shoplifting and provides a thumbnail sketch of retail justice. Part II examines self-help in stratified and segmented societies and explores the implications of treating department stores as both stratified and segmented institutions. Part III identifies other stratified or segmented settings and explores the nature of existing CJ Inc.-like institutions and others that may emerge. The list is long, suggesting that CJ Inc. has a bright future. The conclusion addresses some implications stemming from the likely development of CJ Inc., especially as it affects both public law enforcement and the expansion of private adjudication in criminal law.

I. UNDERSTANDING CRIMINAL JUSTICE, INC.

In order to understand CJ Inc. and its possible future, it is important to appreciate the nature of the problem that it seeks to address and to explore how it has positioned itself to respond to this problem. Section I.A identifies the distinctive features of the crime of shoplifting, and section I.B explores how CJ Inc. is structured to address them. CJ Inc. appears to have devised an efficient and effective response to some of the tougher challenges related to deterring and sanctioning shoplifters. In doing so, it has created a business model that might work for a variety of other criminal offenses as well.

A. *Shoplifting as a Social Problem*

Shoplifting is a minor crime with, as Rappaport says, “major economic and social consequences.”⁷ However, a large number of shoplifting thefts are never reported,⁸ and half of those who are apprehended are warned, made to pay, and let go; the other fifty percent are arrested.⁹ Self-reports by shoplifters indicate that they are caught on average only once every forty-eight times they steal.¹⁰ The average value of a stolen item is seemingly too little to worry about until one realizes that the aggregate amount lost each day is nearly \$50 million.¹¹ CJ Inc. is designed to change this balance: It promises to expand the availability of noncriminal sanctions, decrease costs to stores and law enforcement agencies, and enhance deterrence.¹²

As with many misdemeanor offenses, such as traffic violations, turnstile jumping, petty theft, breaches of the peace, and the like, criminal law enforcement for shoplifting in any particular case is likely to cost both victims and accused much more in time and effort than the magnitude of the harm done.¹³ Still, in total, losses are staggering, and merchants are desperate to find efficient ways to deter would-be shoplifters and sanction offenders. Furthermore, victims of shoplifting, unlike most other types of thefts, have a decidedly long-term perspective; their greatest concern is with compliance (that is, shoplifting reduction), not enforcement.¹⁴

7. Id. at 2255 (internal quotation marks omitted) (quoting 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)). Fortune puts the value of “inventory shrinkage” at about \$32 billion, with shoplifting accounting for thirty-eight percent, employee theft for nearly thirty-five percent, and vendor theft and administrative errors accounting for the rest. Phil Wahba, *Shoplifting, Worker Theft Cost Retailers \$32 Billion Last Year*, *Fortune* (June 24, 2015), <http://fortune.com/2015/06/24/shoplifting-worker-theft-cost-retailers-32-billion-in-2014/> [<https://perma.cc/XDV2-XJ6Z>].

8. See Nat’l Retail Fed’n, *2018 National Retail Security Survey 12* (2018), <https://cdn.nrf.com/sites/default/files/2018-10/NRF-NRSS-Industry-Research-Survey-2018.pdf> [<https://perma.cc/F4MN-VUMZ>] (calculating the average number of shoplifting “apprehensions,” or “stops without referrals”).

9. See Rappaport, *supra* note 1, at 2279 (citing Shoplifting Statistics, Nat’l Ass’n for Shoplifting Prevention, <http://www.shopliftingprevention.org/what-we-do/learning-resource-center/statistics> [<https://perma.cc/DUL6-GXBJ>] (last visited Aug. 10, 2018)).

10. Shoplifting Statistics, Nat’l Ass’n for Shoplifting Prevention, <https://www.shopliftingprevention.org/what-we-do/learning-resource-center/statistics> [<https://perma.cc/DUL6-GXBJ>] [hereinafter Shoplifting Statistics] (last visited Aug. 10, 2018).

11. See Rappaport, *supra* note 1, at 2256. Virtually every retail business is affected by theft, but as a group grocery stores experience the greatest loss: 3.23% of sales, in contrast to 1.27% for department stores. See Wahba, *supra* note 7.

12. See Rappaport, *supra* note 1, at 2272.

13. Id. at 2269–70. Rappaport offers figures indicating that it costs police an average of \$2,100 to follow through on a shoplifting arrest. Id. at 2269.

14. See id. at 2266–70 (describing retailers’ ambivalence toward prosecuting shoplifting offenses).

However, the two are intertwined, and almost all stores invest in both security and law enforcement.¹⁵

Rappaport provides a brief history of shoplifting, which he suggests is a product of modern mass merchandising.¹⁶ In the past, merchandise was displayed behind counters and required clerks to bring goods to customers or was held in stalls presided over by watchful merchants.¹⁷ Department stores and grocery stores introduced industrialized shopping by allowing customers to have easy access to ready-made and prepackaged wares, to be touched and examined and even tried on before purchase.¹⁸ Grocery stores extended this concept in the late 1990s and pioneered self-checkout options that are now being replaced by grab-and-go technology that allows customers to scan items on their cell phones and place them directly into their grocery bags without having to pause at a counter.¹⁹

Security for deterring and apprehending shoplifters has expanded exponentially, but it is not clear that it has kept pace with merchandising.²⁰ Still, cost savings and customer demands for quick service lead merchants to embrace these new technologies. Touching and inspecting merchandise—as well as no waiting time—increase impulse purchases, so stores are reluctant to put barriers between customers and all but the most expensive and attractive items.²¹ There are other sound reasons for having a relaxed approach toward access to merchandise, and even

15. See *id.* at 2300 (describing the “[f]amiliar precautions” used by retailers to prevent retail theft); see also Nat’l Retail Fed’n, *supra* note 8, at 10 (identifying the most commonly used loss-prevention systems and technologies).

16. See Rappaport, *supra* note 1, at 2261–62. This may be the case, but readers of Charles Dickens’s *Oliver Twist* (1838) or Henry Mayhew’s *London Labour and the London Poor* (1851) gain some considerable knowledge about pickpocketing and shoplifting in mid-nineteenth-century London. The most famous petty thief may be Jean Valjean, the hero of Victor Hugo’s *Les Misérables* (1862).

17. See Rappaport, *supra* note 1, at 2261.

18. See *id.* at 2261–62.

19. See, e.g., Sean Buckley, Self-Checkout Concept Makes Your Phone the Cash Register, Engadget (Jan. 15, 2016), <https://www.engadget.com/2016/01/15/self-checkout-concept-makes-your-phone-the-cash-register/> [<https://perma.cc/RZW6-TS7B>]; Bootie Cosgrove-Mather, Self-Checkouts Ring Up Sales, CBS News (June 8, 2004), <https://www.cbsnews.com/news/self-checkouts-ring-up-sales/> [<https://perma.cc/J7J3-65Q7>].

20. For instance, by secretly replacing barcode stickers, self-checkout shoppers can purchase rib eye steak for the price of ground beef. See Rene Chun, The Banana Trick and Other Acts of Self-Checkout Thievery, Atlantic (Mar. 2018), <https://www.theatlantic.com/magazine/archive/2018/03/stealing-from-self-checkout/550940/> [<https://perma.cc/2ZVN-TXAM>].

21. See, e.g., Ian J. Abramson, Shoplifting: Fastest-Growing, Hardest-to-Control Crime, Volume Retail Merchandising, Feb. 1983, at 2, 2 (“As long as retailers continue the trend towards self-service and displays, they will attract thieves as well as the impulse buyers they want and shoplifting will continue to affect each and every one of us.”).

toward shoplifters. Vigorous surveillance and enforcement are expensive, alienate customers, and can lead to claims of false arrest.²²

Additionally, law enforcement officials are loath to invest heavily in pursuing shoplifters.²³ Swamped with more pressing matters, police officers drag their feet in responding to shoplifters, even when caught red-handed.²⁴ Certainly, as Rappaport reveals, law enforcement in many communities is burdened with a high demand from stores reporting shoplifting.²⁵ This is not to say that law enforcement does nothing to respond to shoplifters. After all, big stores and merchants associations carry weight in many communities and can command attention from public officials.²⁶

At the same time, the loss-prevention industry continues to develop and stores have access to a variety of security technologies.²⁷ Department stores pioneered in developing modern private-security practices, designing defensible spaces, and adapting electronic technology designed for other uses.²⁸ They innovated with guards dressed as customers, two-way and fish-eye mirrors, long and clear aisles, restricted entrances and exits,

22. See Rappaport, *supra* note 1, at 2268–70.

23. See Morse Diggs, *Atlanta Police Will No Longer Respond to Some Shoplifting Calls*, Fox 5 (Mar. 20, 2018), <https://www.fox5atlanta.com/news/atlanta-police-to-no-longer-respond-to-some-shoplifting-calls> [<https://perma.cc/2JS4-L3GA>] (last updated Mar. 21, 2018).

24. See *id.*; see also Rappaport, *supra* note 1, at 2297. I showed Rappaport's article to a friend, a police officer in Berkeley, who liked the idea of CJ Inc. He and most other police officers, he says, are not keen on handling shoplifting cases and tend to view stores that have high rates of shoplifting like they do drivers who leave keys in their cars with motors running while doing errands or homeowners who leave their doors unlocked while on vacation. They will give free advice but do not want to invest much time in these cases and prefer to direct victims to their insurance companies.

25. See Rappaport, *supra* note 1, at 2269.

26. See, e.g., Craig Smith, *New Push Against Professional Shoplifters: Chamber Teams Stores and Law Enforceme [sic]*, KGUN9 (Jan. 4, 2017), <https://www.kgun9.com/news/local-news/new-push-against-professional-shoplifters> [<https://perma.cc/F7PL-ZVB4>] (discussing a shoplifting-prevention program developed by the Greater Tucson Chamber of Commerce and local law enforcement). Many communities have merchants associations and local chambers of commerce whose members are active in public affairs and whose officials watch out for common interests and mobilize to lobby municipal officials to adopt new policies. See Chambers of Commerce, Ass'n of Chamber of Commerce Execs. (Nov. 2, 2009), <https://secure.acce.org/about/chambers-of-commerce/> [<https://perma.cc/2CMB-8WNS>] (describing the role of chambers of commerce and noting that there are “roughly 4,000” chambers of commerce in the United States).

27. There are numerous associations dedicated to promoting the profession of “loss prevention” and countering shoplifting, such as the National Association for Shoplifting Prevention, Loss Prevention Foundation, Loss Prevention Research Council, and the Restaurant Loss Prevention and Security Association. See *Our Members*, Loss Prevention Research Council, <https://lpresearch.org/our-members/> [<https://perma.cc/T8GH-8FVY>] (last visited Feb. 8, 2019) (mentioning the industry leaders in loss prevention).

28. See, e.g., Rappaport, *supra* note 1, at 2267, 2300.

saturated use of CCTV cameras, ink tags, electronic tags, and a host of other practices.²⁹

These technologies are only so good. As surveys reveal, roughly ten percent of the U.S. population has admitted to shoplifting at least once,³⁰ and self-reports by shoplifters indicate that they are caught only occasionally.³¹ Further, retailers may differ in their ability to facilitate apprehension, their capacity to invest in security, the degree to which they pursue claims against shoplifters,³² their mix of clientele,³³ and the value of items stolen. What is clear, however, is that stores everywhere detect only a small proportion of shoplifters³⁴ and are desperate for more effective means of deterrence and enforcement.

B. *Criminal Justice, Inc.: A Thumbnail Sketch*

Rappaport pieces together a barebones portrait of the business model and procedures used by CJ Inc. from the websites of the two leading companies, telephone conversations with company officers, trade publications, company documents, litigation materials, and the occasional

29. See, e.g., Read Hayes, *How Store Environments Affect Shoplifting*, *Loss Prevention Media: Insider* (Aug. 29, 2018), <https://losspreventionmedia.com/insider/shoplifting-organized-retail-crime/how-store-environments-affect-shoplifters-and-organized-retail-crime/> [<https://perma.cc/5JSJ-DYYR>] (detailing research on innovations to counter shoplifting); Tim Johnson, *Shoplifters Meet Their Match as Retailers Deploy Facial Recognition Cameras*, *McClatchy* (May 21, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article211455924.html> [<https://perma.cc/2YCR-9RV9>] (describing the use of facial recognition software to counter shoplifting); Tracy Collins Ortlieb, *People Are Watching You Change—and It's Legal*, *AvvoStories* (Oct. 20, 2016), <https://stories.avvo.com/rights/privacy/people-watching-change-legal.html> [<https://perma.cc/H33Z-WR2E>] (discussing the use of two-way mirrors in changing rooms and wifi tracking in stores).

30. See Rappaport, *supra* note 1, at 2256 & n.22 (citing 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)).

31. See *supra* note 10 and accompanying text (providing that self-reports by shoplifters indicate that on average they are caught in only one of every forty-eight thefts).

32. Although some stores intervene only in “dead-bang” cases in which evidence is overwhelming, others can be tenacious even when allegations are weak. See, e.g., Michael Corkery, *They're Falsely Accused of Shoplifting, but Retailers Demand Penalties*, *N.Y. Times* (Aug. 17, 2018), <https://www.nytimes.com/2018/08/17/business/falsely-accused-of-shoplifting-but-retailers-demand-they-pay.html> (on file with the *Columbia Law Review*) (describing the aggressive tactics that many companies use in prosecuting shoplifting cases).

33. For instance, many stores cater to teenagers and young adults, who as a group are both more impulsive and much more likely to shoplift than older people. See Rappaport, *supra* note 1, at 2264 (reporting that “two-thirds of shoplifting cases occur before age fifteen” (citing 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, 911 (2008))).

34. It would be interesting to compare the annual aggregate value of items linked to shoplifters who are apprehended with the annual aggregate value of inventory shrinkage for a particular store or chain to determine what portion of the losses are identified and recovered by enforcement.

newspaper article.³⁵ The Corrective Education Company (CEC), one of the primary CJ Inc. companies, was founded in 2010 and had an annual revenue of \$7.6 million in 2017.³⁶ Store security guards are responsible for monitoring store premises and apprehending suspected shoplifters.³⁷ Upon apprehension, guards take suspects to a private room and screen them for program eligibility. If eligible, they are informed of the reason for their apprehension and told that CEC provides an alternative to arrest and prosecution.³⁸ Suspects view a CEC video which presents them with a choice: pay \$500 (\$400, if they pay up front) and enroll in CEC's "restorative justice" program (with, the company notes, a possibility of partial scholarships for those with low incomes) or have the matter referred back to store officials, who in turn may call the police.³⁹ If interested, they are released and typically receive a phone call from CEC personnel who then explain the course to them.⁴⁰ CEC also operates a modified program for juveniles, the details of which Rappaport did not discuss.⁴¹ A second company, Turning Point Justice (TPJ), operates on the same basic model.⁴²

CEC informs suspects who pass screening that if they enroll and complete the program, the store will "consider the matter closed."⁴³ Although the companies cannot guarantee that law enforcement officials will not bring charges, they can presumably assure enrollees that the store will not report them to the police.⁴⁴ To back this up, CEC promises a full tuition refund if a person is criminally prosecuted after completing its program.⁴⁵ According to CEC officials, more than ninety percent of those offered take the option of private justice, though store officials apparently did not provide Rappaport figures on what percentage of apprehended shoplifters are deemed eligible.⁴⁶ Training consists of a six-

35. See Rappaport, *supra* note 1, at 2272–76 nn.124–161.

36. *Id.* at 2272.

37. *Id.* at 2273.

38. *Id.*

39. *Id.*

40. *Id.* at 2273–74.

41. *Id.* at 2276 n.155. Note, however, that Rappaport reports that nationally over two-thirds of shoplifting cases involve people under fifteen. *Id.* at 2264.

42. See *id.* at 2276.

43. *Id.* at 2274 (quoting Declaration of Darrell Huntsman in Support of Opposition to Motion for Summary Judgment exh. C, at 3, *People ex rel. Herrera v. Corrective Educ. Co.*, No. CGC-15-549094 (Cal. Super. Ct. Aug. 14, 2017)).

44. See *id.*

45. *Id.*

46. *Id.* Since Rappaport reports that store-imposed criteria often exclude almost all juveniles, *id.* at 2275–76, repeat offenders, *id.* at 2273 & n.129, 2282, and, *de facto*, those who cannot afford the tuition, see *id.* at 2273 & n.132, it would be interesting to have a better idea of who are left—those first offenders with at least modest wealth, which as a group, I suspect, are probably least likely to be prosecuted. Rappaport discusses this issue from a theoretical perspective but does not provide data to explore it more fully. See *id.* at 2294.

to eight-hour online course designed to teach students “life skills.”⁴⁷ CEC emphasizes that stores pay nothing for their services and at one time stores even received a portion of the tuition income.⁴⁸ This arrangement saves retailers considerable time and effort.⁴⁹ Further, CJ Inc. claims its program both sanctions and rehabilitates: Its recidivism rate is only two percent, and it allows offenders to escape without even an “erased” arrest record.⁵⁰

Rappaport reports that security officers select participants according to a strict set of eligibility requirements established by each store.⁵¹ The criteria are, among other things, designed to prevent discrimination based on race, gender, nationality, language ability, and other related characteristics.⁵² The program also appears to be aimed at relatively well-off adult first-time offenders, people who might otherwise be good candidates for warning and release.⁵³ For unexplained reasons, stores appear to automatically reject people who are either “too young,” “too old,” or who have stolen big-ticket items.⁵⁴ CEC emphasizes that participating stores set these criteria and that the stores make the initial apprehension of participants.⁵⁵ Accordingly, it is the stores, not CEC, that determine who participates in CEC’s program.⁵⁶

This is the barebones. We do not know from Rappaport’s account much more about the details of how these programs work, who participates, or how much discretion is actually at play. After his basic presentation, Rappaport follows up with a number of important questions raised by the program: Are shoplifting suspects worse off or better off with the added option of retail justice?⁵⁷ Is the process unintentionally discriminatory and are certain groups disproportionately affected?⁵⁸ Does

47. *Id.* (quoting Leon Neyfakh, *Let’s Make a Deal*, *Slate* (Feb. 26, 2015), <https://slate.com/news-and-politics/2015/02/shoplifting-at-whole-foods-or-bloomingtondales-pay-corrective-education-company-320-and-they-wont-call-the-cops.html> [<https://perma.cc/BAR6-LL46>]).

48. *Id.* at 2274–75. TPJ continues to pay stores a fee for each successful participant. *Id.* at 2276.

49. *Id.* at 2274–75. I wish that Rappaport had obtained the necessary information so that he could have disaggregated his accounts by difference in stores and clientele. It must be that CJ Inc. works better in some locations than others. However, Rappaport is interested in the big picture, the model, to see how the idea works and how it fits within conventional understanding of criminal justice administration. Fair enough.

50. *See id.*

51. *Id.* at 2275–76.

52. *See id.*

53. While CEC provides some scholarships for partial tuition remission, the vast majority of participants pay full tuition. *See id.* at 2273 n.132.

54. *Id.* at 2276.

55. *Id.* at 2273 & n.128.

56. *Id.* It would be interesting to see how selection criteria vary across retailers and what discretion (if any) store security officials exercise in the selection process.

57. *Id.* at 2277.

58. *Id.* at 2287.

it have a more significant general deterrent effect than the criminal justice system?⁵⁹ And, is it even legal?⁶⁰

Rappaport concludes that most participants are likely to be better off, since even for the factually innocent, a tuition of \$500, a six- to eight-hour online course, and no criminal arrest record is likely to be less onerous than the alternative (that is, arraignment, bail, repeated court appearances or participation in a diversion program, a record of arrest whatever the promise of expungement, and in some cases a record of conviction and a jail term).⁶¹ However, Rappaport notes that repeat offenders—who are excluded from the program—do not experience these benefits.⁶² Furthermore, he thinks, people of color are likely over-represented in this group, and he suggests that this exclusion “bakes in whatever biases infected earlier interactions with enforcement authorities.”⁶³ Thus, even though the program might be facially nondiscriminatory, its downstream consequences might not be. Rappaport reminds us, however, that absent more data we simply cannot elaborate on this issue with much confidence.⁶⁴

Though recognizing potential “qualms” about CJ Inc.’s business model, Rappaport concludes that “[a]fter careful reflection, it is not clear that retail justice is worse than its public counterpart, and in several important respects it may be better.”⁶⁵ This judgement is not so much based on a rosy picture of CJ Inc. Instead, it emerges, at least in part, from CJ Inc.’s brief comparison with the desultory accounts of the operations of lower criminal courts.⁶⁶ Despite Rappaport’s conclusion, it is important to note that in public law enforcement, some cases now handled by CJ Inc. would never reach the courts. Many would be dispensed with by a warning from the store or an officer, along with an apology and restitution by the accused. Furthermore, prosecutors would drop charges for some and divert still others.⁶⁷ Only a handful of accused

59. See *id.* at 2295.

60. *Id.* at 2307 (considering whether retail justice constitutes blackmail).

61. See *id.* at 2312 (“[I]n most circumstances, the availability of retail justice makes shoplifting suspects better off by allowing them to opt out of the criminal justice system, with all its dangers and lingering legal consequences.”).

62. See *id.* at 2290 (noting that “retail justice companies refer repeat offenders to the police”).

63. See *id.*

64. See, e.g., *id.* at 2291.

65. *Id.* at 2312.

66. See *id.* For similar discussions of the operations of criminal courts, see generally Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (1979) [hereinafter Feeley, *Process*]; see also Nicole Gonzales-Van Cleve, *Crook County: Racism and Injustice in America’s Largest Criminal Court* (2016); Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (2018) [hereinafter Kohler-Hausmann, *Misdemeanorland*].

67. See Rappaport, *supra* note 1, at 2303.

would be convicted and fined and still fewer sentenced to jail.⁶⁸ Some of them would have to post bail, fewer would remain in jail for a while, and even fewer would not be released until disposition. But very few would be fined as much as \$400 or \$500.⁶⁹ Still, all would be hassled.⁷⁰ Even the possibility of pretrial detention, the inability to post bail (or post it immediately), repeated court appearances, the possibility of both a record of arrest and conviction, and a possible fine or jail term could easily tip the balance toward CJ Inc. if one could afford it. One path is clear, the other leads to a bramble bush.

Rappaport goes on to address a number of questions that should be explored in more depth, including transparency about alternatives;⁷¹ the comparative deterrent effects of private retail justice versus public enforcement;⁷² how private justice dispositions distort crime data;⁷³ and possible racial and class bias.⁷⁴ He concludes this portion of his discussion with a proposal to regulate the process to some degree so that “lawmakers can help ensure that it operates fairly.”⁷⁵

In light of the dismal record of many—perhaps most—criminal courts in the United States, Rappaport has an easy job of convincing his readers—this reader, at least—that Criminal Justice, Inc. is likely to be preferable for many people.⁷⁶ He emphasizes: “[T]he question is not *whether* individuals suspected of crime will enter the justice system but rather *which* justice system—public or private—will assess their guilt and administer any necessary sanctions.”⁷⁷ This is not quite right, since stores often warn and release⁷⁸—and certainly, in the absence of CJ Inc. this

68. See *id.* at 2279–81.

69. Cf. *id.* at 2279–81 & n.182 (noting that the portion of “unlucky” shoplifters actually arrested could face substantial criminal fines). But see *id.* at 2282 (suggesting that the tuition costs of CJ Inc. would not be a “raw deal” “until the price of ‘tuition’ exceeded the cost of *actual* criminal justice sanctions”).

70. See Feeley, *Process*, *supra* note 66, at 199 (“[I]n the lower criminal courts the process itself is the primary punishment.”); Kohler-Hausmann, *Misdemeanorland*, *supra* note 66, at 85–93.

71. See Rappaport, *supra* note 1, at 2284–86.

72. *Id.* at 2299–302.

73. *Id.* at 2306–07.

74. *Id.* at 2287–91.

75. *Id.* at 2312.

76. For additional background on the failures of the criminal justice system, see, for example, Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. Rev. 673, 674 (2018) [hereinafter Feeley, *Criminal Courts*] (arguing that “the institutional design of the criminal justice system is not up to the task of delivering justice to those charged with misdemeanors”).

77. Rappaport, *supra* note 1, at 2321.

78. *Id.* at 2268–70 (describing stores’ reluctance to involve the police). For instance, Rappaport cites an article reporting that the Macy’s department store in New York City reported to the public police only fifty-six percent of the 1,900 people its security officials had detained and accused of shoplifting. See *id.* at 2268 & n.97 (citing Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 Utah L. Rev. 573, 590).

outcome would be likely for the sorts of candidates selected for CJ Inc.'s programs. Still, he makes a good point, which is something like this: "Given how bad our lower courts are, it is hard to imagine that CJ Inc. would be worse. So, why not experiment?"⁷⁹ We already know that we can pay for traffic violations by mail to get it over with⁸⁰ and that injured parties in civil suits have fled public courts in droves for private justice systems,⁸¹ so why not experiment with some alternatives to public criminal courts in some types of shoplifting cases as well?

However, there are some twists to consider. First, there is a vast power imbalance. Stores using CJ Inc. are immensely powerful and many of those accused of shoplifting are weak, often in the extreme. If all suspects insisted on a jury trial, they could collectively exercise immense power.⁸² But costs and collective action problems prevent this, so stores have the upper hand in the same way that prosecutors do in the criminal process.⁸³ Further, with CJ Inc., administrative costs have been off-loaded to suspects, not stores or public agencies. Given that CJ Inc. is a for-profit enterprise, we might expect it to search for more ways to off-load costs and generate still more income for both themselves and retail stores. To remain competitive, CJ Inc. may have no choice.

Another crucial concern raised by Rappaport is the legality of CJ Inc.'s operations.⁸⁴ An important if not central part of Rappaport's article deals with whether CJ Inc.'s operations constitute blackmail, as a trial court in San Francisco concluded in 2017.⁸⁵ After all, the store threatens to call the police if the suspect does not sign up for the program and pay its "tuition."⁸⁶ Rappaport deftly weaves his way through the jurisprudential thicket of blackmail, which almost everyone agrees is a crime

79. For a similar view on private prisons, see Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 *Ind. L.J.* 1401, 1428 (2014) [hereinafter *Feeley, Private Prisons*] ("[O]ne might reasonably ask, 'Why, given two hundred years of near constant failure of publicly administered prisons, aren't you interested in experimenting with private prisons?'").

80. See *infra* notes 176–178 and accompanying text (discussing the resolution of traffic tickets by mail and phone application).

81. For a brief exploration of both court-connected and private alternative dispute resolution, see generally Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 *J. Empirical Legal Stud.* 843 (2004).

82. See Rappaport, *supra* note 1, at 2286 ("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 forgo prosecution in many cases." (citing Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 *J. Legal Analysis* 737, 739–40 (2009))).

83. *Id.*

84. See *id.* at 2307–12.

85. *Id.*; see also *People ex rel. Herrera v. Corrective Educ. Co.*, No. CGC-15-549094, slip op. at 3 (Cal. Super. Ct. Aug. 14, 2017) (granting partial summary judgment).

86. Rappaport, *supra* note 1, at 2274.

although no one can agree why.⁸⁷ Rappaport offers no new insights on the nature of blackmail. He uneasily concedes that CJ Inc.'s operations may formally constitute the crime of blackmail⁸⁸ but goes on to assert that the "theoretical footing" justifying the prohibition of blackmail does not "extend persuasively to the case of retail justice."⁸⁹ Accordingly, in this situation at least, he urges prosecutors to refrain from treating CJ Inc.'s activities as criminal.⁹⁰ Ultimately, he believes that experimentation with retail justice is worthwhile and that despite the cloud of quasi-legality, CJ Inc. should proceed.⁹¹

In this Response, I show that using crime to fight crime is not as unusual as it might appear. The use of crime as social control is embedded in many societies, including modern ones. Many observers acknowledge it as a valuable, or at least socially acceptable, form of social control in certain contexts.⁹² So, Rappaport is in good company.

II. SELF-HELP AND SOCIAL CONTROL IN STRATIFIED AND SEGMENTED SOCIETIES

Social scientists have examined self-help or nonpublic forms of criminal law enforcement from two perspectives: in light of social stratification—how does social stratification affect public law enforcement?—and in light of social segmentation—how do segmented groups relate to public law enforcement?

"Stratification" is a term used to express the differentiation of members of a society or a group vertically, according to various socially salient criteria that produce inequalities such as class, status, and power.⁹³ It is a

87. *Id.* at 2307–12.

88. *See id.* at 2312.

89. *Id.*

90. *See id.* at 2314.

91. *Id.*

92. *See* Donald Black, *Crime as Social Control*, 48 *Am. Soc. Rev.* 34, 34 (1983) ("Viewed in relation to law, [crime] is self-help. To the degree that it defines or responds to the conduct of someone else—the victim—as deviant, crime is social control.") [hereinafter Black, *Crime as Social Control*]; *see also* Vera Inst. of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts*, at xii–xv (1977) (noting the large number of crimes stemming from interpersonal conflicts and the inability of the court system to manage conflicts derived from "simple or complicated anger between two or more people who know each other").

93. *See, e.g.,* Donald Black, *The Behavior of Law* 11 (1976) [hereinafter Black, *The Behavior of Law*] (describing stratification as any "uneven distribution of the material conditions of existence"). Social distinctions are as old as societies, but in modern social theory, sociologists have coined the term stratification as a way of systematically focusing on structures that institutionalize differences in life chances among individuals in a society. Karl Marx posited social classes that are defined by one's relation to the means of production and used it to account for power differentials in societies. *See* Wendy Bottero, *Stratification: Social Division and Inequality* 34 (2005). In contrast, Max Weber used three

powerful analytic concept because it is a feature of societies rather than individuals, endures over generations, is common to virtually all known societies, and affects both objective reality and subjective belief.⁹⁴ In its starkest form it distinguishes between “haves” and “have nots,” though along many dimensions.⁹⁵ Sociologists have used the concept to understand crime and the criminal process in any number of ways, including how crimes are defined, how criminal law is enforced, and who has access to law and legal institutions.⁹⁶ The concept also helps explain why, under certain conditions, people who have been victimized by crime resort to self-help though their own criminal conduct rather than call the police.⁹⁷

In social science, the studies of social “segmentation” examine various groups in society, ranging from formal organizations, to ethnic and religious groups, to those who share common characteristics, such as cultural beliefs, age, and physical proximity.⁹⁸ Studies of segmented groups explore what distinguishes these groups from the larger society, what common characteristics they share, and how their distinctiveness

distinct but overlapping forms of stratification based on class, status, and party (an organizational means of achieving power). See *id.* at 39–41.

94. For a discussion of the hegemonic feature of class, see generally Antonio Gramsci, *Selections from the Prison Notebooks* (1971). For a discussion of how stratification (and especially class) shapes law in the Marxist tradition, see generally Hugh Collins, *Marxism and Law* (1996).

95. See E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* 275 (1954) (noting that a function of law is “the allocation of authority and the determination of who may exercise physical coercion as a socially recognized privilege-right”). For an elaborate analysis of how the “haves” come out ahead in the context of the legal system, see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95 (1974).

96. For a seminal work on this subject, see, for example, Black, *The Behavior of Law*, *supra* note 93, at 21–30 (suggesting that the use and application of law changes depending on its “vertical direction” between higher- and lower-ranked members of society).

97. For reviews of the vast anthropological literature on this subject, see generally Black, *The Behavior of Law*, *supra* note 93; Donald Black, *Sociological Justice* (1989) [hereinafter Black, *Sociological Justice*]. For seminal examples of the anthropological literature on this subject, see generally Hoebel, *supra* note 95 (describing numerous cultures that prominently featured elements of self-help); K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* 3–19 (1941) (providing narrative accounts of self-help in Cheyenne Society). For more recent discussions of self-help and the criminal process, see generally Henry P. Lundsgaarde, *Murder in Space City: A Cultural Analysis of Houston Homicide Patterns* 161–66 (1977) (discussing the conditions outlined in the Texas Penal Code under which murder is a legally acceptable or justifiable form of self-help); Vera Inst. of Justice, *supra* note 92, at 19–20, 26–27, 65–67 (showing that a substantial number of felony arrests arise from crimes regarded as forms of self-help—such as debt collection and retribution—which are often not regarded as “real” crimes by arresting officers, prosecutors, defense attorneys, and judges, and are typically dropped or downgraded in seriousness).

98. See Niklas Luhmann, *Differentiation of Society*, 2 *Can. J. Soc.* 29, 33 (describing segmentation as differentiating society into “subsystems” based on “self-selective system-building”).

endures over time.⁹⁹ In contrast with the vertical differential in social stratification, group segmentation is often conceived of in terms of horizontal differentiation.¹⁰⁰ Groups may be distinguished by shared religion, language, tribe, location, or by looser self-selected criteria such as clubs, affinity groups, and occupational associations.¹⁰¹ Like stratification, segmentation also yields insights into crime and responses to it. For example, we generally regard crime and the response to crime differently among members of the same group than we regard crime between strangers, and know that within-group crime is often handled internally.¹⁰²

Taken together, these two concepts—stratification and segmentation—help place CJ Inc. into broader context. They identify some of the structural conditions under which a private justice system can be established and successfully operated. Indeed, as we will see, CJ Inc. is but a recent form of a long-standing practice of resorting to crime and self-help in response to criminal victimization. Stratification and segmentation help us understand why, and under what circumstances, self-help is viewed as socially acceptable. Here, for instance, we find that CJ Inc.’s use of self-help is widely embraced across the country and that at least one law professor sees it as a promising, if far from perfect, alternative to the public criminal justice system.¹⁰³

This Part introduces both of these concepts, discusses notions of self-help in stratified and segmented societies, and explores how these concepts apply to shoplifting, CJ Inc., and beyond. My purpose in this discussion is twofold: to show that (1) this seemingly new and novel innovation is not wholly new—it has counterparts across time and place—and (2) the features of social organization that Rappaport highlights are conducive to the application of the model he has elaborated to a host of other areas. His study points a way back to the future: the expansion of legal pluralism in late modern commodified society.

99. For analysis of the segmentation and “group” basis of societies, see Peter M. Blau, *Exchange and Power in Social Life* 12–14 (1986) (exploring the dynamics of how individuals are bound together in groups); Mark S. Granovetter, *The Strength of Weak Ties*, 78 *Am. J. Soc.* 1360, 1360 (1973) (examining how even weak ties can create strong groups).

100. See, e.g., Black, *The Behavior of Law*, *supra* note 93, at 37–38 (discussing “morphology” as the “horizontal aspect of social life”).

101. See *id.*

102. See Black, *Sociological Justice*, *supra* 97, at 59–60 (observing the differences in how criminal cases are handled based on the relationship between the defendant and victim); Vera Inst. of Justice, *supra* note 92, at xii (describing the reluctance of law enforcement to pursue a case involving an armed robbery between a defendant and victim who had been dating for over five years).

103. See *supra* note 65 and accompanying text (describing Rappaport’s conclusion that CJ Inc. may ultimately “be better” than the public criminal justice system in several ways).

A. *Stratified Societies*

Anthropologists have long reported that in simple societies, victims of crime regularly rely on self-help to avenge wrongdoing.¹⁰⁴ The explanation is obvious: Although there may be clear and unambiguous social norms, some simple societies have few specialized institutions of social control to enforce those norms.¹⁰⁵ There are no police, lawyers, or judges in the contemporary sense; in short, there are no specialized law enforcement institutions.¹⁰⁶ In other societies there are such institutions, but they are not readily available to some members of society.¹⁰⁷ As a result, people develop and come to rely on informal and extralegal forms of self-help such as gossip and shunning.¹⁰⁸

Anthropologists have also noted that victims sometimes take the law into their own hands and fight crime with crime.¹⁰⁹ They celebrate such initiative and go to great lengths describing the complex norms and rituals employed to ensure that a victim's actions do not lead to endless feud.¹¹⁰

104. See *supra* note 97 and accompanying text (highlighting key sources in the anthropological literature).

105. Several studies have revealed that in the absence of division of labor, specialized legal institutions do not emerge and conflict resolution is pursued through informal means of self-help that are often approved by the community. See, e.g., Black, *Crime as Social Control*, *supra* note 92, at 41 (suggesting that in “stateless societies” crimes of self-help may be relatively common); see also Hoebel, *supra* note 95, at 275 (discussing the means by which social order was maintained in Native American societies); Richard D. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 *Yale L.J.* 471, 484–85 (1954) (discussing the role of labor division norms in encouraging social control in Israeli agricultural communities).

106. See, e.g., Hoebel, *supra* note 95, at 4 (quoting a Native American's observation that “before there was the White Man to put him in the guardhouse” there “had to have been something to keep [Native Americans] from doing wrong”); Black, *Crime as Social Control*, *supra* note 92, at 34 n.2 (distinguishing self-help from third-party law enforcement); Schwartz, *supra* note 105, at 474–75 (noting the comparative lack of parties with “delegated sanctioning responsibility” in Israeli *kvutzot* (collective settlements), as opposed to the formal judicial committees available in Israeli *moshavim* (semi-private property settlements)).

107. See Black, *Crime as Social Control*, *supra* note 92, at 41 (“Law is unavailable . . . in many other modern settings . . . Lower-status people of all kinds . . . enjoy less legal protection, especially when they have complaints against their social superiors, but also when conflict erupts among themselves.” (citation omitted)); Schwartz, *supra* note 105, at 474–75 (comparing the *moshav* judicial process, which is available to all parties, and the *kvutza* process, which is largely determined by the “Work Assignment Committee” or “Economic Council” on the basis of “interests of production” rather than individual needs).

108. See Schwartz, *supra* note 105, at 476 (noting that the “powerful force of public opinion” is the “major sanction of the entire kvutza control system” in light of the lack of “specialized functionaries” responsible for control).

109. See *supra* note 97 and accompanying text (highlighting various sources that discuss the use of crime to fight crime).

110. See, e.g., Hoebel, *supra* note 95, at 276 (“[W]hen the community . . . acknowledges the exercise of force by a wronged person or his kinship group as correct

Under many conditions, crime as self-help is not seen as a repugnant form of vigilantism but is embraced as a creative and socially acceptable way to respond to victimization and to restore social equilibrium.¹¹¹

There are at least two conditions in which stratification makes self-help crime socially acceptable. The first form of socially acceptable (at least to some) self-help occurs when social stratification creates vast status and power differentials between parties to a conflict—the victim has low status and cannot gain support from public law enforcement (for example, a homeless person who reports an assault).¹¹² The victim is without law, but for lack of status—not lack of institutions.¹¹³ Here, too, but for different reasons, those without law may resort to crime as a form of self-help.

A second form of socially acceptable self-help occurs when the victimized party is so strong vis-à-vis the perpetrator that she can dominate the process and take matters into her own hands, thus bypassing the criminal process—as when an organization is pitted against an individual and resorts to criminal self-help against a party too weak to resist.¹¹⁴ In this situation, the stronger party may even be powerful enough to reshape the process in ways that bypass the criminal law or redefine the law altogether.¹¹⁵ Examples include corporal punishment of children by parents, some forms of domestic violence, retaliation by gangs, police violence against people of low status, police keeping the money and drugs they take from suspects, companies using the police or thugs to thwart organized labor, and law enforcement in company towns. In each of these two situations, one party relies on crime to assert conventional norms, and the other lacks the ability to get a fair hearing in a public forum.

B. *Segmented Societies*

Like stratification, segmentation also facilitates social acceptance of self-help in response to crime. This might occur in simple societies with

and proper in a given situation, and so restrains the wrongdoer from striking back, then law prevails and order triumphs over violence.”).

111. See *id.*; see also Black, *Crime as Social Control*, *supra* note 92, at 40 (noting that “crimes of self-help are often handled with comparative leniency” and highlighting the “generous application” of the concept of self-defense in medieval England).

112. See Black, *Crime as Social Control*, *supra* note 92, at 41 (noting that law is often unavailable when “[l]ower-status people . . . have complaints against their social superiors”).

113. See *id.*

114. See *id.* at 42 (“Those with grievances against a social inferior illustrate a third pattern: Law is readily available to them, but not to those against whom they might employ self-help. In this situation, the aggrieved party seemingly has a choice of law or self-help.”).

115. See, e.g., Jeffrey H. Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* 140 (1979) (suggesting that the “failure of the criminal justice system is allowed because it performs an ideological service for those with the power to change the system”).

little division of labor and no specialized law-enforcement institutions: In such conditions, victims of wrongdoing often resort to self-help because there are no real alternatives.¹¹⁶ Victims commit a crime in response to a crime, but if deemed proportionate, their actions are socially acceptable.¹¹⁷ But most social groups have an elaborate division of labor, and some of these groups eschew government-sponsored criminal law enforcement in favor of their own internal forms of enforcement.¹¹⁸

Consider that theft among acquaintances is often justified by the perpetrator as “debt collection” (for example, “I took his cell phone because he did not pay me the two-hundred dollars he owed me.”).¹¹⁹ Or, that crimes of violence are more common among family members and acquaintances than between strangers.¹²⁰ These sorts of encounters are often regarded as “understandable” by law enforcement officials, who tend to see them as “technical” crimes rather than “real” crimes, as interpersonal disputes rather than criminal matters.¹²¹ Accordingly, law enforcement officials often fail to arrest or prosecute individuals who commit these crimes, and when they do, the cases are usually dismissed or significantly downgraded in seriousness.¹²² This stance can even extend to homicide.¹²³ In short, in-group crime is viewed less seriously than crime across groups, and internal processes for dealing with it are often preferred by group members, the public, and the police.¹²⁴

116. See *supra* note 97 and accompanying text.

117. See *supra* note 97 and accompanying text.

118. See, e.g., Janet Foster, *Informal Social Control and Community Crime Prevention*, 35 *Brit. J. Criminology* 563, 577 (1995) (highlighting the use of informal conflict resolution among the residents of British public housing).

119. See Black, *Crime as Social Control*, *supra* note 92, at 37 (“[I]n many instances robbery is a form of debt collection and an alternative to law.”).

120. See Matthew R. Durose et al., *U.S. Dep’t of Justice, Family Violence Statistics: Including Statistics on Strangers and Acquaintances* 9 tbl.2.1 (2005), <https://www.bjs.gov/content/pub/pdf/fvs.pdf> [<https://perma.cc/USU6-EJU6>] (finding that of violent crimes, 11% occur between family members, 36.6% occur between friends or acquaintances, and 46.1% occur between strangers).

121. See, e.g., Vera Inst. of Justice, *supra* note 92, at 20 (“[P]rior relationships were often mentioned by prosecutors . . . as their reason for offering reduced charges and light sentences in return for a plea of guilty.”).

122. See *id.*; see also Black, *Crime as Social Control*, *supra* note 92, at 41 (“People in intimate relationships, too, such as members of the same family or household, find that legal officials are relatively unconcerned about their conflicts, particularly if they occur in private and do not disturb anyone else.”).

123. See, e.g., Lundsgaarde, *supra* note 97, at 103–04 (noting that “[h]omicide among friends and associates not only terminates a particular relationship, but the act itself may help the killer resolve a conflict created by a lack of mutual trust or intimacy”).

124. See Vera Inst. of Justice, *supra* note 92, at 135–36 (finding that previously existing relationships tempered both prosecutors’ and judges’ treatment of felony cases and victims’ willingness to pursue prosecution).

Every society has distinct groups that self-identify and are set off from the rest of society.¹²⁵ And in that sense, every society is segmented. When thinking about groups in terms of law enforcement, we can dismiss some of them as ephemeral or too small or weak to be effective—audiences in a theater, amateur sports teams, social clubs, classes. But as some institutions take on larger and more inclusive forms—sports leagues, professional associations, religious institutions, schools, clans or tribes—the possibility of an alternative or parallel legal process seems more realistic. In most modern societies there is a great deal of segmentation and thus a great deal of social control within groups.¹²⁶ Melting pots often do not melt completely, so multiethnic or multicultural societies often consist of groups next to each other but in separate silos.¹²⁷ Within limits, each religious or ethnic group has considerable autonomy to govern itself, including making and enforcing laws for its own members. Some version of this is true for contemporary American society.¹²⁸ Indeed, a new field of legal studies designed to investigate segmented societies and the law—legal pluralism—sprung up in the 1980s, complete with academic journals and annual meetings.¹²⁹

125. See, e.g., George Herbert Mead, *Mind, Self, and Society: From the Standpoint of a Social Behaviorist* 229–37 (Charles W. Morris ed., 1967) (discussing the role of social organization in human society and development).

126. See Steven Vago, *Law and Society* 194–98 (10th ed. 2012) (comparing the conditions under which formal and informal social controls operate).

127. For a classic study challenging the ideas of assimilation and the melting pot, see generally Nathan Glazer & Daniel Patrick Moynihan, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City*, at v (1963) (“The point about the melting pot . . . is that it did not happen.”).

128. A vast library of works from all areas of the social sciences note the role of internal controls in various communities in the United States. On ultra-Orthodox Jews in the diamond industry, see Barak D. Richman, *Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*, at xiv (2017) (charting the importance of “family, religious, and community institutions [in] support[ing] economic exchange”). On the Amish, see John S. Hostetler, *Amish Society* 85 (1993) (noting that the “rules of the Amish church cover the whole range of human behavior”). On Mormons, see Matthew Bowman, *The Mormon People: The Making of an American Faith*, at xvii (2012) (noting that Mormons “have always insisted on defining their own community on their own terms”). On Native American tribes, see Charles Wilkinson & *The Am. Indian Res. Inst., Indian Tribes as Sovereign Governments: A Sourcebook on Federal-Tribal History, Law, and Policy* 34–35 (2d ed. 2004) (discussing the “comprehensive authority of Indian tribes to legislate or otherwise adopt substantive civil and criminal laws” as well as tribes’ authority to administer justice).

129. There is extensive scholarship on “legal pluralism,” whose focus is on the multiplicity of normative orderings found in any single society. Many of these orderings are powerful and perform similar functions as state law, except they are usually based on a stronger sense of legitimacy anchored in professional, religious, or ethnic norms. They also exercise a range of powerful sanctions, including fines, shunning, banning, and repentance ceremonies. For an overview, see, for example, John Griffiths, *What Is Legal Pluralism?*, 24 *J. Legal Pluralism & Unofficial L.* 1, 38–39 (1986) (defining legal pluralism); Sally Engle Merry, *Legal Pluralism*, 22 *Law & Soc’y Rev.* 869, 870 (1988) (noting that legal pluralism is typically defined as “a situation in which two or more legal

Consider also small towns, distinct neighborhoods, condominium complexes, and homeowners associations.¹³⁰ They are separated from the larger society in important ways and possess some degree of vertical integration—providing a variety of services for members, at times permanently and at times only fleetingly. The late anthropologist Stanley Diamond went so far as to suggest that public or government-sponsored law is a form of colonialism designed by central authorities to subordinate other more robust forms of local controls, anchored in the customs of segmented local groups.¹³¹ He is not alone in thinking this. For instance, the late Norwegian criminologist Nils Christie opposed the entire criminal justice system, claiming that conflicts are “property” that has been confiscated by the state.¹³²

Even seemingly homogeneous societies contain segmented institutions, though perhaps less comprehensive and tightly integrated. Consider schools, residential colleges and universities, prisons, hospitals, mental institutions, residential complexes for the elderly, gated communities, cruise ships, amusement parks,¹³³ or summer camps. These are but a few of such *partially* segmented groups. Many are part-time and porous—people move in and out of them easily or spend only portions

systems coexist in the same social field”); see also Sally Falk Moore, *Law as Process: An Anthropological Approach* 82–91 (1978) (discussing public law in the context of informal forms of social control and noting the “interlocking of the public and private domains”); Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *Sydney L. Rev.* 375, 377–90 (2008) (providing an expansive history of the pluralistic nature of law).

130. What holds for distinct ethnic and religious communities might also be present to a lesser degree in many homogeneous communities, which may have their own norms regarding the use of law. See Carol J. Greenhouse, Barbara Yngvesson & David M. Engel, *Law and Community in Three American Towns* 2–4 (1994) (noting that individual communities have norms regarding the use and nonuse of the legal system and courts); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* 38–47 (1990) (recounting how neighbors solve their interpersonal problems on their own and through the courts).

131. See Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 *Soc. Res.* 42, 47 (1971) (“Custom—spontaneous, traditional, personal, commonly known, corporate, relatively unchanging—is the modality of primitive society; law is the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests.”).

132. See Nils Christie, *Conflicts as Property*, 17 *Brit. J. Criminology* 1, 2 (1977) (“[C]riminology to some extent has amplified a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people’s property.”).

133. See, e.g., Clifford D. Shearing & Philip C. Stenning, *From the Panopticon to Disney World: The Development of Discipline*, in *Perspectives in Criminal Law* 335, 342–47 (Anthony N. Doob & Edward L. Greenspan eds., 1985) (“The essential features of Disney’s control system become apparent the moment the visitor enters Disney World.”); Brae Canlen, *Insecurity Complex*, *Cal. Law.*, June 1998, at 30, 81 (“[S]everal parents and guardians of teenagers who were picked up for shoplifting [at Disneyland] claimed they were asked to pay a \$275 to \$500 fine to avoid criminal prosecution.”); see also Rappaport, *supra* note 1, at 2268 n.97 (citing Canlen, *supra*).

of their days or lives in them. But they engage large numbers of people in close quarters for extended periods of time and can develop their own forms of social control.¹³⁴

In universities and schools, for instance, underage drinking, drug use and sales, theft, destruction of property, mayhem, trespass, and assault are common, if not frequent.¹³⁵ Rates of sexual assault are probably as high on college campuses as they are in any other comparably sized space.¹³⁶ Yet, in these places, governmental social control—formal criminal law—is used sparingly.¹³⁷ Criminal law may be invoked with some regularity, but it is called upon infrequently.¹³⁸ Even on college campuses, when campus police, usually sworn peace officers,¹³⁹ are

134. For instance, the literature on disciplinary proceedings on college and university campuses is enormous. For an overview of the nature and magnitude of the challenges, see generally Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 Penn St. L. Rev. 1001, 1006 (2016) (considering “what process is due in a public school discipline case”); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. Rev. 653, 658 (2001) (analyzing “the methods by which courts have reviewed challenges to disciplinary proceedings in private colleges and universities”).

135. See Nat’l Ctr. for Educ. Statistics, *On-Campus Crimes, Arrests, and Referrals for Disciplinary Action Per 10,000 Full-Time Equivalent Students at Degree Granting Postsecondary Institutions* (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_329.20.asp [<https://perma.cc/3YMM-SJMG>] (showing that the range of offenses on campuses includes theft, drug- and liquor-related crimes, sexual assault, and homicide).

136. One in five women in the United States is raped at some point in her life, and a slightly higher proportion of college women are likely victims of forced sex during their time in college. See Bonnie S. Fisher et al., U.S. Dep’t of Justice, *The Sexual Victimization of College Women 10* (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [<https://perma.cc/WU39-UQM5>]; Get Statistics, *Nat’l Sexual Violence Res. Ctr.*, <https://www.nsvrc.org/statistics> [<https://perma.cc/3BL3-7F9L>] (last visited Oct. 31, 2018) (citing M.C. Black et al., Nat’l Ctr. for Injury Prevention & Control, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf [<https://perma.cc/DL8V-T835>]).

137. See, e.g., Collin Binkley et al., *College Disciplinary Boards Impose Slight Penalties for Serious Crimes*, *Columbus Dispatch* (Nov. 23, 2014), <https://www.dispatch.com/content/stories/local/2014/11/23/campus-injustice.html> [<https://perma.cc/K2QD-27SW>] (finding that “[s]ometimes, schools handle crime and punishment without ever reporting violations to police” and that “[m]ost cases never go to court”).

138. See John Paul Wright & Kevin M. Beaver, *For Safety’s Sake, Get Rid of Campus Cops*, *Chron. Higher Educ.* (Oct. 8, 2014), <https://www.chronicle.com/article/For-Safety-Sake-Get-Rid-of-149275> (on file with the *Columbia Law Review*) (arguing that college administrators exert pressure on campus police to enforce campus policies rather than the criminal law, “often in conflict with [the goals] of the police agencies”); see also Beth McMurtrie, *Why Colleges Haven’t Stopped Binge Drinking*, *N.Y. Times* (Dec. 14, 2014), <https://www.nytimes.com/2014/12/15/us/why-colleges-havent-stopped-binge-drinking.html> (on file with the *Columbia Law Review*) (describing campus failures to enforce the law pertaining to the use of alcohol and colleges’ tendency not to involve local police).

139. See Brian A. Reaves, U.S. Dep’t of Justice, *Campus Law Enforcement, 2011–12*, at 1 (2015), <https://www.bjs.gov/content/pub/pdf/cle1112.pdf> [<https://perma.cc/BQP9-PB2N>]

called, they may not report information about an offense to the local police or prosecutor.¹⁴⁰ Rather, criminal and other alleged violations are handled by campus police, deans of students, and internal “dispute resolution” mechanisms run by colleges themselves.¹⁴¹ Indeed, like CJ Inc., such internal law enforcement officials can threaten to contact local police and prosecutors in order to gain suspects’ cooperation.¹⁴² The internal private tribunals set up on campuses can deal with everything from violations of academic rules that have no criminal law counterparts, to a wide range of offenses that mirror what one would find on the calendar of many municipal courts.¹⁴³

Despite the declaration of the death of *in loco parentis*,¹⁴⁴ colleges continue to shield their students from the harshness of the criminal law, at times even disregarding victims’ desires to do so.¹⁴⁵ Perhaps most segmented groups with a strong internal structure prefer to have their members’ dirty laundry washed in private. Of course, there are limits. Few internal dispute resolution processes in such groups would mobilize to handle a homicide.

(“During the 2011–12 school year, about two-thirds (68%) of the more than 900 U.S. 4-year colleges and universities with 2,500 or more students used sworn police officers to provide law enforcement services on campus.”).

140. See Wright & Beaver, *supra* note 138 (arguing that campus police engage in “underpolicing,” whereby activities that might result in arrest and prosecution if traditional police were involved are treated more leniently on college campuses).

141. See Binkley et al., *supra* note 137 (describing and criticizing university disciplinary procedures); *supra* note 134 and accompanying text (discussing the disciplinary procedures used by colleges). For an account describing a multilevel campus hearing and the shortcomings of the internal college process when dealing with a rape charge against a popular football player, see generally Jon Krakauer, *Missoula: Rape and the Justice System in a College Town* (2015).

142. See Christopher Moraff, *Campus Cops Are Shadowy, Militarized, and More Powerful than Ever*, *Wash. Post: The Watch* (July 9, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/07/09/campus-cops-are-shadowy-militarized-and-more-powerful-than-ever/> [https://perma.cc/6S9J-P5ZH] (describing a campus police detective’s use of threats of jail time to ensure a student’s cooperation as an informant); see also Reaves, *supra* note 139, at 4 (finding that eighty-eight percent of campus police at public universities and sixty-three percent of campus police at private universities maintained memoranda of understanding or mutual aid agreements with local police departments, sheriff’s offices, or other public law enforcement groups); Wright & Beaver, *supra* note 138.

143. See Binkley et al., *supra* note 137 (providing examples of campus disciplinary boards adjudicating violent crimes).

144. See, e.g., Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 *Higher Educ. Rev.* 65, 66 (noting that “constitutional protections to university students . . . led to the demise of *in loco parentis*”).

145. See, e.g., Justin Wm. Moyer, *Students Protest After Maryland Lawsuit Alleges ‘Shameless Corruption’ in Concealing Rape Cases*, *Wash. Post* (Sept. 18, 2018), <https://www.washingtonpost.com/dc-md-va/2018/09/18/students-protest-after-maryland-lawsuit-alleges-shameless-corruption-concealing-rape-cases/> (on file with the *Columbia Law Review*) (discussing a lawsuit alleging that the University of Maryland Baltimore County police chief “persuaded” the plaintiff not to report a sexual assault “to police, but to have it handled ‘administratively’ instead”).

Ultimately, segmented institutions can and do wield powerful sanctions. They possess the power to banish, shun, suspend, fine, impose labor, use corporal punishment, and withhold valued resources.¹⁴⁶ To understand the extent of these sanctions, imagine a person who faces the possibility of expulsion in her final year at a prestigious university, or who might be banished from a tight-knit community that has been the only life she has known, or who might lose a license to practice a profession. Or even consider an employee dismissed from a job on suspicion of theft. Furthering the risk of these sanctions, closed communities are also likely to have good surveillance, effective evidence-gathering capabilities, and authoritative judge substitutes.¹⁴⁷ And in the event of law breaking, the possibility of the still heavier hand of state authority is ever present. These are all powerful incentives to maintain control of problems within the group and for the accused to acquiesce with gratitude.

C. *Stratification, Segmentation, and CJ Inc.*

Shoplifting and CJ Inc. are shaped by both stratification and segmentation. In an odd but real sense, in shoplifting neither victim nor accused has adequate resources to rely on formal legal process, and so each has an incentive to embrace alternatives.¹⁴⁸ Still, stores stand in a distinct and stratified relationship to shoplifting suspects: As opposed to individual shoplifters, stores—as organizations and repeat players—are well positioned to shape outcomes and the structure of process in shoplifting cases.¹⁴⁹ They have, after all, employed CJ Inc. and can call the police. In contrast, shoplifters ordinarily have much lower status.¹⁵⁰

Similarly, a department store is a type of segmented and closed community, defined by time, space, location, and membership—shoppers are something like invited “guests,” particularly in the fancier stores that are clients of CJ Inc. Here, too, stores and CJ Inc. seek to take advantage of situation and structure. Store employees—security guards—detain

146. For a classic piece explaining the significance of withholding resources, see Charles Reich, *The New Property*, 73 *Yale L.J.* 733, 785 (1964) (noting that withholding access to government benefits and certifications is the equivalent of a taking of property and thus should be circumscribed by due process protections). Many private justice systems have the power to withhold or grant such benefits.

147. See Allan V. Horwitz, *The Logic of Social Control* 201–04 (1990) (“The encapsulation and visibility of social life promotes direct observation of deviance. When groups are small and tightly interconnected, everyone is aware of what others are doing.”).

148. Rappaport reports that the average value of shoplifted items is \$129. Rappaport, *supra* note 1, at 2318. While even this sounds high, this amount likely pales in comparison to the time and effort required of store employees to see a case through to prosecution. See *id.* at 2297 (comparing the costs of assisting in public prosecution to the “paltry” benefits received by retailers from the criminal justice system).

149. See Galanter, *supra* note 95, at 97–103 (discussing the advantages that “repeat players” have in the litigation system).

150. Apart from organized shoplifting gangs, shoplifters are individuals pitted against experienced organizations (stores).

suspects on the premises, and in most cases both stores and suspects have a strong interest in resolving the matter internally.

CJ Inc. is just the latest effort by stores to shape this internal process. Given the high volume of shoplifting, vigorous enforcement is not cost effective for most retail stores, and for this reason they have a strong incentive to experiment with new forms of self-help: Stores have long relied on a mix of restitution and apologies; warnings; differential treatment for juveniles, established customers, elderly people, and second offenders; banishment; civil remedies; and the like.¹⁵¹ Department stores have also pressed legislatures to streamline civil processes for shoplifting cases. These processes may sometimes work well, especially since they enhance the bargaining power of stores.¹⁵² But resolving matters internally is still likely to be more efficient for many types of cases, especially for first-time suspects.

In this regard, CJ Inc. offers stores an important new development that has not been used systematically before. Frequently stores deal leniently with shoplifters: warning them, making them pay for or return stolen items, and letting them go on their way.¹⁵³ CJ Inc. provides them with a more robust and costless new option.

The key to the success of this new arrangement—theoretically justified or otherwise—is a form of blackmail.¹⁵⁴ Stores can issue credible threats to report suspects to the police if they do not agree to the store's terms. Further, unlike many blackmailers, stores can also offer credible promises that they will not continue to extort suspects. The setting and situation are ripe for blackmail: Stratification and segmentation give stores the upper hand—they are more powerful, they have apprehended

151. Studies of deterrence show that likelihood of apprehension—and not of sanction or enforcement—is the more salient feature of deterrence. See Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 *Crime & Just.* 1, 7 (1998) (“[T]he evidence amassed by perceptual deterrence researchers points overwhelmingly to the conclusion that behavior is influenced by sanction risk perceptions—those who perceive that sanctions are more certain or severe are less likely to commit crime.”). But it is the nature of the sanction that is most easily modified, hence the long-standing concern with varying sanctions by type of offender. Although criminologists have long maintained this, for the “authoritative” statement on identifying the optimal sanction, see generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968).

152. See Ann Zimmerman, *Big Retail Chains Dun Mere Suspects in Theft*, *Wall St. J.* (Feb. 20, 2008), <https://www.wsj.com/articles/SB120347031996578719> (on file with the *Columbia Law Review*) (“Retail lobbies began pressing state legislatures for civil-recovery laws about two decades ago as their theft and store security costs rose”); see also Rappaport, *supra* note 1, at 2267–68 (noting the widespread use of civil recovery statutes for shoplifting).

153. See Rappaport, *supra* note 1, at 2268 & n.97 (citing one study reporting that police were not called in forty-four percent of the cases in which suspects were apprehended for shoplifting).

154. See *id.* at 2312 (arguing that “the theories that may justify prohibiting blackmail in certain settings do not extend persuasively to the case of retail justice”).

the suspect on their premises, and they are thus in a position to “define” the situation. Stores gain tougher enforcement and perhaps enhanced deterrence at little or no cost, and there is the possibility of modest financial gain. In contrast, the accused is often caught red-handed and has much to gain by avoiding arrest, a public airing of the allegations, and the costs associated with prosecution whatever the outcome.¹⁵⁵ Even wrongly accused persons can save time, money, and embarrassment by agreeing to store terms.¹⁵⁶

This arrangement is consistent with the findings of anthropologists of law noted earlier: Using crime to enforce established social norms is a well-accepted form of social control under some conditions.¹⁵⁷ CJ Inc.’s innovation follows the time-honored principle of reciprocity—here, committing a crime (blackmail) in response to a crime (shoplifting). Although well understood by anthropologists studying “primitive” cultures, sociologists and criminologists report that this practice is also widespread in late modern societies.¹⁵⁸ CJ Inc. is simply a new manifestation of the practice.

Virtually every society is stratified, and when differences in status are great enough, one is likely to see crime as a form of self-help.¹⁵⁹ In stratified societies, have-nots may lack adequate resources to turn to the law for help, and haves may be powerful enough to shape the legal process to their advantage or to ignore it.¹⁶⁰ Consider how easy it is for large organizations to get away with violating the law with shoddy accounting practices, pollution and safety violations, short-changing employees on wages, and the like, and how difficult it is for individual victims, particularly poor persons, to obtain redress. Even when they are not fully immune from governmental social control, powerful organizations are able to transform criminal violations into civil violations so that documented harms are settled for pennies on the dollar.¹⁶¹ Like businesses which can shape white collar criminal enforcement to their advantage, retail stores

155. Rappaport catalogues the likely costs of the criminal justice system to defendants. See *id.* at 2279–81. However, I would have liked some educated guesses about what would actually happen to suspects in the absence of CJ Inc.

156. See *id.* at 2281.

157. See *supra* notes 97, 102 and accompanying text (discussing the use of self-help and crime as a means of maintaining social control).

158. See *supra* notes 97, 102 and accompanying text.

159. See *supra* notes 112–115 (discussing the circumstances in which self-help emerges in stratified societies).

160. See Galanter, *supra* note 95, at 97–103 (discussing the advantages of repeat players in litigation); see also *supra* notes 112–115 and accompanying text (noting the circumstances in which self-help may arise in stratified societies).

161. See Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* 1–2 (1993) (“The impact of enforcement can easily stop with a corporate pay-out of a fine or monetary penalty, not because of any socially justified departure from the traditional value of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant . . .”).

can potentially use CJ Inc. to shape shoplifting enforcement to their advantage.¹⁶² Moreover, although retail companies are vastly more powerful than the suspects they detain, these companies face prohibitive costs if they seek full enforcement of the law.¹⁶³ Accordingly, blackmail increases enforcement and off-loads some costs.¹⁶⁴

CJ Inc. is a textbook example of self-help through crime within the anthropology of law literature. In examples provided earlier, victims turn to self-help criminal action to make perpetrators pay for their offenses in cost-effective and socially acceptable ways.¹⁶⁵ CJ Inc.'s actions are appealing for the same reasons: They are justified.¹⁶⁶ Although ostensibly illegal (a form of blackmail), their actions affirm conventional morality; they appear (though we do not know for sure) more humane, or at least more so than the alternative of calling the police; and they appear (though we do not know for sure) to have some deterrent effect.¹⁶⁷ Even a criminal law professor applauds the creativity of using crime to fight crime here.

D. *Retail Stores and Beyond*

Rappaport dwells on the activities of CJ Inc. My concern is somewhat different. Although CJ Inc. supplies the services, this Response focuses on the demand by the retailers. The store is the principal; CJ Inc. its agent. The store defines the conditions for participation. The store in effect contracts out for the judicial-like services it desires, defines the conditions, supervises the services, and determines how things are done. In short, it is the store's program. So, I have focused on the social setting in which CJ Inc. was created, in which it operates, and in which it may expand.

162. See, e.g., Galanter, *supra* note 95, at 97–103 (noting that repeat players—usually “haves”—maintain the capacity to not only dominate individual cases but shape the law and long-term process to their advantage); see also Reiman, *supra* note 115, at 141 (noting that “those who are hurt by present criminal justice policy” are not in a position to change it, while those who can change it “have little incentive” to do so).

163. As in virtually all high-volume, low-stakes cases, prosecutors and victims (like the accused) will have to bear enormous costs if they pursue a case vigorously by taking it to trial. See Feeley, *Process*, *supra* note 66, at 200 (noting that pretrial costs “in the aggregate, and in comparison with the actual consequences of adjudication and sentencing, . . . often loom large in the eyes of the criminally accused”); Rappaport, *supra* note 1, 2269–70, 2286–89 (discussing the costs of pursuing a shoplifting claim in the criminal justice system for police, courts, and suspects).

164. The pressure here is like the pressure to plea bargain in criminal courts—the accused get a deal (or think they get a deal) in exchange for accepting CJ Inc.'s offer. And in doing so, they absorb some of the costs of processing the case that would otherwise be paid by the courts and the victims.

165. See *supra* notes 97, 102 and accompanying text (discussing the use of self-help in various environments).

166. No one likes a thief—except in the movies.

167. See Rappaport, *supra* note 1, at 2312–14 (noting that CJ Inc. “may qualify as blackmail” but nevertheless concluding that it is likely beneficial).

Although anthropologists of law often view crime-as-social control as a weapon of the weak typically used by those without access to law, they also emphasize that organizations are more powerful than unorganized individuals.¹⁶⁸ This certainly is the case here. The stores which have utilized CJ Inc., such as Bloomingdales, Abercrombie & Fitch, and Walmart, are all successful companies that can invoke public law enforcement.¹⁶⁹ But they also have an incentive to reduce costs.¹⁷⁰ So, when a risk assessment manager comes forward with a plan to increase compliance, off-load costs, and provide a new revenue stream, it is unsurprising that store executives are likely to listen. Under this scheme, stores could even remain in the good graces of otherwise good customers who have been caught shoplifting by allowing them to avoid the public criminal justice process.

Furthermore, despite their power in the community, even big and profitable stores are without much law in shoplifting cases. As discussed above, in an individual case, almost none of the stolen items involve sums that even begin to approach the follow-up costs for a store that takes a case on to criminal disposition.¹⁷¹ In the aggregate, it is too expensive for stores to pursue full enforcement.¹⁷² In addition, many police officers and prosecutors don't look kindly on victims of shoplifting. Shoplifting cases are expensive and expend valuable time (especially in some smaller towns with big-box stores), so police in some communities tend to drag their feet when handling them and view them as a nuisance.¹⁷³ On top of

168. See Black, *Crime as Social Control*, supra note 92, at 42 (noting that those “with grievances against a social inferior” have the option of either utilizing the law or employing self-help); Galanter, supra note 95, at 106–10 (noting that organizations are often “repeat players” with distinct advantages in litigation).

169. And by some accounts, Walmart, at least at times, has vigorously pursued a policy of full enforcement by filing criminal complaints against every person caught shoplifting by store security. See Michael Barbaro, *Wal-Mart Eases Policy on Petty Shoplifters*, N.Y. Times (July 13, 2006), <https://www.nytimes.com/2006/07/13/business/worldbusiness/13iht-wal-mart.2190898.html> (on file with the *Columbia Law Review*) (discussing Walmart's previous policy). At times, Walmart was responsible for a disproportionate number of police calls, “call[ing] the police far more often than Target stores in the same jurisdiction.” See Rappaport, supra note 1, at 2301 (citing Zachary T. Sampson et al., *Walmart: Thousands of Police Calls. You Paid the Bill.*, Tampa Bay Times (May 11, 2016), <https://www.tampabay.com/projects/2016/public-safety/walmart-police> [<https://perma.cc/9W5F-2LXP>]).

170. Although the state bears the cost of prosecution, store personnel must file complaints and show up in court. In contrast, CJ Inc. presumably reduces process costs for everyone, and most obviously stores. Why else would they buy into CJ Inc.?

171. See supra note 13 and accompanying text.

172. See supra note 13 and accompanying text.

173. See supra notes 23–24 and accompanying text (discussing police reluctance to respond to shoplifting cases).

this, detection rates remain so low that enforcement in individual cases likely provides no incremental increase in deterrence.¹⁷⁴

In a similar vein, police may miss the vast majority of traffic violators, so the deterrent effect of arrest and sanctioning is not so high. But when the police do catch traffic violators, the evidence is typically overwhelming and enforcement near automatic.¹⁷⁵ Traffic violations—even serious offenses—are now handled bureaucratically.¹⁷⁶ Few people contest traffic charges, and the vast majority of offenders pay a fine (often bail forfeiture with assurance of no further action).¹⁷⁷ The processing is so efficient that it is postbureaucratic; one can pay through an iPhone, for instance.¹⁷⁸ Some cases are contested, but even then, many people likely do not press claims of innocence or error but rather beg the court for mercy in light of other consequences, such as losing their licenses.¹⁷⁹

Privatization has made this process far more advanced. Private companies are deeply involved in the enforcement of traffic laws.¹⁸⁰ Increasingly, automated traffic-light and speeding cameras managed by these private companies are replacing traffic police in issuing tickets; the

174. See *supra* note 151 (noting that the likelihood of apprehension, rather than the severity of sanction, drives deterrence). Only one in forty-eight shoplifters is detected and apprehended, a ratio too low to generate much deterrence. See *Shoplifting Statistics*, *supra* note 10.

175. See, e.g., Stephen L. Brickley & Dan E. Miller, *Bureaucratic Due Process: An Ethnography of a Traffic Court*, 22 *Soc. Probs.* 688, 689–93 (1975) (describing “the general belief that the chances of being found not guilty at one’s [traffic court] trial were quite small”).

176. See *Taking Minor Traffic Tickets Out of Criminal Court*, *Cal. Courts Newsroom* (July 5, 2017), <https://newsroom.courts.ca.gov/news/taking-minor-traffic-tickets-out-of-criminal-court> [<https://perma.cc/292N-RWJE>] (describing a California judge’s proposal to treat minor traffic violations as civil rather than criminal violations and handle them through the mail in line with the approach of other states).

177. See, e.g., Kathy A. Bolten, *Traffic-Camera Appeals Often Successful, but Few Try*, *Des Moines Reg.* (June 20, 2015), <https://www.desmoinesregister.com/story/news/crime-and-courts/2015/06/20/automated-traffic-enforcement-cameras-appeals/29055365/> [<https://perma.cc/L56V-7BTF>] (noting estimates that only five percent “of people nationwide fight regular speeding tickets issued to them”).

178. New York City, for example, maintains the “NYC Parking Ticket Pay or Dispute” application. See *Download the NYC Parking Pay or Dispute App*, N.Y.C. Dep’t of Fin., <https://www1.nyc.gov/assets/finance/html/mobile/parking/payordispute-app-start.html> [<https://perma.cc/EXZ5-DNQL>] (last visited Oct. 31, 2018).

179. See Brickley & Miller, *supra* note 175, at 690–91 (finding that some defendants who contested traffic violations had “more at stake than a fine”).

180. There is a small but growing literature on private companies installing and operating traffic-light and speeding cameras and serving as *de facto* enforcement agencies for municipalities. See, e.g., Joel O. Christensen, Note, *Wrong on Red: The Constitutional Case Against Red-Light Cameras*, 32 *Wash. U. J.L. & Pol’y* 443, 443–47 (2010) (summarizing the problematic aspects of privatizing traffic enforcement); Scott Desind, *3 Private Companies Making Money from Red Light Tickets*, *World Justice Project* (Apr. 18, 2013), <https://worldjusticeproject.org/news/3-private-companies-making-money-red-light-tickets> [<https://perma.cc/N97U-Q3HM>] (highlighting issues in the private traffic-enforcement industry).

entire process from photograph to the mailing of the citation can be managed automatically without human input.¹⁸¹

In some communities, these private companies have installed traffic-light cameras at their own expense and maintain them in partnership with local governments. Like TPJ, some of these companies split the take with victims—here, the city.¹⁸² For example, my own city of Berkeley—the People’s Socialist Republic of Bezerkley—once contracted out traffic-camera enforcement to a for-profit company.¹⁸³ Traffic-light cameras erected and managed by a private company were ubiquitous in the city and likely produced a nice return for both the company and city, but the program has since been terminated.¹⁸⁴ In some places, traffic light and traffic cameras used to capture speeding have led to changes in liability.¹⁸⁵

Similarly, in a novel deal in 2008, Chicago leased rights to its 36,000 parking meters to a consortium of investors, including the government of Abu Dhabi, for seventy-five years at a price over one billion dollars.¹⁸⁶ The new owners, Chicago Parking Meters LLC, moved quickly to increase rates and eliminate free parking on holidays.¹⁸⁷ By some accounts, Abu Dhabi is on track to make its mega-investment back within a few years and will

181. See Desind, *supra* note 180.

182. See Emmarie Huettelman, Traffic Cameras Draw More Scrutiny by States, *N.Y. Times* (Apr. 13, 2013), <https://www.nytimes.com/2013/04/02/us/traffic-cameras-draw-more-scrutiny-by-states.html> (on file with the *Columbia Law Review*) (noting that some of the companies maintain the traffic-light cameras “in exchange for a percentage of the revenue rather than a flat fee”).

183. See Matthew Artz, Camera Company Gets Cut from Red Light Fees, *Berkeley Daily Planet* (Apr. 22, 2005), <https://www.berkeleydailyplanet.com/issue/2005-04-22/article/21214?headline=Camera-Company-Gets-Cut-From-Red-Light-Fees-By-MATTHEW-ARTZ> [<https://perma.cc/5J9M-GUU4>] (discussing Berkeley’s traffic-light camera program).

184. See *id.*; see also BPD Frequently Asked Questions, City of Berkeley, https://www.cityofberkeley.info/Police/Home/Frequent_Questions.aspx [<https://perma.cc/D8FZ-2MGJ>] (last visited Jan. 30, 2019) (noting that the city terminated its red-light camera program).

185. Cameras do not always provide clear images of drivers’ faces, so some jurisdictions have adopted absolute liability for some types of traffic offenses: The registered owner of the automobile is liable unless she can prove that the car was stolen and was being driven by someone else. See, e.g., D.C. Code § 50-2209.02(a) (2018) (“Absent an intervening criminal or fraudulent act, the owner of a vehicle issued a notice of infraction shall be liable for payment of the fine assessed for the infraction.”); 625 Ill. Comp. Stat. Ann. 5/11-208.6(h) (West 2018) (“The court or hearing officer may consider in defense of a violation . . . that the motor vehicle . . . [was] stolen before the violation occurred and not under the control of or in the possession of the owner at the time of the violation . . .”).

186. Dan Mihalopoulos, Company Piles Up Profits from City’s Parking Meter Deal, *N.Y. Times* (Nov. 19, 2009), <https://www.nytimes.com/2009/11/20/us/20cncmeters.html> (on file with the *Columbia Law Review*); see also Max Fisher, Why Does Abu Dhabi Own All of Chicago’s Parking Meters?, *Atlantic* (Oct. 19, 2010), <https://www.theatlantic.com/business/archive/2010/10/why-does-abu-dhabi-own-all-of-chicago-s-parking-meters/339805/> [<https://perma.cc/QK7G-4XUL>] (discussing the background and ownership of the investors).

187. Fisher, *supra* note 186; Mihalopoulos, *supra* note 186.

be floating in gravy for the remaining sixty-something years of its contract.¹⁸⁸ Other hard-pressed cities are ripe for the picking.¹⁸⁹

CJ Inc. appears to be one more step in the same direction. Both promise the same benefits—reducing public costs by contracting out services—and indeed both have the potential for providing new or expanded income streams for “victims.”¹⁹⁰ And as noted earlier, stores have successfully expanded and increased civil remedies so that they, too, can recoup some of their expenses in pursuing shoplifters.¹⁹¹ Indeed, municipalities are starting to emulate this model by adding fees to fines as a way of recouping a higher portion of processing costs.¹⁹²

The discussion of administratively or privately enforced traffic violations is something of a digression in the discussion of shoplifting, stratification, and segmentation. But it is meant to suggest that CJ Inc. is only a small part of the scene in the enforcement of criminal or criminal-like laws by private organizations.

III. THE FUTURE OF CRIMINAL JUSTICE, INC.

Shoplifting, parking meters, traffic-light and speed cameras: What do they have in common? All have been targeted by for-profit entrepreneurs sensing vast new markets. From the sparse information available, they all appear to have struck gold. Together they suggest the advent of a vast new industry. Conceivably, they could do for some types of criminal justice administration what private arbitration has done for large numbers of relatively small civil disputes—shunt complainants out of the public justice system and into mandatory, private, and often for-profit arbitration.¹⁹³ Given the criticism of current arbitration practices,¹⁹⁴

188. See Mick Dumke & Chris Fusco, Parking Meters, Garages Took in \$156M—but City Won’t See a Cent, *Chi. Sun-Times* (May 23, 2016), <https://chicago.suntimes.com/news/parking-meters-garages-took-in-156m-but-city-wont-see-a-cent/> [<https://perma.cc/ST76-9LD7>] (noting that the consortium is “on pace to make back what it paid the city by 2020, with more than 60 years of meter money still to come”).

189. New York City under Mayor Michael Bloomberg looked into privatizing parking enforcement but emphasized that New York would not repeat Chicago’s mistake of leasing its 90,000 parking meters at such a bargain-basement price. See *New York to Repeat Chicago’s Parking Meter Catastrophe*, *Rolling Stone* (June 13, 2012), <https://www.rollingstone.com/politics/politics-news/new-york-to-repeat-chicagos-parking-meter-catastrophe-62583/> [<https://perma.cc/82ZM-27BK>]. Ultimately, the city rejected the idea. See Caroline Porter & Ted Mann, *New York Scraps Privatizing Parking Meters*, *Wall St. J.* (Jan. 26, 2013), <https://www.wsj.com/articles/SB10001424127887323854904578264331152227780> (on file with the *Columbia Law Review*).

190. See Rappaport, *supra* note 1, at 2273, 2276 (noting the practice of paying referral-like fees to CJ Inc.’s customers).

191. See *supra* note 152 and accompanying text.

192. See *infra* note 210 and accompanying text.

193. See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Decks of Justice*, *N.Y. Times: Dealbook* (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>

one would hope that private criminal justice alternatives could be designed to be more fair, but only time will tell. What is certain, however, is that the onslaught of for-profit criminal justice administration has just begun: CJ Inc., Traffic Camera, Inc., and Parking Meter, Inc., all suggest that the camel's nose is already under the tent.

A private criminal justice alternative is also developing in another quite different area. The guidelines for the prosecution of business organizations (for violating laws such as the Foreign Corrupt Practices Act (FCPA)) provide deep discounts in penalties for corporations that report illegal activities within their organizations to the Department of Justice before criminal indictments are handed down.¹⁹⁵ Deferred and nonprosecution agreements further extend these benefits: If corporations design, pay for, and manage their own diversion programs, they can avoid indictment and criminal (and maybe civil) liability altogether.¹⁹⁶ If

[<https://perma.cc/LW9W-NZBX>] (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”); Jessica Silver-Greenberg & Michael Corkery, In Arbitration, a ‘Privatization of the Justice System,’ N.Y. Times: Dealbook (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/QL2G-FXDZ>] (“Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported.”).

194. See, e.g., Silver-Greenberg & Corkery, *supra* note 193 (highlighting potential fairness issues with arbitration and noting that “[b]ehind closed doors, proceedings can devolve into legal free-for-alls”).

195. See Justice Manual § 9-28.900 (2018), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.900> [<https://perma.cc/X4D8-HEPP>] (“[P]rosecutors may consider a corporation’s timely and voluntary disclosure, both as an independent factor and in evaluating the company’s overall cooperation and the adequacy of the corporation’s compliance program and its management’s commitment to the compliance program.”); *id.* § 9-47.120 (“When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated . . . there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.”); see also Rachel E. Barkow, The Prosecutor as Regulatory Agency, *in* Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 177, 178 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (“[M]any jurisdictions, like the federal system, give defendants substantial sentencing discounts for cooperating with the government and accepting responsibility.”).

196. See Jed S. Rakoff, Justice Deferred Is Justice Denied, N.Y. Rev. Books (Feb. 19, 2015), <https://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/> [<https://perma.cc/QNU3-WQKM>] [hereinafter Rakoff, Justice Deferred] (“In the typical arrangement, the government agreed to defer prosecuting the company for various federal felonies if the company, in addition to paying a financial penalty, agreed to introduce various ‘prophylactic’ measures designed to prevent future such crimes and to ‘rehabilitate’ the company’s ‘culture.’”); see also Jesse Eisinger, The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives 197 (2017) (noting that deferred prosecutions became “stage managed,” in that companies’ lawyers could “negotiate the findings to avoid calamitous civil collateral consequences”).

they don't cooperate, prosecutors will come after them.¹⁹⁷ When businesses take these steps, their remediation plans are often developed and implemented by lawyers (usually former Assistant U.S. Attorneys) who are hired by the companies themselves.¹⁹⁸ In essence, they promise to put themselves on probation, design their own probation program, and hire their own private probation officer. If prosecutors accept these plans, companies not only avoid a conviction or at times even a charge, they avoid any finding of liability and indeed any judicial oversight.¹⁹⁹

By being able to help design their private probation, companies are one-up on shoplifters, who must accept or reject the plan offered by CJ Inc. But the two programs provide one common benefit: Neither the corporations nor the shoplifters come away with a record of either arrest or conviction. Moreover, of course, the state benefits: It does not have to bear the cost of prosecution. These and other similar programs may signal the onset of Perpetrator-Funded Preprosecution Probation, Inc., which allows some offenders to avoid the criminal process altogether. Indeed, some private companies already specialize in offender-funded diversion programs.²⁰⁰

Let's return to department stores. Department stores are reflections—perhaps pale reflections but nevertheless reflections—of more robust stratified and segmented institutions. Stores are rich and have vast powers over the typical shoplifter. Rappaport's study reveals how easy it is for them to work with entrepreneurs to establish a parallel system of justice that reduces taxpayer costs, benefits some accused, and reduces certain of those stores' costs to virtually nothing.²⁰¹ Indeed, private enforcement has the potential for providing a new income stream for participating stores.

197. See Barkow, *supra* note 195, at 178 (“Prosecutors typically control downward departures for cooperation, and acceptance of responsibility reductions are usually disallowed when defendants exercise their trial rights or are discounted when defendants wait until too close to the eve of trial before pleading guilty.”).

198. See Eisinger, *supra* note 196, at 195–96 (noting that FCPA investigations have produced a “cottage industry” and a “new door to revolve”); see also Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. Books (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [<https://perma.cc/83FH-U5BU>] [hereinafter Rakoff, *The Financial Crisis*] (describing a scenario in which a company tells a prosecutor it “wants to cooperate and do the right thing, and to that end [it] has hired a former assistant US attorney, now a partner at a respected law firm, to do an internal investigation”).

199. See Rakoff, *Justice Deferred*, *supra* note 196 (“[T]he preference for deferred prosecutions also reflects some less laudable motives, such as . . . the dubious benefit to the Department of Justice and the defendant of crafting a settlement that limits, or eliminates entirely, judicial oversight of implementation of the agreement.”).

200. See CorrectiveSolutions, <https://correctivesolutions.org/> [<https://perma.cc/AG9Y-HQ55>] (last visited Feb. 26, 2019) (describing the company as “the leading administrator of pre-charge, pre-file and deferred prosecution programs for adults and juveniles”).

201. See *supra* notes 12, 61–65 and accompanying text (discussing the benefits of CJ Inc. to victims, the accused, and the criminal justice system).

Let's consider the future of this development, still in its infancy. Different stores appeal to different types of clientele—by age, race, sex, social status, lifestyle, and so forth—and shoppers often try to emulate the lifestyle promoted by the store.²⁰² Working with store image-makers and security, CJ Inc. could help devise strategies to attract people into particular types of stores while discouraging others. Of course, this is already something of a high art. However, screening could be improved, potentially benefitting both stores and CJ Inc.

For example, if Bloomingdale's or Neiman Marcus were more successful than they currently are in specifically screening for high-income shoppers, they should be able to extract higher "tuition fees" from their shoplifters. Why \$400 or \$500? Why not \$1,500 or \$2,500? All things equal, the desire to avoid an arrest record is in part a function of social status, so why not differential rates for different stores? Or even a differential rate for different items taken, or for items taken from different parts of the store (for example, the clearance section in contrast to the boutiques)? Both deterrence and income for CJ Inc. *and* the store could increase with no appreciable additional enforcement costs. While this may sound unusual, consider that punishments are usually tailored to the seriousness of the crime and that Nordic countries have long imposed "day fines" established as increments of an offender's average daily income—both policies that are widely viewed as progressive.²⁰³

Rappaport cites industry figures suggesting that shoplifting is a democratic crime that cuts across all income, race, ethnicity, gender, and age groupings.²⁰⁴ Perhaps, but a group of state trial court judges who read

202. See Ronald D. Michman, Edward M. Mazze & Alan J. Greco, *Lifestyle Marketing: Reaching the New American Consumer* 29 (2003) ("The way individuals see themselves and the way they believe others see them is called the self-concept . . . [which] affects the choice of lifestyles and, consequently, influences the consumer's purchase-decision process."); *id.* at 57 ("When we purchase certain types of clothing, this bears upon our self-concept and helps us to define ourselves.").

203. See William L. F. Felstiner, *Plea Contracts in West Germany*, 13 *Law & Soc. Rev.* 309, 312 (1979) (describing the day-fine system as used in Germany). In Germany and the Nordic countries, a wide variety of nonviolent offenses, including quite serious ones, have long been disposed of through the mail. See *id.* at 309–12. Suspects receive a ticket with a proposed fine and have the choice of paying by mail or showing up in court to contest the charges, much as traffic tickets are handled in the United States. See *id.* The overwhelming majority of those charged pay. *Id.* at 315. Often those who show up in court do so not to contest the charges but to contest the amount of the fine. See *id.* at 312. On the similarity between the German system and traffic courts, see Feeley, *Process*, *supra* note 66, at 296–97.

204. Rappaport, *supra* note 1, at 2264–65. Notably, Rappaport identified several "tentative generalizations" regarding the identity of shoplifters from the data: Shoplifting typically occurs during the adolescent years, males are typically more active shoplifters than females, racial and ethnic patterns of shoplifting vary by time and location, and "middle-class individuals are most likely to shoplift." *Id.*

a draft of his article had a distinctly different impression.²⁰⁵ They were all from small- or medium-sized towns across the United States and none lived in communities with a Bloomingdale's, Abercrombie & Fitch, or Macy's store. However, most of their communities had Walmart and Goodwill Industries. Participants in my informal sample all emphasized that the shoplifters they encounter are typically poor and have substance abuse problems—people likely both to be unable to pay for CJ Inc.'s program and to end up in court for shoplifting regardless of whether CJ Inc. were available.²⁰⁶ The judges also tended to agree that CJ Inc.'s practice constituted blackmail, but they were not particularly troubled by it. Some even noted that CJ Inc.'s program is not all that different from pretrial diversion programs run by prosecutors, also often administered without judicial oversight—except that CJ Inc. has the benefit of costing taxpayers nothing. Other judges noted that they saw many juveniles brought to court charged with shoplifting and wondered if a private alternative might be designed for this group as well, and at a charge well below the prevailing rate of \$400 to \$500.²⁰⁷

Further, while Rappaport does not elaborate on it, one unofficial criterion that stores use to determine eligibility is the suspect's ability to pay.²⁰⁸ After all, it makes no sense to invite someone to enroll in an expensive program if they cannot pay, and CJ Inc. can award only so many scholarships.²⁰⁹ Ultimately, Rappaport and my judges may both be correct; people whom stores might not send to the police may constitute CJ Inc.'s clientele, while my judges see the dredges. However, rather than washing poor people out, CJ Inc. might follow my judges' inclinations and charge lower tuition. What is lost in per unit price might be recouped with volume. Although this would be problematic and potentially predatory, CJ Inc. might do what so many cash-strapped communities do: work with collection agencies to stretch out payments. This would compound the problem since installment plans come with high interest rates and large fees for late payments. In some communities, in

205. Every summer, I teach a short course in the Judicial Studies Master's and Ph.D. program for state trial-court judges at the University of Nevada, Reno. In summer 2018, I devoted part of my class to privatized criminal justice administration and had the students read a draft of Rappaport's article.

206. See Rappaport, *supra* note 1, at 2271 (“[T]he most recent academic studies found that poorer suspects are referred to the police more frequently.”); *id.* at 2282 (noting that CEC's participants “have been cleansed of most repeat offenders”).

207. Rappaport notes that CEC maintains a separate course for juveniles who are otherwise not excluded from eligibility but does not expand on this program. See *id.* at 2276 & n.155.

208. *Id.* at 2288 (suggesting that despite retail justice companies purporting to make their programs accessible, we do not know “how many decline due to financial constraints”).

209. *Id.* at 2273 n.132 (providing that “3–4% of course takers” receive financial aid (quoting Declaration of Darrell Huntsman in Support of Opposition to Motion for Summary Judgment at 2, *People ex rel. Herrera v. Corrective Educ. Co.*, No. CGC-15-549094 (Cal. Super. Ct. Aug. 14, 2017))).

fact, this is an additional attraction—another source of income.²¹⁰ One wonders if stores and CJ Inc. might not be far behind in their thinking. Stores or CJ Inc. might even invest in collection agencies.

Advanced technology will likely produce various other innovations that will have applications for private responses to shoplifting. Consider electronic scanning for facial recognition, a technology whose cost-effective applications are quickly approaching if not already here.²¹¹ Faces will soon be able to be scanned when shoppers enter stores and almost instantaneously be run through a database of known shoplifters.²¹² Cameras can be locked onto suspicious people whose movements are then monitored closely. By tracking higher-risk patrons, stores are likely to detect more shoplifters and in so doing transform CJ Inc.'s business model.

One could easily imagine still other more substantial developments. We have already witnessed the proliferation of self-service checkout counters in grocery and hardware stores.²¹³ Seattle and Silicon Valley

210. In the wake of the shooting of Michael Brown in Ferguson, Missouri, and the finding that the “financial relationship between Ferguson’s municipal courts and its police department resulted in the disproportionate ticketing, fining, and jailing of its African American residents,” writing on this topic has mushroomed. See U.S. Comm’n on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications I* (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [<https://perma.cc/AJH4-P3BK>]; *id.* at 1–2 (noting that “some municipalities apply late fees, payment plan fees, and interest—aptly referred to as ‘poverty penalties’—when an individual is unable to pay,” and suggesting that this practice is “excessive”); see also Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 *J. Crim. L. & Criminology* 161, 200–03 (2017) (noting that contract prosecutors may “treat[] municipal and other misdemeanor and infraction courts as revenue generators for their respective municipal governments”). Or consider that one district attorney’s office in California, in collaboration with a private company, now routinely collects DNA samples from virtually everyone arrested on any type of misdemeanor or felony charge, despite a restrictive state law that limits state DNA collection. The district attorney’s office operates on the same principle as the stores: Give us a mouth swab and pay \$75.00, and we will drop charges in some instances or reduce them in others. Virtually everyone takes the deal. See, e.g., Tony Saavedra, *Fate of DA Tony Rackauckas’ DNA Program on the Line*, *Orange County Reg.* (Nov. 23, 2018), <https://www.ocregister.com/2018/11/23/fate-of-da-tony-rackauckas-dna-program-on-the-line/> [<https://perma.cc/N8XJ-L86V>] (describing the spit and acquit program).

211. For an overview of potential applications, see Jesse Davis West, *21 Amazing Uses for Face Recognition—Facial Recognition Use Cases*, *FaceFirst* (May 2, 2018), <https://www.facefirst.com/blog/amazing-uses-for-face-recognition-facial-recognition-use-cases/> [<https://perma.cc/USM7-BDSU>].

212. Interestingly, at least one company is attempting to market this technology for shoplifting prevention. See *Face Recognition for Retail Stores*, *FaceFirst*, <https://www.facefirst.com/industry/retail-face-recognition/> [<https://perma.cc/RM7C-4722>] (last visited Oct. 31, 2018).

213. See *supra* notes 19–20 and accompanying text (describing self-service checkout counters).

have already introduced cashless and cashier-less stores.²¹⁴ In January 2018, Amazon opened a cashless and cashier-less convenience store that allows customers to place items directly into their shopping bags and then exit the store through a turnstile.²¹⁵ More recently, a group of Silicon Valley investors opened Standard Market in San Francisco, a cashless convenience store that has neither checkout counter nor turnstile.²¹⁶ Both companies are preoccupied with the problem of shoplifting—recall that grocery stores experience more than twice the level of shoplifting loss as a percentage of sales than department stores.²¹⁷ Indeed, the founders of Standard Market previously worked for the SEC developing software to detect fraud in stock trades.²¹⁸ These stores are not one-off novelties but prototypes; analysts are confident that the future is in cashless and cashier-less stores and expect them to be the 7-Eleven of the future.²¹⁹ However, central to their success is an ability to curtail the theft of small and inexpensive items.

How might they do this efficiently? Currently, they rely on a saturation of cameras and microchips. Another way might be to transform the nature of store-customer relations. As a condition for signing up for the convenience of cashier-less shopping, customers might be asked to agree to accept dispute resolution through a store-sponsored plan. If there is a challenge about items taken, customers will receive notification that the cost of the purloined item will be added to the bill,

214. See John Tierney, *The Future of Retail Checkout: No Checkout at All?*, Atlantic (May 9, 2014), <https://www.theatlantic.com/business/archive/2014/05/whats-ahead-with-the-retail-checkout-experience/362017/> (on file with the *Columbia Law Review*); see also Marine Cole, *The Future of Retail: Hassle-Free Checkout*, Fiscal Times (Jan. 14, 2015), <https://www.thefiscaltimes.com/2015/01/14/Future-Retail-Hassle-Free-Checkout> [<https://perma.cc/U383-EX4Z>].

215. David Z. Morris, *Amazon's Cashier-Free Store Opens to the Public Tomorrow in Seattle*, Fortune (Jan. 21, 2018), <https://fortune.com/2018/01/21/amazon-go-opening-to-the-public/> [<https://perma.cc/T5UR-E7RN>]; see also Drew Harwell & Abha Bhattarai, *Inside Amazon Go: The Camera-Filled Convenience Store that Watches You Back*, Wash. Post (Jan. 22, 2018), <https://www.washingtonpost.com/news/business/wp/2018/01/22/inside-amazon-go-the-camera-filled-convenience-store-that-watches-you-back/> [<https://perma.cc/DVD6-HKMU>].

216. *Standard Market Opens as San Francisco's First Public Cashierless Store*, Convenience Store News (Sept. 10, 2018), <https://csnews.com/standard-market-opens-san-franciscos-first-public-cashierless-store> [<https://perma.cc/2ENL-XNPT>].

217. See *supra* note 11 (noting that grocery stores experience a loss of 3.23% of sales; department stores, 1.27%).

218. Nellie Bowles, *Stealing from a Cashierless Store (Without You, or the Cameras, Knowing It)*, NY Times (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/technology/standard-market-retail-automation-behavioral-data.html> (on file with the *Columbia Law Review*) (“Five of the seven founders came from the Securities and Exchange Commission, where they built artificial intelligence software to detect fraud and trade violations.”).

219. See Rani Molla, *Amazon's Cashierless Go Stores Could Be a \$4 Billion Business by 2021, New Research Suggests*, Recode (Jan. 4, 2019), <https://www.recode.net/2019/1/4/18166934/amazon-go-stores-revenue-estimates-cashierless> [<https://perma.cc/XW33-6RXP>] (describing RBC Capital Market's estimates for Amazon Go).

as well as a \$300 inconvenience fee, unless customers wish to challenge the charge, in which case they can contact CJ Inc., which already has their agreement to handle the matter. An expanded CJ Inc. might become the equivalent of American Express's arbitration program. And, I suspect, with similar consequences.²²⁰

Indeed, such an arrangement can go well beyond retail stores. Consider, one regularly sees signs saying, "KEEP OUT. Trespassers will be Prosecuted." What if these signs were rewritten to read, "WARNING: People entering these premises agree to be subject to private prosecution if an issue of illegal behavior arises. If you do not agree, keep out. For more details see . . ." Such an arrangement might be extended to entering private property, theft in various locations, and the like—anywhere CCTV cameras might record behavior.

In addition, one can imagine success of such arrangements turning on more than blackmail. The advantage of CJ Inc. over public criminal courts is that they provide swifter and cheaper justice to victims and accused alike. Here, too, costs to the accused might be low enough to induce many wholly innocent people to plead guilty to "get it over with."²²¹ If this sounds bizarre, consider this: Accused people regularly plead guilty in lower criminal courts to "get it over with" and avoid the costs of the criminal justice system.²²²

Additionally, as the internet has shown, in postmodern commodified societies, virtual communities are easily established and provide real and meaningful benefits.²²³ Informal online electronic sanctioning for some types of violations is already well institutionalized.²²⁴ A much-expanded CJ Inc. may simply be one more natural development for virtual communities of the future. One can easily imagine a future in which people

220. Recent investigative reporting by the *New York Times* revealed that consumers infrequently prevail in cases taken to arbitration. See Silver-Greenberg & Gebeloff, *supra* note 193 ("Roughly two-thirds of consumers contesting credit card fraud, fees or costly loans received no monetary awards in arbitration . . ."). They conclude that the arbitration process is skewed from beginning to end to the advantage of the credit card company. See Silver-Greenberg & Corkery, *supra* note 193 (noting that in arbitration, "rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients").

221. See Rappaport, *supra* note 1, at 2281 (noting that it would be rational for innocent suspects to prefer retail justice given the costs of the justice system).

222. See Feeley, *Process*, *supra* note 66, at 185 (noting that plea bargaining is premised on the idea that a defendant will "exchange the uncertainties and costs of going to trial and the possibility of a lengthy sentence for the certainty of a fixed outcome which guarantees a less severe sanction").

223. For an examination of why individuals choose to join a virtual community, see generally Catherine M. Ridings & David Gefen, *Virtual Community Attraction: Why People Hang out Online*, 10 *J. Computer-Mediated Comm.* (2004), <https://doi.org/10.1111/j.1083-6101.2004.tb00229.x> [<https://perma.cc/MY9G-7R9Y>].

224. See, e.g., Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 *N.Y.L. Sch. L. Rev.* 63, 72–73 (2004) (discussing the formal and informal sanctions used by online game players and platform owners).

receive a form by email reporting that they have been caught trespassing, damaging property, or stealing, and that they can either pay a fee by credit card for the violation or contest the matter by contacting CJ Inc. to arrange for a hearing.

In fact, there is ample room for expansion without the need for elaborate new technology. Rappaport's account seems to suggest that CJ Inc.'s technology is best adapted to large chain stores.²²⁵ If so, there may be a way to extend it to smaller stores: CJ Inc. could contract with mall associations rather than individual stores and thus expand to smaller shops. Such shops already share some mall-wide security expenses, so why not extend CJ Inc.'s services mall-wide?

A partial version of this may already be operating. The Midtown Community Court on 54th Street in Manhattan is staffed by "real" prosecutors, defense attorneys, and judges who are on duty during busy evenings and weekends.²²⁶ It was created through the efforts of an entrepreneurial nonprofit organization, the Center for Court Innovation,²²⁷ spurred in part by the local business community.²²⁸ People picked up on narcotics, prostitution, shoplifting, pickpocketing, and quality-of-life violations in the Midtown area are taken directly to this court and given the option to accept its jurisdiction on the spot or be sent downtown to the central criminal court to spend a night or two in jail, wait for arraignment on more serious charges, and then run the gamut of the regular court system and risk a tougher sentence.²²⁹ Not surprisingly, a large majority of those arraigned in the Midtown Court opt for immediate action; they know they are likely to be in and out of the community court and finished with their community service sentence before the court

225. See Rappaport, *supra* note 1, at 2253 (noting that CEC's clients have included major retailers).

226. See Greg Berman & John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* 61–66 (2005) (discussing the role and development of the Midtown Community Court). For additional discussion of the operations of the court, see generally Council on Judicial Admin., *Report on the Midtown Community Court*, 52 *Rec. Ass'n B. City N.Y.* 231 (1997).

227. See Andrew Denney, *After 25 Years, NYC's Midtown Community Court Still Takes 'Problem-Solving' Approach to Low-Level Crime*, *N.Y. L.J.* (Dec. 07, 2018), <https://www.law.com/newyorklawjournal/2018/12/07/after-25-years-nycs-midtown-community-court-still-takes-problem-solving-approach-to-low-level-crime/> (on file with the *Columbia Law Review*) (discussing the history of the Midtown Community Court). At the time of the court's founding, the Center for Court Innovation was a public-private partnership; the success of the Midtown Community Court prompted the formal establishment of the Center as an "ongoing engine for justice reform in New York." See About, *Ctr. Ct. Innovation*, <https://www.courtinnovation.org/about> [<https://perma.cc/G6SL-ZK6T>] (last visited Feb. 16, 2019).

228. See Michele Sviridoff et al., *Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court* app. 1.1 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196397.pdf> (on file with the *Columbia Law Review*) (describing the origins of the Midtown Community Court and the role of public-private partnership in its development).

229. See Berman & Feinblatt, *supra* note 226, at 62.

downtown could even get into high gear.²³⁰ By any measure, the Midtown Community Court is a roaring success. Crime is down (even beyond the normal decrease in the city) and its proactive and community-intensive programs have improved the lives of many of those who have been brought to the court.²³¹

What happens in communities without a Center for Court Innovation? Given the dearth of any sustained interest in innovating in American criminal court systems,²³² one can easily imagine a commercial variation on this model, allowing malls to develop their own private criminal courts. Malls already hire off-duty police officers as security guards who have the power to detain and arrest, so why couldn't CJ Inc. branch out to provide a broader array of services? It could hire retired or off-duty prosecutors and judges—or arrange for the appointment of lawyers to serve as judges pro tem, as is done in California for courts of general jurisdiction and in many states for small claims courts²³³—to staff private criminal courts in malls. One might even update this in light of constitutional considerations and create some sort of duty solicitor scheme, which would provide free or low-cost advice to the recently arrested. Certain crimes could be redefined as “violations” to reduce due process concerns. This idea is also not so novel. It is a back-to-the-future move that would replicate many of the functions of the old magistrates' courts, whose demise Judge Stephanos Bibas has lamented.²³⁴ But this time it would be provided by an innovative and market-responsive private justice system rather than the inevitably sluggish public justice system. And it could be paid for by offenders rather than taxpayers.

This is not as far-fetched as it might seem. A former student of mine has worked as a “dispute resolution facilitator” on a cruise ship and reports that most of his cases involved allegations of crimes or near-crimes related to drunken and disorderly behavior, property damage (at times into the thousands of dollars), theft, and even assault or sexual assault.²³⁵ Although he occasionally threatened to report the crimes to

230. See Council on Judicial Admin., *supra* note 226, at 232 (noting that about seventy-three percent of cases before the court result in guilty pleas).

231. See *id.* at 233 (discussing the “positive effect” of the Midtown Community Court).

232. For an analysis of the lack of research and development institutions in American criminal courts, see Feeley, *Criminal Courts*, *supra* note 76, at 688 (“[T]he traditional criminal justice system is bereft of any real research and development functions, so new ideas from entrepreneurs on the outside should be encouraging.”).

233. For a good review of the use of “rent-a-judges,” see generally Anne S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 *Duke L.J.* 166, 168–80 (1994).

234. See Stephanos Bibas, *The Machinery of Criminal Justice* 1–6 (2012) (noting that the criminal justice system “has morphed from a public morality play into a speedy plea-bargaining machine, hidden and insulated from the public”).

235. He served in the “Semester at Sea” program run by the University of Colorado. But similar problems occur on all cruise ships, particularly those catering to younger travelers. For an overview of serious crime on cruise ships, see Hanna Kozłowska, *Why Cruise Ships*

authorities upon reaching port, he never did so. Instead, he regularly imposed fines, secured restitution, and banned people from certain parts of the ship for the duration of the voyage. Victims, the accused, and the cruise line were happy to put matters behind them.

Or consider a possible adaptation of a program already well institutionalized in California. There, disputing parties in civil suits can jointly hire virtually any lawyer they agree upon and arrange to have her appointed as a judge pro tem and preside over their dispute.²³⁶ While paid for by the parties, this court is a court of record.²³⁷ Parties can also opt for a jury trial, tailor-make a jury to their specifications, and construct the procedures to be followed.²³⁸ This arrangement is not used frequently, but when it is, participants—both plaintiffs and defendants—likely benefit.²³⁹ Further, if one side disagrees with the outcome, she can appeal to the state’s intermediate courts of appeal.²⁴⁰ Of course, as with all trial courts, most cases are still likely to settle.²⁴¹ With some changes, this arrangement might be adapted for use in criminal cases.²⁴²

What works for shoplifting and on cruise ships could also be used in other quasi-segmented communities: gated communities, condominiums, mobile home parks, and the like. Many of them already have elaborate alternative dispute resolution institutions for some recurring types of disturbances—noise, swimming pool use, lawn ornaments, laundry room

Have a Sexual Assault Problem, Quartz (July 6, 2017), <https://qz.com/1022245/why-cruise-ships-have-a-sexual-assault-problem/> [https://perma.cc/SXK8-5D97].

236. See Kim, *supra* note 233, at 169.

237. See *id.* at 170–71.

238. See *id.* at 168–72.

239. See *id.* at 189 (noting that private judging “offers the speed, efficiency, and convenience of arbitration and mediation along with an enforceable, appealable state court judgment”).

240. See *id.* at 171 (noting that one distinction between pro tem judges and arbitrators is the preserved right to appeal).

241. See Theodore Eisenberg & Charlotte Lanvers, What Is the Settlement Rate and Why Should We Care?, 6 *J. Empirical Legal Stud.* 111, 115 (2009) (estimating, based on an empirical analysis, that approximately sixty-seven percent of filed cases ended in settlement in two federal jurisdictions).

242. Of course, in shoplifting cases, penalties would most likely have to be restricted to fines and fees and perhaps agreements not to enter the premises, and could not include any custody. But then, many—perhaps most—shoplifting cases do not result in custodial sentences. Other logistical considerations would include how to pay for the court personnel. Rather than each party paying for the judge and prosecutor, the hypothetical Private Judge Inc. could hire and pay for them through collections from the accused and perhaps also the retail stores. Private Judge Inc. might even create—at arm’s length—a defender system, which could provide a modicum of advice for all arrestees appraised of the private-court option, and, if they accept, could provide additional advice for a nominal extra fee. Of course, this could work only if the accused could waive her rights to be taken to the central police department for booking and on to criminal court for arraignment. I imagine that fast-track private criminal courts, if placed in strategic locations, could generate quite a bit of business.

use, and so on.²⁴³ An experienced CJ Inc. might make inroads in managing more serious issues, including some types of criminal law violations that occur in some of these institutions. In so doing, it may offer even swifter, cheaper, and more effective outcomes in selected types of controversies—all without high-profile reporting in the community at large and the cost of the criminal process. One can imagine homeowner and tenant contracts that require certain types of criminal issues arising between association members be brought first to their CJ Inc. before turning to a public forum.

Consider further the myriad segmented or quasi-segmented institutions discussed earlier.²⁴⁴ Tight-knit religious and ethnic communities are not likely to need CJ Inc. even if it were run by their own members. These groups already have their own authorities who deal with community norms and disputes, including those arising under the criminal law.²⁴⁵ Other institutions do not, and some of them might be ripe for the picking. Colleges and universities, in particular, might benefit from the professionalism of a CJ Inc.²⁴⁶ Any reader who has sat on a university disciplinary committee knows just how amateur and haphazard these institutions can be. They work adequately for some kinds of issues; indeed, it is useful, even edifying, to participate in an untutored group of faculty and students on a disciplinary committee trying to struggle with issues of academic cheating, dress codes, how much robust speech should be allowed in classrooms, or whether a fraternity prank has gone too far. But college hearings are often disasters when dealing with more serious criminal matters, such as harassment, theft, stalking, assault, and especially sexual assault.²⁴⁷ Nevertheless, despite harsh criticism, they

243. Many associations of all sorts have well-developed dispute resolution. In fact, in California, internal dispute resolution procedures are mandated by law for common interest developments. See Cal. Civ. Code § 5905(a) (2018) (requiring an association to “provide a fair, reasonable, and expeditious procedure for resolving a dispute”).

244. See *supra* notes 128, 130, 133 and accompanying text.

245. Legal scholars tend to focus on trouble cases emerging from religious tribunals, such as when one party to the proceeding challenges the authority of religious courts in the secular courts. See, e.g., Michał Rynkowski, *Religious Courts in the Jurisprudence of the European Court of Human Rights*, 18 *Ecclesiastical L.J.* 62, 62–63 (2016) (discussing European Court of Human Rights cases which “effectively constituted an appeal against the decision of a religious court”); see also Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 *Colum. L. Rev.* 1843, 1844 (discussing when it might be appropriate for the secular judiciary to intervene in religious property conflicts). Not much legal scholarship has directed itself at the internal workings of religious tribunals—or tribunal-like structures—to determine how efficacious they are in resolving nonreligious disputes.

246. Rappaport briefly introduces, but does not fully elaborate upon, this idea. See Rappaport, *supra* note 1, at 2320.

247. There are numerous journalistic accounts of the shortcomings of campus disciplinary proceedings, especially when dealing with charges of sexual assault and charges against star athletes. See generally, e.g., Krakauer, *supra* note 141; Binkley, *supra* note 137. Others, including a group of Harvard Law School faculty, have criticized certain

endure. One wonders if someone at CJ Inc. has already envisioned a marketing opportunity for involvement in at least some cases at some schools. CJ Inc. might know when it is best to move swiftly to turn certain cases over to local law-enforcement authorities and when to manage them internally in order to shape them to the distinctive concerns of campus culture. CJ Inc. might provide a degree of detachment and disinterest as well as professionalism that is lacking in a proceeding run by a student justice, a faculty member, or a dean of students. For all I know, something like this is already operating on some American college campuses.

CONCLUSION

Professor Rappaport has done a great service by calling attention to a novel institution, CJ Inc., which has begun to take root in some major retail stores desperate to find better ways to cope with the massive problem of shoplifting. He has identified the business model of this new industry and then systematically worked through a host of likely and possible consequences that could flow from its operation. He is sometimes convincing, but some of his observations are, as he acknowledges, tentative because there is no readily available evidence.²⁴⁸ His article is certainly provocative. It opened the eyes of this author, who after reading it was stimulated to explore some of the many implications of his findings. One hopes that a sociolegal scholar will seize on his article and use it as the basis for a proposal to the National Science Foundation, which promises a more systematic, expansive, and empirically grounded examination of this important new development.

I am afraid that I have not done justice to Rappaport's article. He focused on one important new development, but I used it as an instance of a general phenomenon to explore some of its many implications. His work has made me see what has long been hidden in plain sight and confront its implications: the ubiquity of self-help remedies to criminal offending and the entrance and expansion of for-profit companies into the field. I think we are on the cusp of a dramatically expanded role for for-profit disposition of criminal offenses. If it works for shoplifting, as it appears to, where else might it work? What are the features of stores and shoplifting that are shared by other settings and other offenses that might invite innovation by for-profit companies? In a crude way I have tried to identify some of the distinguishing characteristics of retail stores where it appears to work—their stratification and segmentation—and

campus internal procedures for lacking “basic elements of fairness and due process.” See Rethink Harvard’s Sexual Harassment Policy, *Bos. Globe* (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (on file with the *Columbia Law Review*).

248. See Rappaport, *supra* note 1, at 2313–14 (suggesting that “the distributive effects of retail justice are indeterminate,” and advocating for increased data collection).

point to other institutions and situations with similar characteristics where it is already used or might be used.

Without much effort, one can imagine that CJ Inc. could come to rival private arbitration in civil disputes. Of course, it remains to be seen, and if it does, one should worry that it might have the same desultory effects here as it does in the resolution of consumer complaints.²⁴⁹ Still, I hope I have pointed to potential extensions and in so doing alerted criminal justice scholars to possible new and important developments in the field.²⁵⁰ Viewed differently, privatized criminal justice administration may only now be taking steps to catch up with private police, which have been around so long and whose presence is so ubiquitous that they are part of the taken-for-granted landscape,²⁵¹ and with private prisons, which despite ups and downs continue to grow and become a normalized presence in our criminal justice and immigration systems.²⁵²

In closing, I want to emphasize two additional points. Criminal justice administration usually involves dramatically unequal parties—the state and institutions supported by the state versus a lone individual. The imbalance is tremendous and compensating procedural adjustments do little to correct it. What is true for the criminal process also holds for CJ Inc. and the stores that have created it. Except here, the process operates without even nominal judicial oversight. Still, as described by Rappaport, this particular development may be a net gain for justice. If I am correct, what he has examined is only one tiny step toward more expansive privatized criminal justice administration. This, too, on balance, might be good. But, then again, it might not be. Certainly as we are learning from the

249. For a discussion of the limits of the arbitration system for consumers, see *supra* notes 193–194 and accompanying text. For a discussion of the failure and occasional success of ADR in resolving consumer complaints, see Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 *Law & Soc’y Rev.* 463, 466 (2012) (“[I]n the context of the adjudication of public legal rights, I show the privatization of dispute resolution by organizations has the potential to undermine the rights of social have-nots.”).

250. Indeed, some sections of this Response suggest the need to be more imaginative in investigating private criminal justice alternatives that have long existed.

251. See generally James S. Kakalik & Sorrel Wildhorn, RAND Corp., *The Private Police Industry: Its Nature and Extent* (1971), <https://www.rand.org/pubs/reports/R0870.html> [<https://perma.cc/9TCH-J2ZJ>] (describing the extent and growth of the private police industry); David A. Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1168 (1999) (“The private security industry already employs significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing.”).

252. For a perspective on private prisons that roughly parallels Rappaport’s assessment of CJ Inc., see generally Feeley, *Private Prisons*, *supra* note 79. For an account suggesting that for-profit imprisonment is a “mechanism for injustice and social stratification,” see Michael A. Hallett, *Private Prisons in America: A Critical Race Perspective* 9 (2006).

experience of colleges and universities,²⁵³ the Roman Catholic Church,²⁵⁴ and professional sports associations,²⁵⁵ privatized justice and internal conflict resolution can be problematic in the extreme.²⁵⁶ And we know that technological innovations are not infallible. Still, the headache of appearances in criminal courts may lead many people to pay fines and fees levied by the agents of victims in order to get the matter over with.

This brings me to my final point. Criminal justice reforms usually produce unintended consequences. Indeed, many such consequences are so predictable that they should no longer be labeled “unintended” but “expected.”²⁵⁷ The histories of bail reform, pretrial diversion, rehabilitative programming, community sentencing, conditional sentences, electronic monitoring, drug testing, and the like all have several features in common: They rarely accomplish their stated objectives, are often turned to serve other purposes, and almost inevitably end up widening the net of social control.²⁵⁸ Alternatives to criminal prosecution are rarely

253. See *supra* note 247 and accompanying text (discussing the limits of university-run disciplinary processes).

254. See Laurie Goodstein & Sharon Otterman, Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says, *N.Y. Times* (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html> (on file with the *Columbia Law Review*) (discussing a grand jury report finding that the Catholic Church had covered up and failed to appropriately respond to allegations of the sexual abuse of children).

255. See Marisa Kwiatkowski et al., Judge Releases USA Gymnastics Sex Abuse Files, *IndyStar* (Mar. 3, 2017), <https://www.indystar.com/story/news/local/2017/03/03/judge-releases-usa-gymnastics-sex-abuse-files/98717208/> [<https://perma.cc/4WPQ-KA67>] (detailing USA Gymnastics’s improper handling of sexual abuse allegations against coaches).

256. I hasten to add that Rappaport recognizes this problem and the need for some sort of oversight and regulation of the process. This sounds good, but it is also clear just how feeble judicial oversight is in plea-bargaining. Cases are not tested in open court, and an accepted guilty plea virtually ensures that cases cannot be reviewed by appellate courts. See Kirke D. Weaver, A Change of Heart or a Change of Law? Withdrawing a Guilty Plea Under Federal Rule of Criminal Procedure 32(e), 92 *J. Crim. L. & Criminology* 273, 273 (2002) (“[C]ourts are unquestionably reluctant to permit defendants to withdraw from their plea agreements once approved by the court.”). Indeed, I am aware of just how little meaningful regulation there is in any component of the criminal justice system. The system seems to rest on the belief that it is supposed to operate like the market, with components with distinct interests checking each other. If so, we have a calamitous market failure.

257. See generally Malcolm M. Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (1983) [hereinafter Feeley, *Court Reform*] (evaluating how a series of court reform efforts ultimately resulted in few benefits and occasionally in perverse outcomes); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1467 (2016) (highlighting that reform may have a “pacification effect,” which can limit efforts to enact meaningful changes); Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *The New Criminal Justice Thinking* 246, 263 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (explaining that “despite a significant change in the legal rules structuring the site of lower criminal courts,” the criminal process is still not being used to “sort the guilty from the innocent”).

258. See, e.g., Malcolm M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System—An Account*

just alternatives, especially when entrepreneurs develop them.²⁵⁹ Businesses seek to expand markets. They search for weak spots, for obvious problems in need of better solutions, and then design and offer those solutions. But if they are shrewd, as most entrepreneurs are, their first products are loss leaders. From the outset, they are likely to have long-term business plans and ideas for expansion.²⁶⁰ This is the dynamic of the market and for-profit criminal justice institutions whose operations I have explored elsewhere.²⁶¹

Consider that some of the first private prisons in the United States in the contemporary era were built as “return to custody centers” to house those returned to prison for technical violations of parole and probation.²⁶² This provided contractors with a proverbial foot in the door, and since then they have expanded into full-service prisons and immigrant detention centers for entire families.²⁶³ Or, consider companies that own and operate electronic monitoring programs. Vendors and criminal justice officials alike tout electronic monitoring as an alternative to prison at a fraction of the cost.²⁶⁴ Yet, electronic monitors are often affixed to people who would not otherwise be in custody.²⁶⁵ Again, net widening.

of Convict Transportation and Electronic Monitoring, *Criminology Crim. Just. L. & Soc’y*, Dec. 2016, at 1, 1 [hereinafter Feeley, *Entrepreneurs*] (discussing this phenomenon in the context of electronic monitoring).

259. See *id.* (describing “private contractors who sought to harness market forces to develop and supply new forms of social control”).

260. Rappaport quotes what must be part of CEC’s mission statement from a brief submitted to the California Court of Appeals: “[Our] vision is to reinvent the way petty crimes are handled, starting with retail theft.” Rappaport, *supra* note 1, at 2259 (emphasis omitted) (internal quotation marks omitted) (quoting Appellant’s Opening Brief at 11, *People ex rel. Herrera v. Corrective Educ. Co.*, No. A149195, 2017 WL 1366020 (Cal. Ct. App. Apr. 13, 2017), 2016 WL 6037455). Elsewhere he notes that CEC has already moved into another area of “offender-funded” justice—the business of dealing with employee theft, which is often subsumed under shoplifting but which in fact is a distinct and fairly significant aspect of inventory shrinkage. See Rappaport, *supra* note 1, at 2319 & n.382 (describing employee theft and CEC’s employee-oriented program).

261. See, e.g., Feeley, *Entrepreneurs*, *supra* note 258, at 1 (describing two criminal justice innovations—the transportation of convicts to North America in the seventeenth and eighteenth centuries and electronic monitoring in the late twentieth century—driven by private parties).

262. See Mark A. Stein, California’s First ‘Private Prison’ Is Open for Business, *L.A. Times* (May 29, 1986), https://articles.latimes.com/1986-05-29/news/mn-7853_1_private-prison [<https://perma.cc/X259-SY77>] (noting that California’s first private prison was a “minimum-security jail for short-term, low-risk parole violators”).

263. See Clyde Haberman, For Private Prisons, Detaining Immigrants Is Big Business, *N.Y. Times* (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html> (on file with the *Columbia Law Review*) (describing the scale of the private prison industry in the United States).

264. See Feeley, *Entrepreneurs*, *supra* note 258, at 13 (“It costs \$35,000 to \$50,000 a year to house a prisoner but only \$1,500 to \$3,000 to maintain them in an electronic prison.”); Mark A.R. Kleiman et al., We Don’t Need to Keep Criminals in Prison to Punish Them, *Vox* (Mar. 18, 2015), <https://www.vox.com/2015/3/18/8226957/prison-reform-graduated->

Why would this not also be a consequence of an expanded CJ Inc.? It has started out with shoplifting, and may be doing a credible job, but if successful it will want to expand. Indeed, there is ample evidence that CJ Inc. is widening the net: Its “students” are relatively well off and have no prior record of shoplifting—the sorts of people who in the absence of these programs are most likely to be warned and released. If CJ Inc. expands, it may continue to focus on less-serious offenses, since its business model is predicated on avoiding hassle. It may come up with a way of handling a variety of high-volume, low-stakes cases with effectiveness and efficiency that allows everyone—guilty and innocent alike—to proceed at significantly reduced costs. And unlike lower criminal courts, it has the advantage of generating neither a record of arrest nor conviction. Finally, it promises to reduce law enforcement and court costs by diverting cases out of the criminal justice system at the outset and shifting costs from victims and the public to the accused. But it will almost inevitably widen the net,²⁶⁶ since many of those caught up in it, guilty or not, will conclude that the wisest course of action is to pay the fee and extricate themselves as quickly as possible even if they stand a good chance of having charges in criminal court dropped or dismissed.²⁶⁷

Consider how CJ Inc. or its successors might exponentially expand, just as rent-a-judge programs and private arbitration and mediation programs have. Shoplifting, trespassing, petty theft, petty assault, and other actions that are now defined as crimes can easily be redefined so that they are civil violations as well. From a victim’s point of view, there could be several benefits flowing from such a shift. Rules of evidence and procedure would be relaxed, the standard of proof lowered, and victims could sue to recover damages rather than pursue only nonremunerative civic duty. Some defendants would resist and might be shunted off to the criminal process. However, many others would probably see the value of avoiding the bramble bush, which threatens to ensnare them with both criminal and civil charges. An expanded “Criminal and Civil Justice Inc.”

reentry [<https://perma.cc/X8FQ-ZLNQ>] (discussing some of the benefits of GPS monitoring as an alternative to incarceration).

265. See Feeley, *Entrepreneurs*, *supra* note 258, at 15–16 (noting that electronic monitoring is designed for “the big pool of easier targets,” such as those on pretrial release or in drug treatment programs, who would otherwise likely not be in jail).

266. As suggested earlier, I suspect that a closer examination of the 20,000 cases processed by CJ Inc. at the time of Rappaport’s study would reveal a substantial number of cases that would have been dropped outright by the participating stores. Rappaport raises, but ultimately rejects, this net-widening argument. See Rappaport, *supra* note 1, at 2294–95 (arguing against the net-widening argument by suggesting that “many retailers do not turn suspects over to CEC whom . . . they would not have referred to the police” and that the “consequences of being ensnared . . . are less severe”).

267. Rappaport suggests that there “are powerful disincentives for store security to target actually innocent individuals.” *Id.* at 2293. At the same time, he concludes that it is “rational, if tragic, for innocent suspects” to “prefer the retail justice option” due to the consequences of arrest. *Id.* at 2281.

(“C&CJ Inc.”) might make a killing since it would be marketing more services to more customers.

Does this sound wild? Perhaps. But keep in mind that stores are increasingly pursuing shoplifters through the civil process.²⁶⁸ So, the idea outlined above is only an expansion of an existing trend. Furthermore, both restorative justice and problem-solving courts movements, which continue to expand by leaps and bounds, embrace an administrative-like process that mixes both criminal and civil justice concerns.²⁶⁹ Consider also how thoroughly internal dispute alternatives are already embedded within corporations, and how private external alternative dispute resolution institutions have been shaped to reflect the interests of the dominant and repeat players in recurring types of disputes.²⁷⁰ Finally, and pointing in another direction, consider the late sociologist and criminologist Nils Christie’s “conflicts as property” argument.²⁷¹ He wanted to return crime to its roots so that victims could confront those who injure them and demand an apology and redress.²⁷² Of course, his idea was anchored in pastoral images of village life²⁷³ so that many of his friends and admirers thought him too quaint by half. However, C&CJ Inc. might be the modern tough-minded equivalent of Professor Christie’s scheme for contemporary commodified societies. It might succeed where his ideas could not gain traction. If so, it might truly transform modern criminal justice administration. I do not advocate this but simply want to note that all of the components of such an arrangement are already in place or can easily be put in place if there is a political environment that supports private solutions for public problems.

Critics of privatization rightfully raise questions about whether core public responsibilities such as criminal justice administration should be delegated to for-profit companies or nonprofit agencies.²⁷⁴ Furthermore, they raise good questions about whether the alleged efficiency and effectiveness of private criminal justice institutions actually result in public

268. See *supra* note 152 and accompanying text.

269. See Yana Kunichoff, *Should Communities Have a Say in How Residents Are Punished for Crime?*, *Atlantic* (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/chicago-restorative-justice-court/524238/> [<https://perma.cc/7TBX-CMDD>] (describing a “restorative justice” court in Chicago that focuses on “mediation between the accused and the accuser, and restitution targeted at the local community”); *supra* notes 226–231 and accompanying text (describing the success of a problem-solving court in Manhattan).

270. See *supra* notes 193–194 and accompanying text (noting how arbitration favors corporations over consumers).

271. See Christie, *supra* note 132, at 1–2.

272. See *id.*

273. See *id.*

274. Feeley, *Private Prisons*, *supra* note 79, at 1405–11 (discussing “state monopoly” criticisms of privatization).

savings.²⁷⁵ These are important questions that deserve answers. However, I think there is a third question about privatization that is both less-frequently asked and more important: Does for-profit criminal justice widen the net of social control? If so, can it be justified? This to me is the central question to ask about any “alternative” introduced into the criminal justice system, and is certainly an appropriate question to ask about CJ Inc. as it continues to expand.

275. *Id.* at 1411 (noting other arguments against privatization, which include “utilitarian comparisons, fears that employees of corporations will put profits ahead of persons, or worries that the scope of liability will be less with public contractors than government employees”).