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Articles

Predicting Violence

Shima Baradaran[*] & Frank L. McIntyre[**]

The last several years have seen a marked rise in state and federal pretrial detention rates. There has been very little scholarly analysis of whether increased detention is reducing crime, and the discussion that has taken place has largely relied on small-scale local studies with conflicting results. This Article asks whether the United States is making substantially mistaken judgments about who is likely to commit crimes while on pretrial release and whether we are detaining the right people. Relying on the largest dataset of pretrial defendants in the United States, this Article determines what factors, if any, are relevant to predicting "dangerousness" pretrial and what percentage of defendants can be released safely before trial. Prior work in this area disagrees as to whether the current charge or past convictions are relevant predictors of future crimes, whether flight risk is linked to pretrial violence, and whether judges can accurately predict which defendants are dangerous. This Article—for the first time—relies on empirical methods and a nationally representative fifteen-year dataset of over 100,000 defendants to determine what factors are reliable predictors of who will commit pretrial crime. This analysis suggests two important conclusions: First, judges often detain the wrong people. Judges often overhold older defendants, defendants with clean records, and defendants charged with fraud and public-order offenses. Second, using our model, judges would be able to release 25% more defendants while decreasing both violent crime and total pretrial crime rates.

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I. Introduction

Historically, defendants were guaranteed release on bail before trial.[1] Until the 1970s and 1980s, people were primarily legally held in jail before trial if they posed a flight risk. The 1984 Federal Bail Reform Act and state legislation during this period altered the landscape, allowing defendants to be held if they were deemed dangerous or posed a threat to public safety.[2] Congress and state legislatures charged judges[3] with the task of predicting who could be safely released and who should be held in jail before trial.[4] It became appropriate nationally to hold people in jail before trial if they were most likely guilty or if they were believed to threaten public safety. During this time period, many legal scholars, criminologists, and economists discussed the issues surrounding preventive detention and the reliability of judicial prediction[5]: Can and should judges predict which defendants are most likely to commit crimes pretrial? If so, what factors can reliably

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1. There were some exceptions for capital defendants. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (requiring bail to be admitted in all criminal cases "except where the punishment may be death," in which case admission would be only at the judge's or court's discretion). However, overall, the Court made clear that due to the presumption of innocence and due process, bail was presumed and liberty should not be deprived without an adequate hearing. *See Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (stating that bail is "not designed as a satisfaction for the offence, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence"); *see also* Rochin v. California, 342 U.S. 165, 169–71 (1952) (making clear that an adjudication was required to satisfy the demands of due process); Coffin v. United States, 156 U.S. 432, 463 (1895) (holding that even a trial by an impartial but confused jury was not sufficient to deprive a defendant of liberty); Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371–72 (1873) (holding that although bail bondsmen do have considerable authority over the accused, due process requires that the bail be forgiven if an act of God or act of the law precludes the accused from appearing before the court); United States v. St. Clair, 42 F.2d 26, 28 (8th Cir. 1930) ("Bail is to procure release of a prisoner by securing his future attendance"); 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 286–91 (1736) (delineating the many criteria that must be met before the accused may justly be found guilty and subject to punishment).

2. Bail Reform Act of 1984, Pub. L. No. 98-473, sec. 203, § 3142(d)(2), 98 Stat. 1976, 1978 (codified as amended at 18 U.S.C. § 3142(d)(2) (2006)).

3. Throughout this Article, we refer to the individuals releasing defendants as *judges* or *judicial officers*. However, in many jurisdictions throughout the United States, bail decisions are handled by magistrates, judicial officers, or others. *E.g.*, 18 U.S.C. §§ 3041, 3141, 3156(a)(1) (2006) (authorizing judicial officers to release the accused).

4. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 747–49 (2011) (observing that the 1984 Act empowered federal judges to consider a defendant's dangerousness when deciding whether to grant pretrial release and that many state legislatures soon granted state judges similar authority).

5. For a poignant critique of using statistical methods for criminal law decisions, particularly racial profiling and policing, see BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 5–6 (2007). Harcourt criticizes the trend toward actuarial prediction and argues that "criminal law enforcement and correctional institutions should be blind to predictions of criminality based on group characteristics." *Id.* Other scholars have commented more broadly on other issues surrounding bail, like the Excessive Bail Clause. *See, e.g.*, Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1126 (1965) (arguing that equal protection issues arise from the history of the right to bail, which was originally intended to systematically disadvantage the lower class).

indicate which defendants will commit violent crimes? Should judges consider the prior record of the defendant, or the current charge, in deciding who to release? However, broad public debate on the topic died in the 1980s, and since then there has been little dialogue on how pretrial detention is going for America.[6] While politicians are starting to talk about the rising costs of incarceration in tough economic times, the solutions proposed have not focused on the substantial impact of pretrial detention on high incarceration rates.[7]

This Article uses empirical methods to analyze the largest dataset of pretrial defendants in the United States to determine what factors, if any, are relevant to predicting "dangerousness" pretrial and what percentage of defendants can be released safely before trial. Previous commentators in this area disagree as to whether the current charge or past convictions are relevant as predictors of future crimes, whether flight risk is linked to pretrial violence, and whether judges are accurately able to predict which defendants are dangerous.[8] Most previous work also relies on small-scale local studies. Our analysis, in contrast, relies on the most current national data for over 117,000 defendants,[9] between 1990 and 2006, from a large, representative sample of urban counties in the United States. This analysis is both timely and necessary, as there has been no comprehensive nationwide analysis of

6. While an additional question is what impact race, gender, and age have in predicting pretrial crime, in this Article we do not comment on the merits of judges using race and gender in their determination of whether to release individuals on bail. Others have commented extensively on this issue and on other important issues of race in the criminal justice system. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5 (1999) (arguing that "our criminal justice system affirmatively depends on inequality" (emphasis omitted)); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 660–62 (1981) (noting that the Supreme Court has interpreted the Due Process and Equal Protection Clauses to "mandate a comprehensive reform of the criminal justice system," though it has not discussed the impact of race on the prosecutor's discretion). For an interesting analysis of how racial stereotypes play into jury and police perceptions of dangerousness, see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 138–99 (2003).

7. *E.g.*, Newt Gingrich & Pat Nolan, *Saving Money, Saving Lives*, WASH. POST, Jan. 7, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html (blaming the escalating prison population on recidivism and drug-related convictions but failing to mention the effects of pretrial detention).

8. *See* J.W. Looney, *Neuroscience's New Techniques for Evaluating Future Dangerousness: Are We Returning to Lombroso's Biological Criminality?*, 32 U. ARK. LITTLE ROCK L. REV. 301, 314 (2010) (considering the implications of using neuroscience techniques in pretrial predictions); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) (describing the preventative-detention trend which allows punishment of defendants to prevent future crimes). *Compare* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRETRIAL RELEASE AND MISCONDUCT 4 (1985) [hereinafter RELEASE AND MISCONDUCT] (identifying various factors exhibiting a positive correlation with pretrial misconduct), *with* Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1034–35 (1954) (arguing that the nature of the offense charged is the only factor that can be generally applied to dangerousness).

9. About 80,000 of these defendants were released, and the remainder were detained during this time period.

pretrial violence since the 1970s and 1980s.[10] Though scholars have written about predicting violence after trial,[11] and about violent recidivism in general,[12] there has been no commentary accounting for all of the new state laws and federal amendments since the 1980s that have made considerations of dangerousness almost universal. Additionally, in the last several years, national pretrial detention rates have increased significantly[13] without any scholarly comment and without a determination of whether increased detention is reducing crime.

The results of this analysis can have sweeping public-policy impacts, as many counties in the United States spend more on jails than schools[14] and

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10. The Bureau of Justice releases biyearly reports with some analysis of the data, but none of these reports provides an analysis of the data from such a broad range of years. *E.g.*, THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010) [hereinafter 2006 FELONY DEFENDANTS], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf; TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 (2008) [hereinafter 2004 FELONY DEFENDANTS], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf. The analysis is also not comprehensive, nor does it rely on any of the modeling techniques we rely on here to examine prediction.

11. *See, e.g.*, HARCOURT, *supra* note 5, at 22–34 (outlining three critiques of prediction, including in the context of sentencing); CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 10–12 (2007) (discussing dangerousness and punishment in terms of experts' predictions of antisocial behavior by offenders); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 *passim* (2003) (arguing that the state police power justifies detention based on dangerousness by focusing on sexual predator laws and detention based on propensity to commit sexually deviant acts); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 122 (2005) (discussing the increasing use of dangerousness to confine individuals and arguing that criminal law should unabashedly embrace the use of dangerousness determinations and strive for prevention of crime).

12. Andreas Mokros et al., *Assessment of Risk for Violent Recidivism Through Multivariate Bayesian Classification*, 16 PSYCHOL. PUB. POL'Y & L. 418, 418 (2010) (noting that Bayesian statistics have already been used to assess violent recidivism and extending Bayesian analysis of violent recidivism to the multivariate case).

13. *See, e.g.*, Timothy P. Cadigan, *Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982*, 71 FED. PROBATION 10, 11 (2007) (reporting that pretrial detention rates rose from approximately 40% in 1992 to more than 60% in 2006).

14. *See* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 465 (2010) (noting that Oregon, Michigan, Connecticut, Vermont, and Delaware spend more on corrections than on higher education). *Compare* HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf (reporting and discussing annual prison statistics), *with* NAT'L EDUC. ASS'N, RANKINGS AND ESTIMATES: RANKINGS OF THE STATES 2010 AND ESTIMATES OF SCHOOL STATISTICS 2011, at 55 tbl.H-11 (2010), *available at* http://www.nea.org/assets/docs/HE/NEA_Rankings_and_Estimates010711.pdf (listing state-by-state expenditures per enrolled student). States trying to reduce prison populations are placed in a political predicament due to a change in public view evidenced by forty years of increasing prison capacity and size. *See* TODD R. CLEAR ET AL., AMERICAN CORRECTIONS IN BRIEF 350 (2012) (lamenting the nearly forty-year period of U.S. prison population growth); Elizabeth Napier Dewar, Comment, *The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review*, 114 YALE L.J. 1177, 1183 (2005)

because the majority of the people in U.S. jails are pretrial defendants, not convicts.[15] And, the total number of people in U.S. jails has tripled from 1985 to 2006.[16] If it can be shown that pretrial detention can be decreased and more defendants can be safely released without a commensurate increase in crime, more defendants will have access to pretrial liberty and due process, counties can save substantial amounts of money on corrections that can be put toward other important social goals, and the public can continue to feel safe at home.

This Article unfolds in four parts. Part II of this Article discusses the history of changes in federal and state law that allow judges to make predictions of future violence and pretrial dangerousness. This part traces the shift from using flight risk as a determinant to considering other factors such as community safety and dangerousness of the defendant for release decisions. Part III of this Article reviews previous empirical studies that look at pretrial violence, crime, and the reliability of various factors in determining which defendants will commit crimes pretrial. It reviews studies conducted historically and examines the effect of the initial charge, past conduct, and age on pretrial crime and court appearance rates. Part IV analyzes our national dataset with several predictive models and concludes that we are largely holding the wrong defendants pretrial. It also concludes that up to 25% more defendants can be released pretrial while maintaining the same level of pretrial crime if we release a larger number of older defendants, defendants with clean records, and defendants charged with fraud and public-order

(suggesting that legislation that would reduce criminal penalties, including imprisonment, is unpopular with constituents and, thus, imposes a "high political cost").

15. *See* WILLIAM J. SABOL & TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007, at 5 (2008) [hereinafter INMATES AT MIDYEAR 2007] (reporting that in 2007, 62% of the people in local jails were pretrial defendants); ALLEN J. BECK & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2000, at 7 (2001) [hereinafter INMATES AT MIDYEAR 2000] (reporting that "an estimated 56% of the Nation's adult jail inmates in 2000 were awaiting court action on their current charge"). Over the last two decades, local jails have housed more pretrial detainees than actual convicts. In 1990, the percentage of pretrial detainees was about 50%, but since then, the percentage has climbed. CHERISE FANNO BURDEEN, JAIL POPULATION MANAGEMENT: ELECTED COUNTY OFFICIALS' GUIDE TO PRETRIAL SERVICES 4 (2009). In 2000, the percentage hovered around 56%, and in 2007, the pretrial detainee population increased to 62% of the jail population. INMATES AT MIDYEAR 2000, *supra*, at 7; INMATES AT MIDYEAR 2007, *supra*, at 7. Based on the authors' calculation from the *Annual Survey of Jails*, the number of pretrial detainees has increased from 49% of the jail population in 1985 to about 56% of the jail population in 2006. Bureau of Justice Statistics, U.S. Dep't of Justice, *Annual Survey of Jails: Jurisdiction-Level and Jail-Level Data, 1985*, NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA (Oct. 12, 1987), http://dx.doi.org/10.3886/ICPSR08687.v1 [hereinafter *1985 Annual Survey of Jails*] (computer file); Bureau of Justice Statistics, U.S. Dep't of Justice, *Annual Survey of Jails: Jurisdictional Level Data, 2006*, NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA (July 27, 2007), http://dx.doi.org/10.3886/ICPSR20368.v1 [hereinafter *2006 Annual Survey of Jails*] (computer file).

16. *Compare 1985 Annual Survey of Jails*, *supra* note 15 (reporting that the total number of inmates was 209,412), *with 2006 Annual Survey of Jails*, *supra* note 15 (reporting that the total number of inmates had ballooned to 602,416).

offenses. Part V sketches out the conclusions of our study and provides a roadmap for future research.

II. History of American Pretrial Prediction

A. Federal Changes in Detention Laws

Under the common law, due process rights combined with the pretrial presumption of innocence to guarantee defendants the right to bail before trial.[17] U.S. federal law largely followed English law by requiring bail to be presumed for all but murder defendants, so long as there was significant proof that the accused committed the alleged crime.[18] The Judiciary Act of 1789 guaranteed bail for all noncapital federal offenses, and most states took a similar approach.[19] In 1944, the adoption of Federal Rule of Criminal Procedure 46 required courts to take into account several factors in setting a bail amount to ensure the defendant's appearance at trial, including "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and *the character of the defendant*."[20] Opening the door for judges to consider the "character of the defendant" marked a step toward evaluation of a defendant's dangerousness. Like the Judiciary Act, Federal Rule 46 only allowed consideration of the character of the defendant as it impacted whether the defendant would appear at trial. It did not consider whether the defendant would pose a threat while released. But the culmination of these small steps came with the 1984 Bail Reform Act, which allowed judges to consider whether defendants were dangerous in determining whether to detain them pretrial.

1. 1966 Bail Reform Act.—The Bail Reform Act of 1966[21] evolved as a result of a collaboration between Congress and private citizens concerned about excessive pretrial detention of defendants.[22] Congress held various

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17. *See* Baradaran, *supra* note 4, at 739 (noting that early U.S. cases assert the importance of the right to bail, sometimes connecting it to due process rights).

18. *Id.* at 728–29.

19. *See id.* at 730 ("In the early nineteenth century, U.S. state and federal courts unanimously agreed that the Constitution entitled the accused to pretrial release except when the crime charged was a capital offense."). However, during this time, many felonies were capital offenses. *See, e.g.*, Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (designating treason, murder, piracy, counterfeiting, and robbery on the high seas as capital crimes).

20. Stack v. Boyle, 342 U.S. 1, 5 n.3 (1951) (emphasis added) (quoting FED. R. CRIM. P. 46(c) (1951) (repealed 1956)).

21. Pub. L. No. 89-465, 80 Stat. 214 (codified at 18 U.S.C. § 1341 (2006)).

22. *See, e.g.*, *Proposals to Modify Federal Bail Procedures: Hearing on S. 1357, S. 646, S. 647, and S. 648 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements to Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 27 (1965) (statement of Ramsey Clark, Deputy Att'y Gen. of the United States) (explaining the progress of the Department of Justice in studying the procedures by which U.S. attorneys regularly report to the Attorney General on all detained defendants in order to minimize unnecessary detention); *Bills to Improve Federal Bail*

hearings,[23] ultimately resulting in the 1966 Bail Reform Act, which was based on the philosophy that bail laws' sole purpose is to ensure the court appearance of defendants.[24] The 1966 Act included language allowing judges to consider defendants' prior records in determining whether they would be a flight risk.[25] As an unintended consequence, the Bail Reform Act of 1966 opened the door for judges to consider additional factors besides flight risk in determining whether to release defendants pretrial.[26]

2. *District of Columbia Crime Bill.*—In a decidedly controversial crime bill, Congress passed a law in 1970 allowing preventive detention in the District of Columbia.[27] This bill—for the first time in U.S. history—allowed judges to detain a defendant pretrial without setting any bail if the defendant was deemed dangerous to society.[28] Certainly, judges had set bail at prohibitively high amounts in the past, preventing defendants from obtaining release, but by all measures this was a bill that commentators feared would greatly increase detention.[29] The District of Columbia Court of Appeals

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Procedures: Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 88th Cong. 148 (1964) (statement of David J. McCarthy, Jr., Director, District of Columbia Bail Project) (identifying a goal of the proposed legislation as crafting a method to halt the frequent refusal of bondsmen to write bonds for invalid reasons); *see also* Sam J. Ervin, Jr., *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 292 (1971) (lauding the collaboration of the legal profession, the Executive Branch, private citizens, and Congress to craft a well-regarded—if only partial—solution to the problem of pretrial release of defendants accused of a crime).

23. Ervin, *supra* note 22, at 292. *Compare Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 210 (1970) (statement of Daniel J. Freed, Professor of Law, Yale Law School) (bemoaning the tendency of preventative detention hearings to determine guilt without the protections of trial and consequently, to result in short-term imprisonment based on inadmissible evidence), *with* D.C. CODE §§ 23-1321 to -1322 (2001) (calling for pretrial releases of most defendants unless the judicial officer, after conducting a pretrial hearing, cannot be reasonably assured that the defendant will appear as required and poses no danger to the safety of others).

24. S. REP. NO. 98-147, at 8 (1983). The Supreme Court had held in *Stack v. Boyle* that the only legitimate reason for restricting pretrial freedom is if the defendant is not likely to appear in court. *Stack*, 342 U.S. at 5–6.

25. Bail Reform Act of 1966, Pub. L. No. 89-465, sec. 3, § 3146(b), 80 Stat. 214, 214 (codified at 18 U.S.C. § 3146(b) (2006)).

26. *See* Baradaran, *supra* note 4, at 741–42 (tracing the courts' movement from solely determining flight risk to also analyzing guilt through consideration of additional factors such as the prevention of crime).

27. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

28. *Id.* sec. 210, § 23-1321, 84 Stat. at 642–43; Ervin, *supra* note 22, at 292.

29. *See, e.g.*, Ervin, *supra* note 22, at 293 (stating that while the Bail Reform Act is considered by some to have been a milestone in criminal justice reform, the District of Columbia crime bill and preventive detention are viewed by many as having regressed society back to a time when fear and politics controlled criminal justice); Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of* United States v. Salerno, 14 AM. J. CRIM. L. 155, 165 (1988) (discussing the fear of preventative detention expressed by Congressman Sam Ervin, Abner Mikva, Lawrence Tribe, and others testifying before Congress and quoting Ervin, who testified that preventative detention was a

decided in *United States v. Edwards*[30] to uphold the Act's authorization of detention based on dangerousness, reasoning that preventive detention is not punishment but is, rather, a form of regulation.[31]

3. *The Federal Bail Reform Act of 1984.*—Taking a cue from the D.C. crime bill and a greater public fear of crime, the federal Bail Reform Act of 1984[32] took a leap towards preventive detention.[33] Whereas earlier bail reforms in the 1960s were concerned with failure to appear in court and with improving defendants' right to bail, the 1980s reforms focused on protecting the public from danger.[34]

With no definition, or even a vague definition, of *danger*, scholars have criticized the "danger laws" as too overbroad, stating that just about any defendant could be considered dangerous.[35] In 1984, many of the laws allowing danger as a factor in bail decisions did not explicitly define *danger*.[36] Out of those states with laws that did define *danger*, scholars claimed that half of the definitions were vague.[37]

The 1984 Bail Reform Act has been challenged in court but has been upheld[38] and even amended to further decrease pretrial release for defendants.[39] Right away, there were a number of constitutional challenges to the 1984 Act—claims of vagueness, violation of the right to bail, the presumption of innocence, due process, and freedom from excessive bail that courts rejected individually.[40] One such challenge where the Supreme Court

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"radical departure" from American law and argued that "if our country is going to remain a free society it has got to take certain risks and one of those risks is that persons who are released prior to their trial may commit another crime").

30. 430 A.2d 1321 (D.C. 1981).

31. *Id.* at 1332–33.

32. Pub. L. No. 98-473, tit. II, ch. I, 98 Stat. 1976, 1976–87 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. § 636, FED. R. CRIM. P., and FED. R. APP. P. 9(c)).

33. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1, 4–6 (1985).

34. *Id.* at 2.

35. *E.g.*, Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 422–24 (1996); Goldkamp, *supra* note 33, at 27; Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 336–38, 343–44 (1994).

36. Goldkamp, *supra* note 33, at 1, 17, 29–30 (asserting that though there is a great margin of error associated with predicting future danger, prediction will continue to be practiced because it has been traditionally practiced and because it became institutionalized in the legislation of the 1980s).

37. *Id.* at 18. References to danger in bail laws appear in provisions excluding defendants from the right to bail, in provisions discussing conditions of release, and in provisions discussing specific factors to be considered in fixing bail or conditions of release. *Id.* at 19.

38. *Id.* at 45–46.

39. *Compare* 18 U.S.C. § 3142(f) (2000), *with* 18 U.S.C. § 3142(f) (2006) (adding numerous offenses to the list of those for which a court must consider whether pretrial release will ensure both that the defendant will appear in court and the safety of the community).

40. *See* United States v. Jessup, 757 F.2d 378, 384–87 (1st Cir. 1985) (holding that the Act's imposition of a rebuttable presumption that a defendant charged with a serious drug offense will flee before trial did not deprive defendants of liberty without due process of law); United States v.

legitimized pretrial detention was *Schall v. Martin*.[41] The Court upheld detention of a juvenile based on anticipated future crime, stressing that "crime prevention is 'a weighty social objective.'"[42] The Court conceded that prediction of future criminal conduct is not readily codified, but felt that "from a legal point of view there is nothing inherently unattainable" about it and that it is "an experienced prediction based on a host of variables."[43] With this and the decision in *United States v. Salerno*[44] upholding the 1984 Act, federal judges were able to detain defendants if they were deemed a flight risk or dangerous.[45]

B. State Changes in Danger Laws

Before the 1984 Bail Reform Act, various states had passed legislation allowing judges to consider the danger posed by defendants to the community in making their bail determinations.[46] Some state laws listed general criteria to consider when making bail decisions (such as community ties, employment status, financial resources, drug addictions, etc.); however, judges were free to ignore these criteria and focus only on the criminal charge and prior criminal record of the defendant.[47] By 1978, twenty-three states and the District of Columbia had passed legislation pointing to danger as a factor in bail decisions;[48] by 1984, this had grown to thirty-four states and the District of Columbia.[49] During this time, one legal scholar cautioned that in determining dangerousness, there should be "precise legal standards," methods of prediction "subjected to careful and continuous validation," and

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Hazzard, 598 F. Supp. 1442, 1448–49 (N.D. Ill. 1984) (holding that the Eighth Amendment did not grant defendants a right to bail and also holding that the Act's capacity to deny defendants bail did not constitute an unconstitutional imposition of excessive bail); United States v. Payden, 598 F. Supp. 1388, 1395–97 (S.D.N.Y. 1984) (rejecting a vagueness challenge to the Act on the grounds that the Act specified certain factors to be considered in ordering detention and also holding that there was no conflict between the Act and the presumption of innocence).

41. 467 U.S. 253 (1984).

42. *Id.* at 264 (quoting Brown v. Texas, 443 U.S. 47, 52 (1979)); *id.* at 278–79.

43. *Id.* at 278–79 (quoting Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 16 (1979)).

44. 481 U.S. 739 (1987).

45. *See id.* at 747 (holding that preventing danger to the community is a legitimate regulatory goal).

46. *E.g.*, FLA. STAT. ANN. § 907.041(1) (West 1985); *see also* Goldkamp, *supra* note 33, at 1, 5 (noting that state legislatures scrutinized their bail practices in response to heightened public fear of crime in the 1980s, and observing that a shift in emphasis toward protecting the public from dangerous defendants started appearing in state legislation prior to the federal 1984 Act).

47. Goldkamp, *supra* note 33, at 9–10.

48. *Id.* at 15. The states were Alabama, Alaska, Arkansas, Colorado, Delaware, Kentucky, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, and Washington. *Id.* at 15 n.56 (citing JOHN GOLDKAMP, TWO CLASSES OF ACCUSED (1979)).

49. *Id.* at 15. Arizona, California, Florida, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Nevada, South Dakota, and Wisconsin were the additional states. *Id.* at 15 n.57.

defendants provided with "certain minimal procedural safeguards."[50] While most state laws enacted during this period provided defendants with some procedural safeguards such as a hearing before detention, the laws did not establish precise legal standards for judges to use in predicting dangerousness, and those determinations were not carefully monitored.[51]

To date, forty-eight states and the District of Columbia have enacted laws permitting courts to either detain or conditionally release defendants determined to be dangerous.[52] All danger laws include some method for determining dangerousness, but the laws vary by state. These state laws are depicted in Table 1.

1. Determining Dangerousness.—In determining whether the accused is too dangerous to release prior to conviction, state courts consider three main categories: (1) the circumstances surrounding the present offense charged, (2) the defendant's past conduct, and (3) judicial discretion regarding the defendant's circumstances and character.[53] Many states use the first two categories in an attempt to objectively determine which defendants pose a risk to public safety. For example, states often create a statutory rebuttable presumption for defendants charged with specific crimes.[54] Similarly, some

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50. Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 725 (1972).

51. *See* Fagan & Guggenheim, *supra* note 35, at 417–18 (explaining that the new state statutes were often insufficiently precise in defining detention eligibility).

52. For the laws of forty-six of the jurisdictions, see *infra* notes 53–55. For the remaining two, see IDAHO CODE ANN. § 19-2904 (Supp. 2011) and N.D. R. CRIM. P. 46.

53. ALA. R. CRIM. P. 7.2(a); CAL. CONST. art. I, § 12; CAL. PENAL CODE §§ 1270.5, 1275(a) (West 2011); COLO. REV. STAT. ANN. § 16-4-105(1)(h) (West Supp. 2010); CONN. GEN. STAT. ANN. § 54-64a(b)(1), (2) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); IND. CODE ANN. § 35-33-8-4(b) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (Supp. 2010); ME. REV. STAT. ANN. tit. 15, § 1026(4) (West Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MINN. R. CRIM. P. 6.02(2); MO. REV. STAT. ANN. § 544.457 (West 2002); NEB. REV. STAT. § 29-901.01 (2008); N.H. REV. STAT. ANN. § 597:2(III-a) (Supp. 2010); N.M. CONST. art. II, § 13; N.M. R. CRIM. P. FOR DIST. CTS. 5-401(c); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO CONST. art. I, § 9; OHIO REV. CODE ANN. § 2937.222(C) (West 2006); S.C. CODE ANN. § 17-15-30 (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TEX. CODE CRIM. PROC. ANN. art. 17.15(3) (West 2009); UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); WASH. R. CRIM. P. 3.2(b).

54. ALASKA STAT. § 12.30.011(d)(2) (2010); ARIZ. REV. STAT. ANN. § 13-3961(A), (G) (West 1956); DEL. CONST. art. I, § 12; DEL. CODE ANN. tit. 11, § 2103(a), (b) (2007); FLA. STAT. ANN. §§ 907.041(4)(a), (c)(5) (West Supp. 2011); GA. CODE ANN. § 17-6-1 (Supp. 2011); HAW. REV. STAT. ANN. §§ 804-3(a), (c) (LexisNexis 2007); ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. 5/110-4-5(a) (West Supp. 2011); IND. CONST. art. I, § 17; IND. CODE ANN. §§ 35-33-8-2 (West 2004), 35-33-8-3.5(c) (West Supp. 2011); KY. R. CRIM. P. 4.02; LA. CODE CRIM. PROC. ANN. art. 330 (2003); MD. CODE ANN., CRIM. PROC. § 5-202(a)–(f) (LexisNexis Supp. 2010); MICH. CONST. art. I, § 15; MICH. COMP. LAWS ANN. § 765.5 (West 2000); MISS. CONST. art. III, § 29(3); MONT. CODE ANN. § 46-9-106(2) (2011); NEV. CONST. art. I, § 7; OHIO CONST. art. I, § 9; OKLA. STAT. tit. 22, § 1101(D) (Supp. 2010); OR. CONST. art. I, § 43; OR. REV. STAT. ANN. § 135.240 (West 2009); PA. CONST. art. I, § 14; 42 PA. CONS. STAT. ANN. § 5701 (West Supp. 2011); R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, §§ 11, 11a; UTAH CODE ANN. § 77-20-1(1) (LexisNexis 2008); VT. STAT. ANN.

statutes create a rebuttable presumption of detention if a defendant has previously been convicted of certain enumerated violent crimes.[55] The third category, in contrast to the first two objective inquiries, allows a much more subjective judicial assessment, permitting judges to consider the totality of the defendant's character and present circumstances.[56]

a. Present Offense Charged.—Courts analyze the nature of the alleged crime to predict the dangerousness of the defendant. In the 1980s, many judges relied predominantly on the criminal charge in determining whether to detain an individual.[57] Of the forty-six jurisdictions that allow pretrial detention of dangerous defendants, only two jurisdictions do not include some aspect of the present offense charged as a factor in determining whether the defendant is dangerous.[58] The remaining forty-four jurisdictions

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tit. 13, § 7553 (2009), tit. 13, § 7553a (Supp. 2010); VA. CODE ANN. § 19.2-120 (B)–(E) (Supp. 2010); WASH. R. CRIM. P. 3.2(a), (e); WIS. CONST. art. I, § 8(3).

55. ALASKA STAT. § 12.30.011(d)(2)(b) (2010); HAW. REV. STAT. ANN. § 804-3(c)(1) (2007); MD. CODE ANN., CRIM. PROC. § 5-202(f)(1) (LexisNexis Supp. 2010); MICH. CONST. art. I, § 15(a); *see also* GA. CODE ANN. § 17-6-1(e)(4) (Supp. 2011) (creating the presumption if the current charge *and* a previous conviction were of the type enumerated in the statute).

Other states allow the court to consider a defendant's criminal history when making bail determinations. ALA. R. CRIM. P. 7.2(a)(3); ARK. R. CRIM. P. 8.5(b)(vii); CAL. CONST. art. I, § 12; COLO. REV. STAT. ANN. § 16-4-105(1)(i) (West Supp. 2010); CONN. GEN. STAT. ANN. § 54-64a(b)(2)(B) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3)(A) (2001); FLA. STAT. ANN. § 907.041(3)(b)(2) (West Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2)(A) (West 2006); IND. CODE ANN. § 35-33-8-4(b)(5) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (Supp. 2010); LA. CODE CRIM. PROC. ANN. art. 334(8) (2003); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(7) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MINN. R. CRIM. P. 6.02(2)(h); MO. REV. STAT. ANN. § 544.455(2) (West 2002); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853(5) (2009); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(3)(h); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(3)(a) (West 2006); R.I. GEN. LAWS § 12-13-1.3(c)(7) (2002); S.C. CODE ANN. § 17-15-30(b)(1) (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TENN. CODE ANN. § 40-11-115(b)(5) (2006); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); W. VA. CODE ANN. § 62-1C-3 (LexisNexis 2010); WIS. STAT. ANN. § 969.01(4) (West Supp. 2010); WYO. R. CRIM. P. 46.1(d)(3).

56. ALA. R. CRIM. P. 7.2(a)(1)-(13); ALASKA STAT. § 12.30.011(c) (2010); COLO. REV. STAT. ANN. § 16-4-105(c)–(j) (West Supp. 2010); CONN. GEN. STAT. ANN. § 54-64a(b)(2) (West 1958); DEL. CODE. ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3) (2001); FLA. R. CRIM. P. 3.131(b)(3); 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2) (West 2006); IND. CODE ANN. § 35-33-8-4 (b) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2008); KAN. STAT. ANN. § 22-2802(8) (2007); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C) (West Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MINN. R. CRIM. P. 6.02(2)(c)–(m); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853 (2009); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(3); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(3) (West 2006); R.I. GEN. LAWS § 12-13-1.3(c)(3)–(10) (2002); S.C. CODE ANN. § 17-15-30 (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TENN. CODE ANN. § 40-11-115(b) (2006); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); WYO. R. CRIM. P. 46.1(d).

57. *See, e.g.*, ARIZ. CONST. art. II, § 22(3); MICH. CONST. art. I, § 15; WIS. CONST. art. I, § 8; MINN. STAT. § 629.72 (1983); N.Y. CRIM. PROC. LAW §§ 530.12, 530.13 (1984).

58. IDAHO CODE ANN. § 19-2904 (Supp. 2011); N.D. R. CRIM. P. 46.

use the present offense charged to restrict the scope of pretrial detention authority[59] and require or permit judicial officers to consider the present offense in the exercise of judicial discretion.[60]

Some states constrain judicial discretion in dangerousness assessments by creating a presumption of detention or release based on the nature of the crime.[61] Where there is a presumption based on the charges, judges are able to avoid making subjective determinations.

b. Defendants' Past Conduct.—In addition to considering the present offense charged, thirty-seven states consider some aspect of the defendant's prior conduct.[62] Specifically, thirty-four states and the District of

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59. ARIZ. REV. STAT. ANN. § 13-3961 (2010); CAL. CONST. art. I, § 12; CAL. PENAL CODE § 1270.5 (West 2011); CONN. GEN. STAT. ANN. § 54-64a(b)(1) (West 1958); DEL. CONST. art. I, § 12; DEL. CODE ANN. tit. 11, § 2103(a) (2007); FLA. STAT. ANN. § 907.041(4) (West Supp. 2011); GA. CODE ANN. § 17-6-1(a)–(b) (2008); HAW. REV. STAT. §§ 804-3(a)–(c), 840-8 (LexisNexis 2007); ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. ANN. 5/110-4 (West Supp. 2011); IND. CONST. art. I, § 17; IND. CODE ANN. §§ 35-33-8-2, 35-33-8-3.5 (West 2004 & Supp. 2011); LA. CONST. art. I, § 18; MD. CODE ANN., CRIM. PROC. § 5-202(a)–(f) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MICH. CONST. art. I, § 15; MICH. COMP. LAWS ANN. § 765.5 (West 2000); MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29(3); MONT. CODE ANN. § 46-9-106(2) (2011); NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; NEV. REV. STAT. § 178.484 (2009); N.M. CONST. art. II, § 13; OHIO CONST. art. I, § 9; OHIO REV. CODE ANN. § 2937.222(A) (West 2006); OKLA. CONST. art. II, § 8; OKLA. STAT. ANN. tit. 22, § 1101(A) (West Supp. 2011); OR. CONST. art. I, § 43; OR. REV. STAT. § 135.240 (2009); PA. CONST. art. I, § 14; 42 PA. CONS. STAT. ANN. § 5701 (West Supp. 2011); R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, §§ 7553, 7553a (2009); VA. CODE ANN. § 19.2-120 (B)–(E); WASH. R. CRIM. P. 3.2(a); WIS. CONST. art. I, § 8 (3).

60. ALA. R. CRIM. P. 7.2(a)(6); ALASKA STAT. § 12.30.011(c)(1) (2010); CAL. PENAL CODE § 1275(a) (West 2011); COLO. REV. STAT. ANN. § 16-4-105(1)(h) (West Supp. 2011); CONN. GEN. STAT. ANN. § 54-64a(b)(2) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(1) (Supp. 2011); FLA. STAT. ANN. § 907.041(c)(5) (West Supp. 2011); GA. CODE ANN. § 17-6-1(e) (Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West Supp. 2011); IND. CODE ANN. § 35-33-8-4(b)(7) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (2007); LA. CODE CRIM. PROC. ANN. art. 334(1) (2003); ME. REV. STAT. ANN. tit. 15, § 1026(4)(A) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MICH. COMP. LAWS ANN. § 765.6(1)(a) (West Supp. 2011); MINN. R. CRIM. P. 6.02(2)(a); MO. ANN. STAT. § 544.455(2) (West 2002); MONT. CODE ANN. § 46-9-301(5) (2011); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853(7) (2009); N.H. REV. STAT. ANN. § 597:2(III-a) (Supp. 2010); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(1); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(1) (West 2006); S.C. CODE ANN. § 17-15-30(B)(2) (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TENN. CODE ANN. § 40-11-115(b)(7) (2006); TEX. CODE CRIM. PROC. ANN. art. 17.15(3) (West 2005); UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(1) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); WYO. R. CRIM. P. 46.1(d)(1).

61. *See, e.g.*, HAW. REV. STAT. ANN. § 804-3(c) (LexisNexis 2007); MD. CODE ANN., CRIM. PROC. § 5-202(a)–(d) (LexisNexis Supp. 2011); N.C. GEN. STAT. § 15A-533(d)–(e) (2009); OKLA. STAT. ANN. tit. 22, § 1101(d) (West Supp. 2011); R.I. GEN. LAWS § 12-13-5.1 (2002); VA. CODE ANN. § 19.2-120(B)–(E) (Supp. 2010). Georgia has a rebuttable presumption based on the nature of the crime, but the presumption only applies when the defendant has a previous conviction for certain enumerated crimes. GA. CODE ANN. § 17-6-1(e) (Supp. 2011).

62. *See supra* note 55.

Columbia allow some degree of review of the defendant's prior convictions in determining dangerousness.[63] Some statutes allow full review of the accused's criminal record,[64] while others allow only the portions of the record that relate to a dangerousness determination[65] or only certain types of crimes.[66] Twenty-five jurisdictions either require or allow judges to consider the defendant's record of appearances, or past conduct while on bond or supervised release.[67]

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63. ALA. R. CRIM. P. 7.2(a)(3); ALASKA STAT. § 12.30.011(c)(6) (2010); CAL. CONST. art. I, § 12; CONN. GEN. STAT. ANN. § 54-64a (b)(2)(B) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3) (2001); FLA. STAT. ANN. § 907.041(3)(b)(2) (West Supp. 2011); GA. CODE ANN. § 17-6-1(e) (Supp. 2011); HAW. REV. STAT. ANN. § 804-3(c)(1) (LexisNexis 2007); 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2)(A) (West 2006); IND. CODE ANN. § 35-33-8-4 (b)(5) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (2007); LA. CODE CRIM. PROC. ANN. art. 334(3) (2003); MD. CODE ANN., CRIM. PROC. § 5-202(f)(1) (LexisNexis Supp. 2010); NEV. REV. STAT. § 178.4853(5) (2009); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(3)(h); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(3)(a) (West 2006); R.I. GEN. LAWS § 12-13-1.3(c)(7) (2002); S.C. CODE ANN. § 17-15-30(B)(1) (Supp. 2010); TENN. CODE ANN. § 40-11-115(b)(5) (2006); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); WIS. STAT. ANN. § 969.01(4) (West Supp. 2010); WYO. R. CRIM. P. 46.1(d).

In some states that allow this review, the statutes do not specify that the judge should consider a defendant's prior convictions specifically in light of how dangerous they are. COLO. REV. STAT. ANN. § 16-4-105(1)(i) (West Supp. 2010); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(7) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MICH. CONST. art. I, § 15(a); MINN. R. CRIM. P. 6.02(2)(h); MO. ANN. STAT. § 544.455(2) (West 2002); NEB. REV. STAT. § 29-901.01 (2008); S.D. CODIFIED LAWS § 23A-43-4 (2004).

64. *See, e.g.*, IOWA CODE ANN. § 811.2(2) (West 2003) (stating that the court may consider the defendant's record, including failure to pay fines or failure to appear at court proceedings); *see also* LA. CODE CRIM. PROC. ANN. art. 334(8) (2003) (allowing a court to consider "[w]hether the defendant is currently out on bond on a previous felony arrest" in addition to the defendant's criminal record).

65. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2)(A) (West 2006) (requiring that, to be considered, the defendant's criminal history be relevant to "violent, abusive, or assaultive behavior"); *see also* IND. CODE ANN. § 35-33-8-4(b)(5) (West 2004) (specifying that the defendant's criminal record must be indicative of "instability and a disdain for the court's authority").

66. *See, e.g.*, GA. CODE ANN. § 17-6-1(e) (Supp. 2011) (creating a rebuttable presumption against bail release when the defendant is charged with a serious violent felony and has been previously convicted of a serious violent felony); *see also* MD. CODE ANN., CRIM. PROC. § 5-202(f)(1) (LexisNexis Supp. 2010) (forbidding the defendant's release on bail if the defendant was previously convicted of one of the crimes enumerated in § 5-202(f)(1) and is currently charged with one of the enumerated crimes).

67. ALA. R. CRIM. P. 7.2(a)(3); ALASKA STAT. § 12.30.011(c)(7) (2010); ARK. R. CRIM. P. 8.5(b)(vii); COLO. REV. STAT. ANN. § 16-4-105(1)(i) (West 2006); CONN. GEN. STAT. ANN. § 54-64a(a)(2)(C) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3)(A) (Supp. 2011); FLA. STAT. ANN. § 903.046(2)(d) (West Supp. 2011); 725 ILL. COMP. STAT. ANN. § 5/110-5(a) (West Supp. 2011); IND. CODE § 35-33-8-4(b) (West 2004); KAN. STAT. ANN. § 22-2802(8) (Supp. 2010); ME. REV. STAT. ANN. tit. 15, § 1026(4)(c)(8), (11) (Supp. 2010); MD. CODE ANN., CRIM. PROC. § 5-202(d)(1) (LexisNexis Supp. 2011); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MO. ANN. STAT. § 544.455(2) (West 2002); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853(5) (2009); N.Y. CRIM. PROC. LAW § 51.30(2)(a) (McKinney 2009); OHIO REV. CODE ANN. § 2937.222(C)(3)(b) (West 2006); S.C. CODE ANN. § 17-15-30(A)(7) (Supp. 2010); TENN. CODE ANN. § 40-11-118(b)(5) (Supp. 2010); VT. STAT. ANN.

A substantial minority of states allow for an even deeper look into a defendant's background by allowing judges to factor the defendant's "past conduct" into their determination.[68] A few states explicitly mention the defendant's history of violence generally as important to evaluating prior conduct.[69]

c. Defendants' Character and Present Circumstances.—The third major factor for determining dangerousness is much broader and allows for judicial discretion in analyzing the circumstances and character of the defendant. Twenty-six states and the District of Columbia urge the court to consider a specific series of factors substantially similar to the factors set forth in the Federal Bail Reform Act, which include the accused's (1) family situation, (2) employment, (3) finances, (4) character and reputation, (5) record of appearances or history of flight, and (6) community ties.[70] However, state danger laws include a variety of additional relevant factors not included in the Bail Reform Act, such as alien status,[71] gang involvement,[72] possession or control of weapons,[73] propensity for violence,[74] general attitude and demeanor,[75] history of depression,[76] and treatment of animals.[77] Many state danger laws begin the list of factors with an

tit. 13, § 7554(b) (Supp. 2011); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. REV. CODE ANN. § 10.21.050(3)(a)–(b) (West Supp. 2011); WYO. R. CRIM. P. 46.1(d).

68. *See, e.g.*, D.C. CODE § 23-1322(e)(3) (2001) (allowing inquiry into a defendant's "past conduct" including criminal history and court record); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C) (Supp. 2010) (prescribing consideration of the defendant's "history and characteristics"); N.M. R. OF CRIM. PROC. FOR DIST. CTS. 5-401(C)(3) (allowing inquiry into "history and characteristics"); OHIO REV. CODE ANN. § 2937.22(C)(3) (West 2006) (focusing on "history and characteristics"); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011) (focusing on "history and characteristics").

69. *See* CONN. GEN. STAT. ANN. § 54-64a(b)(2)(J) (West 1958) (allowing consideration of the defendant's "history of violence"); 725 ILL. COMP. STAT. ANN. 5/110-5.1(b)(1) (West Supp. 2011) (weighing evidence of violent behavior); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010) (considering recent history of violence).

70. *See* statutes cited *supra* note 56.

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (2010) (refusing to allow bail if the person committed a serious felony and there is probable cause to believe the person is in the United States illegally).

72. ARIZ. REV. STAT. ANN. § 13-3961(G) (2010); GA. CODE ANN. § 17-6-1(f)(4) (Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West Supp. 2011); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011).

73. 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(6) (West 2006); N.H. REV. STAT. ANN. § 597:2(III-a)(d) (Supp. 2010); WASH. R. CRIM. P. 3.2(b); *see also* ALA. R. CRIM. P. 7.2(a)(7) (instructing a judge to consider the type of weapon used in the crime).

74. 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(8) (West 2006); KAN. STAT. ANN. § 22-2802(8) (2007).

75. *See* Querubin v. Commonwealth, 795 N.E.2d 534, 542 (Mass. 2003) (quoting Commonwealth v. Hodge (No. 1), 406 N.E.2d 1010 (Mass. 1980)) (including "general attitude and demeanor" in the list of factors a judge should consider when setting bail).

76. N.H. REV. STAT. ANN. § 597:2(III-a)(b) (Supp. 2010).

77. *Id.* § 597:2(III-a)(g).

"including but not limited to" clause, or permit judicial officers to consider "any other factor" relevant to making a determination of dangerousness.[78]

Seven state danger laws do not include any list of factors for courts to consider in exercising judicial discretion.[79] However, in some states, where the legislature has included no specific factors for consideration, state courts have judicially created factors to consider in determining dangerousness.[80] California law now mandates that public safety is the first consideration in determining bail,[81] while traditional factors such as the nature of the charge and the defendant's prior criminal record are secondary considerations.[82] California also requires pretrial detention for serious felonies involving violence or sexual predation.[83] Only one state allows absolute discretion to judges regardless of the present offense charged or prior criminal convictions.[84]

After finding that a defendant poses a danger to an individual or the community, forty-five states and the District of Columbia permit either (1) pretrial detention or (2) release subject to restrictive conditions, depending on the seriousness of the danger posed.[85] Many of the statutes

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78. *E.g.*, FLA. STAT. ANN. § 907.041(3)(b)(3) (West Supp. 2011); IND. CODE ANN. § 35-33-8-4(b)(9) (West 2004); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(9-A) (Supp. 2010); MO. ANN. STAT. § 544.676 (West 2002); NEV. REV. STAT. § 178.4853(10) (2009); N.H. REV. STAT. ANN. § 597:2(III) (Supp. 2010); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(5); OHIO R. CRIM. P. 46(C); R.I. GEN. LAWS § 12-13-1.3(c) (2002); TENN. CODE ANN. § 40-11-118(b)(9) (Supp. 2010); WASH. SUP. CT. CRIM. R. 3.2(e).

79. IDAHO CODE ANN. § 19-2904 (Supp. 2011); KY. REV. STAT. ANN. § 431.520 (LexisNexis 2010); KY. R. CRIM. P. 4.10; MONT. CODE ANN. § 46-9-106 (2011); N.D. R. CRIM. P. 46(a)(3)(G); TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2005); UTAH CODE ANN. § 77-20-1(2) (LexisNexis 2008).

80. For example, the Idaho Supreme Court held,

> The statute makes this decision an occasion for the exercise of the sound legal discretion of the district court. These cases, however, are not entirely consistent with respect to the standard which this Court should apply to determine whether bail was improperly denied. The district court should consider (1) whether the defendant is prosecuting his appeal in good faith, (2) the personal situation of the defendant, (3) the nature and circumstances of the offense, (4) the defendant's past record, (5) the possibility that the defendant will commit additional offenses, and (6) the possibility that the defendant will attempt to escape.

State v. Jimenez, 456 P.2d 784, 789 (Idaho 1969) (footnote omitted).

81. CAL. PENAL CODE §§ 1270(a), 1275(a) (West 2011).

82. *Id.* § 1275(a).

83. *See* CAL. CONST. art. I, § 12(b)–(c) (declaring that a person "shall be released on bail," except for felony offenses involving acts of violence, sexual assault, or threats of great bodily harm where the court finds that there is a substantial likelihood that the person would harm another if released); *Ex parte* Page, 255 P. 887, 888 (Cal. Dist. Ct. App. 1927) (explaining that an individual charged with a capital offense may be denied bail if the evidence "induces the belief that he may have committed the offense"). *See generally In re* Christie, 112 Cal. Rptr. 2d 495, 497–98 (Cal. Ct. App. 2001) (describing various factors and procedures used by California courts when setting bail).

84. N.D. R. CRIM. P. 46.

85. Sometimes, a judge will take dangerousness into account and release a defendant on certain conditions for release. For example, the accused may have to participate in alcohol treatment (if alcohol abuse is possibly the underlying cause of dangerousness) or will have to stay away from a

prohibit detention if conditional release would prevent flight and protect the public from danger.[86] Similarly, many statutes require that the court impose the "least onerous" or "least restrictive" condition that will ensure the defendant's appearance and protect any person or the community.[87]

While states have different considerations and definitions of dangerousness, the majority of states currently allow judges to detain the accused pretrial based on predictions of dangerousness. The next part discusses past studies that have looked at which factors accurately predict pretrial violence.

III. Past Studies on Predictions of Violence

A number of studies have been performed over the last fifty years in order to examine various bail systems, pretrial detention programs, and predictions of pretrial crime. This part reviews the major studies and their conclusions. Most of these studies have a small sample, are locally limited, and, for the most part, are outdated and less predictive than our analysis in Part IV.

A. *Foote's Philadelphia Bail Study (1954)*

The Philadelphia Bail Study, conducted by Caleb Foote in 1954,[88] documented inequities in bail and detention practices, and it served as a catalyst for many bail reforms in both Philadelphia and the rest of the country.[89] Foote examined bail-hearing records for 501 Philadelphia defendants and found evidence that judges relied heavily on defendants' criminal charges when determining bail.[90] This reliance on the charge criterion provided judges with a fast and easy standard to apply to a large volume of cases.[91] The data indicated the opposite of what was expected: those charged with less serious offenses were less likely to appear in court.[92]

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certain person or people. Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 11–12 (2008). GPS bracelets and home detention are other examples of conditional release. *Cf. In re* McSherry, 5 Cal. Rptr. 3d 497, 499–502 (Cal. Ct. App. 2003) (describing various bail restrictions and release conditions based on safety concerns).

86. *E.g.*, MONT. CODE ANN. § 46-9-108(2) (2011).

87. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 276 § 58 (West Supp. 2011); MONT. CODE ANN. § 46-9-108 (2011) (both allowing a court to impose restrictions on a defendant's activity on release).

88. Foote, *supra* note 8, at 1031.

89. According to Foote, the following troublesome issues were apparent in the bail and detention practices of the 1950s: the unstructured exercise of discretion in bail matters, the procedural impediments to the fair administration of bail, the presumption of guilt and pretrial punishment, the inequitable treatment of defendants at bail, and questions about the effectiveness of bail practices. *Id.* at 1069–72.

90. *Id.* at 1048 & n.68.

91. *Id.* at 1034–35.

92. *See id.* at 1062 (stating that bail forfeitures for serious crimes were rare and noting that when gambling, liquor, and traffic offenses were removed from the calculus, the forfeiture rate

If the justification for bail was to guarantee appearance in court, defendants charged with more serious crimes should be receiving bail more often. Bail decisions provided judges with too much discretion, permitting bail to be denied for any reason.[93] Foote's conclusion that too much emphasis was placed on the crime charged was noted, and judges in Philadelphia were encouraged to consider other factors in deciding bail.[94] This study also warned that, due to the uncertainty of human behavior, bail determination may never be effective.[95]

B. *The National Bureau of Standards Study (1969)*

The National Bureau of Standards conducted a study in August 1969 in response to the proposed District of Columbia crime bill introducing preventive detention. The study focused on 712 defendants in a four-week sample of cases in the District of Columbia in 1968.[96] The Bureau's study concluded that only 11% of defendants were arrested for a new crime while released pretrial, a figure that included misdemeanors.[97] If only counting serious felonies, the pretrial crime rate was actually only 5%.[98] The study's first conclusion contradicted the claims of advocates of preventive detention by showing that there is a low crime rate among defendants released pretrial.[99]

The Bureau also concluded that there was no statistical relationship between the first-arrest type of crime and the second-arrest crime. Those

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dropped to 1.35%). Foote also found evidence indicating that judges used cash bail as a means to detain defendants they personally considered guilty and as a means to punish certain defendants. *Id.* at 1038–39.

93. *Id.* at 1038–43. The evidence Foote found of excessive reliance on the charge criterion and manipulative bail proceedings came approximately twenty-five years after the National Commission of Law Observance and Enforcement (known as the Wickersham Commission), which was a government commission on crime that admonished judges and magistrates to pay closer attention to defendants' history, character, standing, personality, and record when setting bail, thus individualizing bail determination. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (1931).

94. *See* John S. Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179, 187–88 (1980) (examining Foote's study and its effects on Philadelphia bail practices and noting that Philadelphia judges are now instructed to consider up to sixteen factors in their bail decisions).

95. Foote, *supra* note 8, at 1036. The defendants' charges were interpreted differently by different judges, which resulted in unequal treatment of similar defendants. Goldkamp, *supra* note 94, at 184.

96. J.W. LOCKE ET AL., NAT'L BUREAU OF STANDARDS, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY 1 (1970) [hereinafter NBS STUDY] (describing a study of 712 defendants with comparisons for "re-arrest rates for defendants initially charged with particular classes of crime").

97. *Id.* at 2 & n.1, 131.

98. *See id.* at 2 ("[O]nly 5 percent of those initially charged with a violent offense were re-arrested for another violent offense, and only 5 percent of those initially arrested for a dangerous offense were re-arrested for a dangerous offense.").

99. *See id.* at 188 (finding only 11% recidivism).

first arrested for committing felonies were almost as likely to be charged with misdemeanors as felonies the second time.[100]

The Bureau also evaluated the District of Columbia bill's predictive mechanism and its accuracy. The bill attempted to predict which individuals were more likely to commit another crime and should therefore be detained, basing its findings on ten characteristics.[101] These ten characteristics were (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the defendant's family ties, (4) the defendant's employment, (5) the defendant's financial resources, (6) the defendant's character and mental conditions, (7) the defendant's past conduct, (8) the length of the defendant's residence in the community, (9) the defendant's record of convictions, and (10) any record of the defendant's appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.[102] The Bureau's study asserted that none of the ten characteristics were actually accurate predictors, because criminal law is a "chancy process."[103]

C. *Los Angeles Study (1970)*

In a 1970 Los Angeles study,[104] an experimental-release group of 328 defendants were released even though they were deemed high risks for failure to appear for trial.[105] The study compared the experimental group with a group of 201 defendants who were deemed low risks and eligible for release.[106] Approximately 74.1% of the low-risk defendants were never rearrested while awaiting trial, while 53% of the high-risk group avoided rearrest.[107] The crimes for which both groups were arrested were mostly property crimes.[108] The study concludes that it is rare for defendants on pretrial release to be arrested for new crimes—especially those who are

100. *See id.* at 135 (illustrating that of the 217 first arrested for felonies, 9 were rearrested for a felony while 8 were rearrested for misdemeanors). The Bureau's third conclusion was that most bail recidivism does not occur within the immediate postarrest time period; thus, preventive detention does not work because most crimes were not committed in the first sixty or ninety days after arrest, which is the time limit set on pretrial detention in the District of Columbia. *See* D.C. CODE ANN. § 23-1322(d)(2)(A) (2001).

101. Ervin, *supra* note 22, at 295.

102. 115 CONG. REC. 19,261 (1969).

103. Ervin, *supra* note 22, at 295.

104. Michael R. Gottfredson, *An Empirical Analysis of Pre-trial Release Decisions*, 2 J. CRIM. JUST. 287 (1974) (part of the Los Angeles Superior Court Own Recognizance Project).

105. *Id.* at 289.

106. *Id.* at 289–90.

107. *Id.* at 294 tbl.IV. These numbers included as failures those who unintentionally missed their trial date and voluntarily returned to the court without the use of a warrant; if these voluntary returns were instead counted as successes, then only 15% of the low-risk group failed to appear and only 27% of the high-risk group failed to appear. *See id.* at 293 (reporting that 85% of the low-risk group and 73% of the high-risk group were successes if voluntary returners are included).

108. *Id.* at 294 tbl.IV.

evaluated as low risks.[109] The Los Angeles study agreed with the National Bureau of Standards study that defendants released pretrial are not very likely to be rearrested.

D. Harvard Study (1970–1971)

A Harvard study conducted in 1970 confirmed the Bureau's findings on the incidence of bail crime, the relationship between the first and second crimes, and the time frame of bail recidivism.[110]

In this study, 657 defendants were examined; 230 were charged with violent crimes but were not eligible for preventive detention.[111] Of the remainder, 427 would have been subject to preventive detention.[112] Of the 657 defendants in the sample, the study found that 12.3% were rearrested, 6.2% were rearrested for violent crimes, and 4.1% were rearrested and convicted for violent crimes.[113] The sample size was small, however, and the margin for error was large for the types of assertions made.

The study examined the ten characteristics that the District of Columbia used to determine which defendants should be held without bail: (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the defendant's family ties, (4) the defendant's employment, (5) the defendant's financial resources, (6) the defendant's character and mental conditions, (7) the defendant's past conduct, (8) the length of the defendant's residence in the community, (9) the defendant's record of convictions, and (10) any record of the defendant's appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.[114] As to the first factor, the Harvard study concluded that the initial charge was actually "little better than a random indicator of recidivism."[115] Similarly, the circumstances of the initial offense did not identify recidivism risks with substantial accuracy.[116] The Harvard study also found that the defendant's family ties, economic situation, and occupational status were equally poor predictors of recidivism.[117] Past conduct as well as character and mental condition, evaluated by variables such as education level and arrests for drunkenness, were of little help

109. *Id.* at 300. It is also rare for pretrial defendants to fail to appear for trial. *Id.*

110. Ervin, *supra* note 22, at 296.

111. Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 306 (1971).

112. *Id.* This study took place in Boston, and this sample of 427 defendants represents the defendants that would have been subject to preventive detention if the defendants were subject to the District of Columbia bill. *Id.*

113. *Id.* at 308 tbl.A.

114. *Id.* at 309–10.

115. *Id.* at 311.

116. *Id.*

117. *Id.* at 312.

because many of the defendants shared the same characteristics.[118] Mental illness and drug use correlated with recidivism fairly substantially, but only a small number of recidivists displayed these traits.[119]

The Harvard study concluded that factors that were better at predicting recidivism included juvenile arrests, previous incarceration, conviction of violent or dangerous crimes within the past ten years, and convictions of four or more misdemeanors.[120] In several cases, defendants with these characteristics had recidivism rates almost twice the rate of the overall sample.[121] In addition, those who had failed to appear at previous court proceedings more than twice had a higher recidivism rate than those who had not failed to appear.[122] What could be gleaned is that criminal acts committed while on bail could be traced with certainty to 10% of the population eligible for preventive detention.[123]

While the Harvard study was groundbreaking during its time and is still the most widely cited study on this topic, it failed to differentiate between indicators that are poor predictors simply because the sample size under con-

118. *Id.* High school graduates were better risks, but 75% of defendants had not graduated from high school, making any conclusions difficult to ascertain. *Id.* In addition, most had never served in the armed forces. *Id.*

119. *Id.* Many of these factors could not be accurately predicted due to small sample size. *Id.* at 313 n.72.

120. *Id.* at 313.

121. *Id.*

122. *Id.* (21.3% as compared to 4.6%). The researchers gave each defendant a dangerousness score and then tried to find a point where the most recidivists would be caught and the least nonrecidivists detained. *Id.* at 314. At that numerical point, eighteen defendants were recidivists and fifty-two were not. *Id.* at 315. At no point could the researchers find a formula that would detain more recidivists than nonrecidivists. *Id.* at 314. Missing from this study are the unreported, undetected, and unsolved bail crimes. Because of these uncertainties, some have used arrests, not convictions, in recidivism studies. *Id.* at 317. However, using the number of arrests in calculations is an uncertain figure that calls into question the accuracy of the results. *Id.* at 321. For this reason, the study presented in this Article uses convictions, not arrests.

123. *Id.* Six other studies confirm these findings. *Id.* A 1962 study reported sixteen rearrests (.7%) out of 2,192 defendants released pending trial. *Id.* at 321 n.126 (citing NAT'L CONFERENCE ON BAIL & CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 172 (1965)). A 1966 study found that 207 (7.5%) of 2,776 defendants released on felony charges for a two-and-one-half-year period were charged with a bail crime, and 124 (4.5%) were charged with a crime of actual or potential violence. *Id.* (citing REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA (1966)). Another study, this one after the Bail Reform Act of 1966, found that about 9% of bailed defendants (59 out of 671) were indicted for crimes committed within six months after pretrial release, as compared with 15% of defendants released on bail pending appeal (14 of 93). *Id.* (citing JUDICIAL COUNCIL OF THE D.C. CIRCUIT, REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA 45 (1968)). In the most comprehensive study on pretrial crime, 200 (9.2%) of 2,166 defendants released on recognizance were rearrested pretrial, and of those charged with serious or violent crimes, 16 (2.9%) of 552 were rearrested for another violent or serious crime. *Id.* (citing RICHARD MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL: FINAL REPORT OF THE D.C. BAIL PROJECT 31, 44 (1966)). In the Vera Institute's Manhattan Bail Project, only 20 (less than 1%) of 3,200 defendants released on their own recognizance were rearrested. *Id.* at 322 n.127 (citing *Federal Bail Procedures: Hearings on S. 2838, S. 2839 and S. 2840 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. 117 (1964)).

sideration was too small and predictors that would be uninformative even in large samples. Dividing 657 defendants over a dozen initial crime categories made it extremely difficult to say anything informative about the relationship between initial crime and future criminal activity.[124]

E. Goldkamp's Philadelphia Bail Study (1977–1980)

Goldkamp conducted a study in the late 1970s that examined changes in the Philadelphia bail system that had occurred since the 1950s.[125] By 1980, many aspects of the bail system had changed in Philadelphia.[126] Before bail was set, defendants were first interviewed about their community ties, employment, income, health problems, and prior record,[127] and this information was provided to judges.[128] While the Pennsylvania Rules of Court dictated that judges weigh sixteen factors when determining bail,[129] the nature of the criminal charge still appeared to carry the most weight in deciding bail.[130] The Goldkamp study also indicated that those who were detained pretrial were much more likely to be incarcerated than those who were released pretrial when both groups pleaded, or were found, guilty.[131]

F. 1980s Studies

In the early 1980s, some studies showed that pretrial crime rates were low and defendants attended their court dates. These studies tried to counter the public tide that was turning against pretrial release and toward preventive detention. Pryor and Smith's review in 1982 concluded that more than 85% of defendants appeared for their court dates.[132] Rearrest rates were reported

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124. For instance, like our analysis below, the Harvard study makes assertions about the dangerousness of those held, claiming that they are more dangerous than those released. *Id.* at 332 (calculating that the 102 defendants held are substantially more dangerous than the typical defendant (with about a fourth of them expected to commit a new crime) but also concluding that if they had been released, the total rate of bail conviction would have increased by a little more than 2%). It is difficult, though, with such a small number of defendants to make such assertions with any degree of accuracy.

125. Goldkamp, *supra* note 94, at 179.

126. *Id.* at 186. There was no longer a division of responsibility between the lower and higher courts; instead, Philadelphia had an entire division of its court system devoted to pretrial services. *Id.* Lower court judges were exclusively lawyer-judges. *Id.* Nonhomicide defendants waited a maximum of twelve hours for bail to be set. *Id.*

127. *Id.*

128. *Id.* This information was provided to judges by the Pretrial Services Division. *Id.* at 188.

129. *Id.* at 188. Factors included employment, community ties, financial resources, etc. *Id.*

130. *Id.* Goldkamp based this assertion on interviews with bail judges in Philadelphia, observations of first appearances, and empirical analysis of bail decisions. *Id.* at 188 & n.27.

131. *Id.* at 190–91.

132. DONALD E. PRYOR & WALTER F. SMITH, PRETRIAL ISSUES: SIGNIFICANT RESEARCH FINDINGS CONCERNING PRETRIAL RELEASE 1 (1982); *see also* JEFFREY A. ROTH & PAUL B. WICE, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA 42–43 (1980) (finding 11% nonappearance rates for felony and misdemeanor cases); WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 87–105 (1976) (noting that the percentage of defendants on pretrial release who failed to appear increased between 1962 and 1971 and analyzing problems with computing such failure-to-

to be quite high though, hovering between 10% and 20%, with 5% to 10% of those arrests resulting in convictions.[133] These studies ultimately did not convince policy makers: federal and state laws increased detention.[134]

In 1985, against the tide of academic commentary at the time, the Bureau of Justice Statistics examined data and concluded that the following factors could be used to determine whether a person was likely to commit a new crime while on release: amount of time before trial, prior criminal record, drug use, economic and social stability, age, sex, and race.[135] According to the Bureau of Justice Statistics, those with prior criminal records were more likely to commit new crimes or fail to appear at trial.[136]

G. *Urban Institute Data (1999–2001)*

Though most of the public debate on pretrial detention died in the 1980s, there have been a few more recent studies that have examined pretrial detention issues, though none on a national scale. In a largely inconclusive study, the Urban Institute (UI) examined pretrial risk assessment in the District of Columbia. The study was conducted in 2001 using data on defendants processed by the D.C. Pretrial Services Agency between January 1, 1999, and June 30, 1999.[137] The instrument used by UI contained

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appear data); PAUL B. WICE, FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE 65–73 (1974) (describing failure to appear in terms of a forfeiture rate, noting that high forfeiture rates could be the result of several problems, arguing that forfeiture rates can be easily manipulated and can be interpreted to advance a particular group's agenda and proposing some solutions for high forfeiture rates).

133. *See* NBS STUDY, *supra* note 96, at 2 (reporting that "11 percent of those released charged with misdemeanors or felonies were subsequently rearrested on a second charge during the release period"); *see also* Angel et al., *supra* note 111, at 308–09 (reporting that 14.5% of the sample defendants were rearrested during the pretrial period and 64% of those arrested (9.6% of the sample) were convicted). Some jurisdictions had rearrest rates as low as 3% to 8%. Gerald R. Wheeler & Carol L. Wheeler, *Two Faces of Bail Reform: An Analysis of the Impact of Pretrial Status on Disposition, Pretrial Flight and Crime in Houston*, 1 POL'Y STUD. REV. 168, 170, 173–78 (1981) (finding that a higher number of convicted, detained defendants were sentenced to prison than those released on bail but that pretrial crime rates for released defendants were low at about 7%).

134. *See supra* notes 4–6 and accompanying text.

135. RELEASE AND MISCONDUCT, *supra* note 8, at 4. The longer an individual is on bail release before his or her trial, the higher the likelihood that he or she will commit a new crime. *Id.*

136. *Id.* at 4 (finding also that those with prior drug use and poor economic and social stability were likely to commit new crimes or fail to appear at trial). About 35% of defendants with a serious record (three felony convictions, one case pending, and one failure to appear) either failed to appear in court or were arrested for a new crime while released on bail, compared to only 20% of those with less serious records (one felony conviction, no pending cases, and no failure to appear) and only 8% of those with no previous criminal record. *Id.* About 98% of the "stable group" (employed, college degree, six years at same residence, and retained counsel) avoided misconduct—new arrest or failure to appear—while only 80% of the "unstable group" (unemployed three years, no high school degree, no fixed residence, and appointed counsel) was able to do so. *Id.*

137. LAURA WINTERFIELD, MARK COGGESHALL & ADELE HARRELL, URBAN INST., DEVELOPMENT OF AN EMPIRICALLY-BASED RISK ASSESSMENT INSTRUMENT 1 (2003). Defendants had appeared in either the D.C. Superior Court or in the U.S. District Court for the District of Columbia (only 3%). *Id.* at 5.

twenty-two factors[138] related to criminal history and the current charge.[139] After assigning numbers and then categories to each defendant,[140] UI examined how the instrument had performed in predicting which defendants were failure-to-appear (FTA) risks and which were safety risks.[141] The correlation found was not perfect, and UI concluded that most of the variation across people lies in factors not captured by the data.[142]

H. *New York City Pretrial Misconduct Data (2001)*

In another local study, the New York City Criminal Justice Agency (CJA) conducted a study on New York defendants in order to analyze pretrial risk prediction.[143] New York law prohibits considering dangerousness as a factor in determining bail, and thus bail decisions are based exclusively on risk of flight.[144] CJA compiled data on pretrial rearrests[145] showing that 17% of defendants were rearrested while on pretrial release,[146] and only 3% of defendants were rearrested for violent crimes.[147]

The analysis used independent variables that could be categorized into community-ties items,[148] criminal-history indicators,[149] top charge at initial

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138. *Id.* at 4. Three of the items, which were meant to help predict failure to appear, were age, citizenship, and whether the defendant lived with a family member. *Id.*

139. *Id.* ("Nearly all selected items relate to drug testing, criminal history, and current charges.").

140. "Low" consisted of good candidates for release on personal recognizance, "condition monitoring" would recommend release on personal recognizance with certain conditions, "moderate" would recommend release under more restrictive conditions, "high" would recommend release only under the most restrictive conditions (e.g., halfway house, intense supervision program), and "severe" would recommend detention. *Id.* at 7.

141. *Id.* at 4–5. The instrument produced a correlation (also known as Spearman R) of .21 between the categories and appearance risk and .16 between the categories and safety risk. *Id.* at 4. A strong relationship correlation is usually considered .33 or higher. *Id.* at 5. UI determined that this instrument would be fairly useful in decision making. *Id.* at 5.

142. *See id.* at 4–5 (stating that "much variance in risk is not explained" by the instrument and the factors it employed). UI suggested that this variance might have been explained by nearly half of the sample being categorized as a moderate risk. *Id.* at 5.

143. QUDSIA SIDDIQI, PREDICTING THE LIKELIHOOD OF PRETRIAL FAILURE TO APPEAR AND/OR RE-ARREST FOR A VIOLENT OFFENSE AMONG NEW YORK CITY DEFENDANTS: AN ANALYSIS OF THE 2001 DATASET 1 (2009). Defendants in the analysis were all initially arrested between January 1, 2001, and March 31, 2001. *Id.* at 3.

144. *Id.* at 1.

145. *Id.* at 1–2.

146. *Id.* at 7. Rearrests included both misdemeanors and felonies. *Id.*

147. *Id.* at 13. Violent offenses included murder, non-negligent murder, negligent murder, forcible rape, robbery, aggravated assault, simple assault, and kidnapping. *Id.* at 55. From the at-risk sample, 15% of defendants failed to appear in court. *Id.* at 13.

148. *Id.* at 13. Community-ties items included data concerning whether the defendants had a working telephone (residential or cellular), length of time at their current address, if they had a New York City-area address, if they expected someone at their arraignment, and whether they were employed, in school, or in a training program full-time when they were arrested. *Id.*

149. *Id.* The criminal-history variables included information on a defendant's prior arrests, convictions, failures to appear, and pending cases. *Id.*

arrest,[150] demographic attributes,[151] and case-processing characteristics.[152] The study found that residing at a New York City address, having a residential telephone, being employed, being in school, or participating in a training program full time were all factors that related significantly to low risk of pretrial misconduct.[153]

In terms of criminal history, those defendants with prior arrests or previous failures to appear in court were at a higher risk of failing to appear or being rearrested for violent offenses.[154] The correlation between the initial crime charged and the risk of pretrial misconduct was statistically significant, and those initially arrested for felony-level violent offenses and property offenses were actually less likely to fail to appear in court or to be rearrested for a violent crime.[155] In terms of demographics, younger defendants were also higher risks.[156]

CJA concluded that while New York did not then permit consideration of dangerousness and public safety when making pretrial-release decisions, CJA's analysis and recommendation system could help predict the likelihood of pretrial misconduct.[157] Indeed, CJA posited that focusing exclusively on flight-risk prediction could still reduce pretrial crime.[158]

I. *Analysis of Earlier Studies*

Previous studies revealed several important points about prediction of pretrial crime. First, judges often relied on the initial charge to set bail.[159] Though some scholars criticized the reliance on the initial charge, stating that it was irrelevant to what crimes the defendant would later commit,[160] others demonstrated that those charged with more serious crimes were actually more likely to appear in court.[161] Second, several researchers pointed out

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150. *Id.* at 13–14. Both the type and severity of the offense were considered. Offense type was based on Uniform Crime Reports' categories: violent, property, drug, public order, and other offenses. *Id.*

151. *Id.* These variables included the defendant's sex, ethnicity, and age. *Id.*

152. *Id.* at 14 ("The case-processing variables included . . . borough of initial arrest, borough of first pretrial re-arrest, time from arraignment to disposition on the initial arrest (case-processing time), type of first release, and court of disposition.").

153. *Id.* at 23.

154. *Id.* Defendants with open cases were also at a higher risk of new arrests or failing to appear in court. *Id.*

155. *Id.* at 26. Those initially arrested for misdemeanors or other lesser offenses were more likely to fail to appear or be rearrested for a violent crime. *Id.*

156. *Id.*

157. *See id.* at 51–52 (noting that the CJA's recommendation system was implemented citywide in June 2003).

158. *Id.* at 52.

159. Foote, *supra* note 8, at 1035; Goldkamp, *supra* note 94, at 183.

160. Angel et al., *supra* note 111, at 311.

161. *See, e.g.*, SIDDIQI, *supra* note 143, at 49 (reporting that only 3% of their 2001 at-risk sample was rearrested pretrial for a violent offense); Foote, *supra* note 8, at 1036 (reporting that "most bail jumping was for minor crimes and that there was none for the most serious offenses").

that there was a low crime rate by defendants released pretrial.[162] A New York study stated that there were even lower rearrests for violent crime,[163] though some rearrest rates reported in the 1980s ranged from 10% to 20%, depending on the jurisdiction.[164] Third, some studies claimed that past conduct[165] or previous convictions were not accurate predictors of future criminal conduct.[166] But other researchers found that a prior criminal record was relevant to future misconduct.[167] Fourth, some said previous failure to appear did not predict future failure to appear or future crimes that would be committed.[168] Fifth, all of those who commented on age and gender noted that younger, male defendants were more likely to commit pretrial crime than

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162. *See* NBS STUDY, *supra* note 96, at 2 (reporting in 1970 that 11% of those released charged with misdemeanors or felonies were rearrested presentence); *see also* Gottfredson, *supra* note 104, at 293 (finding 74.1% of low-risk and 53% of high-risk defendants were not rearrested pretrial); *supra* subpart III(F) (detailing the studies from the early 1980s).

163. *See* SIDDIQI, *supra* note 143, at 49 (finding that 3% of their 2001 at-risk sample was rearrested pretrial for a violent offense).

164. PRYOR & SMITH, *supra* note 132, at 2.

165. Angel et al., *supra* note 111, at 312 (suggesting that the usefulness of past conduct as a factor was limited because many recidivist and nonrecidivist defendants shared the same characteristics).

166. *See* WILLIAM RHODES ET AL., PREDICTING PRETRIAL MISCONDUCT WITH DRUG TESTS OF ARRESTEES: EVIDENCE FROM SIX SITES 4 (1996), *available at* https://www.ncjrs.gov/pdffiles/pretrmis.pdf (finding that prior failures to appear did not lead to future likelihood to commit crimes while on release for individuals charged with serious crimes); MARY A. TOBORG, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 5, 18 (1981) (studying 3,500 defendants in a multivariate study to demonstrate that it was not possible to identify defendant characteristics that could predict failure to appear accurately); PAUL B. WICE, FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE 73 (1974) (casting doubt on the importance of prior convictions in the pretrial-release determination by pointing out that the seriousness of the defendant's criminal charge had "very little predictive value" in court appearance and noting that survey respondents who favored prior record in determining release had bail-forfeiture rates higher than the national average, indicating overemphasis on prior convictions in a national regression analysis); John S. Goldkamp et al., *Pretrial Drug Testing and Defendant Risk*, 81 J. CRIM. L. & CRIMINOLOGY 585, 605, 622–23 (1990) (noting that the Dade County multivariate analysis revealed no significant relationship between prior arrests or convictions and failure to appear in court); Gottfredson, *supra* note 104, at 289, 295 (finding through a comparison between 201 Los Angeles defendants in 1969–1970 eligible for pretrial release and 328 defendants rejected by the pretrial-release program that there was little explanatory power between failure-to-appear rates and prior-conviction rates, even though one group of defendants had more prior convictions); Peggy M. Tobolowsky & James F. Quinn, *Drug-Related Behavior as a Predictor of Defendant Pretrial Misconduct*, 25 TEX. TECH L. REV. 1019, 1028 (1994) (noting that "there is no research consensus regarding the relationship, if any, between a defendant's criminal record . . . and the likelihood of his court nonappearance" and that research specifically found that prior criminal record was not correlated to a "defendant's failure to appear in court").

167. RELEASE AND MISCONDUCT, *supra* note 8, at 4.

168. THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 10 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf (finding no relationship between prior failures to appear and future failures to appear). For additional support, see sources cited *supra* note 166.

older, female defendants.[169] Finally, many scholars said that determinations of bail and predictors of pretrial crime could never be effective or accurate.[170]

Predicting pretrial violence is a difficult endeavor. During debates of the Federal Bail Reform Act, some opponents of the bill criticized the use of predictors of dangerousness in determining bail. One opponent asserted that predictions are imprecise and that states permitting detention based on these factors have not experienced any reduction of pretrial crime rate.[171] One House report quoted experts stating that predicting pretrial crime was nearly impossible.[172] Other experts pointed out the irony in the fact that many who were detained pretrial were often released rather than convicted, suggesting that predictions are frequently inaccurate.[173] A look at previous studies shows that predicting crime pretrial requires a large sample size and must account for selectivity bias.

Only three studies prior to 1987 focused on *violent* pretrial criminality.[174] These three studies produced similar results despite varying in jurisdiction and year: high-risk defendants were younger, unemployed, used drugs, and had longer criminal records.[175] Beyond that, the limited data and sample sizes made it difficult to make more fine-grained predictions[176]—a problem we do not have given our extensive data. Our approach, discussed in the next part, leverages our large sample size to move beyond simple summary statistics to a model that determines which factors are most important in predicting violence while, at the same time, controlling for all other observed characteristics.

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169. *See* RELEASE AND MISCONDUCT, *supra* note 8, at 4 (finding a higher probability of misconduct among males and younger defendants); SIDDIQI, *supra* note 143, at 26 (finding that the likelihood of failing to appear or of being rearrested for a violent offense decreased with age).

170. *See* NBS STUDY *supra* note 96, at 3 (describing how accurate prediction models are impossible due to many crimes not being reported and suspects not being apprehended and that, therefore, these additional crimes cannot be included in data used to create statistical models); Foote, *supra* note 8, at 1036 (describing how attempts to individualize bail determination have to deal with uncertainty inherent in predicting human behavior).

171. H.R. REP. NO. 99-1121, at 11–12 (1984).

172. *Id.*

173. John S. Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 JUST. SYS. J. 234, 238 tbl.1 (1979–1980) (reporting that only 55% of the defendants detained throughout the pretrial period were convicted and that the conviction rate for those detained for more than twenty-four hours, but not through trial, was 39%).

174. *See* Mary A. Toborg & John P. Bellassai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses*, *in* THE PREDICTION OF CRIMINAL VIOLENCE 101, 103 (Fernand N. Dutile & Cleon H. Foust eds., 1987) (describing three studies of serious pretrial criminality conducted before 1987).

175. *Id.* at 103–04.

176. *See id.* at 104 (concluding that the low degree of accuracy of pretrial-risk-prediction studies is due to the low rate of pretrial misconduct).

IV. Analysis of Pretrial Crime Dataset

This part analyzes our national dataset of felony state defendants in large U.S. counties to address the most controversial points of prior work, including whether judges can reliably predict pretrial crime using any factors. This analysis explores the role of the present offense charged, prior convictions and arrests, failure-to-appear rates, age, and sex in predicting pretrial crime.

We note at the outset that while empirical analysis is highly relevant and evidence-based prediction is an improvement over the system we currently have, there is no substitute for an individual determination of guilt before a deprivation of liberty.[177] And indeed, an ideal pretrial-release system that respects constitutional protections would leave all fact finding until trial and not allow judges to make any of these predictions pretrial.[178] But given the reality of federal and state judges considering dangerousness, the initial charge, and previous convictions in release determinations, judges should at least prepare to make these decisions in an evidence-based manner.

A. *Introduction to Dataset and Explanation of Variables*

Most of the prior work discussed above dealt with small, geographically confined samples over a couple of years.[179] Our analysis, in contrast, is based on a nationally representative sample covering the seventy-five largest counties in the United States. We use the Bureau of Justice's State Court Processing Statistics from 1990 to 2006.[180] This dataset is particularly appropriate because it is explicitly designed as a nationally representative sample of large urban counties.[181] As the survey abstract notes, "These 75 counties account for more than a third of the United States population and approxi-

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177. *See* Ricks v. District of Columbia, 414 F.2d 1097, 1110 (D.C. Cir. 1968) ("Statistical likelihood that a particular societal segment will engage in criminality is not permissible as an all-out substitute for proof of individual guilt."); *see also* Baradaran, *supra* note 4, at 727 (maintaining that individuals should retain their liberty until proven guilty at trial).

178. *See* Baradaran, *supra* note 4, at 776 (arguing that a pretrial-release system that eliminated the current practice of allowing judges to predict defendants' guilt before trial would be more faithful to the Due Process Clause).

179. An exception to this is the reports set out by the Bureau of Justice Statistics itself, though they do not provide the same depth of analysis over such a long period of time and come to some different conclusions. *See* 2004 FELONY DEFENDANTS, *supra* note 10, at 4 (analyzing a sample of 15,761 felony cases that arose in May 2004 in 40 of the 75 most populated counties in the nation); COHEN & REAVES, *supra* note 168, at 11 (analyzing samples of 15,000 felony cases biennially from 40 of the 75 most populated counties in the nation from 1990 to 2004).

180. The survey was originally known as the National Pretrial Reporting Program and tracks defendants arrested on felony charges. *State Court Processing Statistics*, BUREAU JUST. STAT., http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=282.

181. Data is taken from May of each year with sampling done in the large jurisdictions. The survey provides weights that allow one to reconstruct a sample representative of the seventy-five counties. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS, 1990–2006: FELONY DEFENDANTS IN LARGE URBAN COUNTIES 5 (2010), *available at* http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=2038&ds=1&file_id=1062658.

mately half of all reported crimes."[182] Every two years, the ten largest U.S. counties are automatically surveyed, as are thirty other counties drawn from the next sixty-five largest counties.[183] The dataset also spans almost two decades (1990–2006), abating concerns that results are due to peculiarities of a given year.

The data include over 116,000 observations spanning the sixteen-year period, as shown in Table 2.[184] Each observation records what happened to a given felony defendant from the time of his arrest through his trial. Over this period, judges released a little over 70,000 defendants, with an average release period of 122 days. We rely on data on both defendants' rearrest outcomes and their characteristics.[185] The data contain initial-felony-charge categories including violent crimes, property crimes, drug crimes, and public order offenses. We also record the percentage of those arrested that are held in each year. This extensive and representative dataset gives us a fair amount of precision.

Our data are a rich source of information on the initial crime committed, any subsequent bail crime, and the prior record of the defendant, including any failures to appear in court.[186] The data also contain basic information on the demographic characteristics of the defendants, such as age, gender, and race. As judges are not allowed to use race or gender in considering whom to release, we do not use this demographic information, as we wish to focus on a model relevant to legal practice. Additionally, we use the counts of felony arrests to form average county crime rates by type of crime, which we will discuss below as an important control in our study of rearrest while on bail.

B. *Selectivity Bias*

As a preliminary matter, two types of selectivity bias are inherent in pretrial risk assessment. First, there is no way to directly observe the risk posed by detained defendants. It is difficult to predict what would happen if we were to start releasing those who were previously detained, because the statistical model is based on the released, who may be different in unobservable ways than those who are detained. In an early attempt to deal with this,

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182. *Id.*

183. *Id.* at 5–6.

184. The original data contain just over 130,000 observations. About 10% of these are missing some piece of information we wish to use and are therefore removed, leaving us with 116,000. Common missing information is whether the defendants were released pretrial or their prior arrest record.

185. Those defendants who were held waited in jail an average of 73 days (a median of 41 days). Those who were released had a median of 100 days. In addition, for those who were released and rearrested, median time from release to rearrest was 63 days, with the average being 90 days. For those who were rearrested, the median time to trial was 153 days with a mean of 164 days.

186. Tables 4 and 5, *infra*, give summary statistics for the covariates we use in the probit model.

Goldkamp used emergency releases of low-danger inmates and found that, unsurprisingly, those who were held were indeed more dangerous than those who were released.[187]

Though, admittedly, selectivity bias is a serious issue, we can address this problem using modern empirical methods and access to data from many jurisdictions. With the large number of observations provided by national-level data, we are able to model and predict the risk of detained defendants. As we show in subpart IV(F), counties across the United States have wildly varying policies on detention, which means defendants with similar characteristics are released in some jurisdictions but often held in others. We exploit this variation across counties to look at how the probability of rearrest rises for those released as we release a larger, and potentially more dangerous, fraction of defendants. From this we can predict how dangerousness differs between those defendants commonly, but not always, held and those commonly released.

Second, when courts release defendants with conditions, the defendants may experience lower levels of risk than what they would have naturally experienced.[188] The worry here is that we will not be recovering the latent probability that a person would commit crime, because their release may have been under a set of conditions that may make them less likely to commit crime. While it would certainly be useful to know the latent crime risk of a defendant, the more relevant policy question is the defendant's crime risk if he is released under a standard set of restrictions by the court, as this is the crime risk that will likely occur under a policy shift toward increased releases. Knowing a defendant's crime risk under no restrictions is not pertinent if the most common way defendants are released is with restrictions.[189]

C. *Overall Pretrial Crime Rates & Initial Charge*

In this subpart, we explore overall pretrial crime rates and how individual defendant characteristics, like the initial charge, predict rearrest while on release.

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187. John S. Goldkamp, *Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia*, 74 J. CRIM. L. & CRIMINOLOGY 1556, 1586 (1983).

188. Toborg & Bellassai, *supra* note 174, at 105.

189. *See* ANTHONY M.J. YEZER ET AL., CLASSIFICATION SYSTEMS FOR THE ACCUSED: AN EMPIRICAL ANALYSIS OF WASHINGTON, D.C. 79–80 (1986) (discussing the inadequacy of analytical models that predict system-wide crime risk by considering only the crime risks posed by persons who are released with no restrictions). Of course, we would also be interested in knowing how such restrictions affect the probability of committing a crime. But we leave that for future work because it is potentially very difficult to disentangle the causal effect of restrictions from the selection effect that those who are more dangerous may be placed under more serious restrictions on pretrial release. *See id.* (recognizing that restrictions on release affect the probability of committing a crime and that those given more restrictive releases have a higher probability of misconduct).

While some prior work has commented that pretrial crime is actually low, other reports have stated that rearrests were between 20% to 30% in some jurisdictions.[190] Using our dataset, we can confirm some previous studies that concluded that, overall, even among felony defendants, there is a relatively low level of rearrest pretrial.[191] Table 3 presents statistics on release and rearrest based on the initial charge the defendant faced. Of all of the defendants released, 16% are rearrested for any reason,[192] 11% are rearrested for a felony, and only 1.9% are rearrested for a violent felony. Overall, the rates of pretrial crime, and especially violent pretrial crime, were perhaps lower than one might expect, especially given general recidivism rates, particularly among felony defendants.[193]

We then turn to examine how the initial charge predicts a defendant's rearrest rate. Overall, the data show that those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial.[194] However, those charged with violent crimes, if arrested, are more likely to be rearrested for violent crimes on release.[195]

In forty-four jurisdictions, judges may consider the defendant's present charge in determining release.[196] Prior studies have also found that judges often rely on the initial charge to set bail,[197] though some studies have concluded that the crime charged is unrelated to the crime the defendant is rearrested for on release.[198] Our large sample allows us to draw a much cleaner inference than found in previous studies because we have over 70,000 released defendants. Thus, we can subdivide our data by initial crime and still confidently predict the probability of rearrest. For example, among all those released between 1990 and 2006, the probability that any person is rearrested while awaiting trial was 16%.[199] This probability, though, varied

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190. *See supra* notes 163–64 and accompanying text.

191. *See infra* Table 3. Obviously there is not one national detention regime in the United States because many jurisdictions have their own detention practices. While the national data is interesting broadly, to suggest any specific changes, this analysis must be replicated on a county level.

192. These break down as 6% misdemeanors (a slight number being failures to appear), 2% drug-possession felonies, and 9% non-drug-possession felonies.

193. The normative questions around how many defendants should be released are not addressed in this Article, but will be in a forthcoming article. For other scholars addressing the same topics, see generally Roger H. Peters & Mary R. Murrin, *Effectiveness of Treatment-Based Drug Courts in Reducing Criminal Recidivism*, 27 CRIM. JUST. & BEHAV. 72 (2000) and George E. Dix, *Clinical Evaluation of the "Dangerousness" of "Normal" Criminal Defendants*, 66 VA. L. REV. 523 (1980).

194. *See infra* Table 3.

195. *See infra* Table 3.

196. *See, e.g.*, IDAHO R. CRIM. P. 46; N.D. R. CRIM. P. 46; *see also supra* subsection II(B)(1)(a).

197. *See supra* Part III.

198. *See supra* note 115 and accompanying text.

199. *See infra* Table 3. Some of these rearrests were due to a failure to appear in court. If the original charges were felonies, the rearrests would show up in the data as Public Order "Other"

wildly across individuals based on observable characteristics. In fact, one can readily calculate the rearrest probability based on the original offense.[200] Here, we provide a simple description of these characteristics' relation to pretrial crime. Below, we bring all these factors into a probit model that lets us predict a given person's overall probability of committing a crime.

While the Harvard study and others previously claimed that there was little information in the initial charge, this turns out only to be true when one lacks the data to discriminate effectively between groups. Table 3 provides rearrest probabilities for those released, conditional on the initial charge. For example, those with an initial murder charge were more than twenty times more likely to be rearrested on a violent felony charge than defendants charged with fraud (6.4% vs. 0.3%) and about six times more likely than defendants arrested on drug possession charges (6.4% vs. 1.1%).

We can use Table 3 to give an overview of pretrial crime broadly.[201] It shows that those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial. The highest pretrial rearrest rates were for defendants charged with drug sales or robbery (21%),[202] followed by motor vehicle theft (20%), and burglary (19%). Those released who were charged with the "more dangerous crimes," such as murder, rape, and felony assault, had much lower overall rates of pretrial rearrest at 12%, 9%, and 12% respectively.

Because many of the federal and state bail reforms focused on decreasing violence and cutting down on violent bail crime, the last column of Table 3 breaks out rearrests for violent crime. It makes clear that while no group was composed mostly of people who will be rearrested, there was still huge variation in how "dangerous" different groups were on average. For example, those *originally* charged with violent crimes, particularly murder, were much more likely to be rearrested pretrial for violent crimes. Murder defendants led this group with a 6.4% violent-crime rearrest rate. This is a relatively high percentage, affirming much of what has historically existed as a presumption against release of murder defendants. In addition, other defendants charged initially with violent crimes were much more likely to be rearrested for violent crimes. Robbery defendants had a 5.8% chance of

felonies. Some rearrests would also show up as misdemeanors. We have gone through our data and looked at the exact name of the rearrest charge, and we estimate that only 14% of these Public Order "Other" rearrests, and less than 1% of misdemeanor rearrests, were for failure to appear in court. As very few (3%) of the rearrests were charged with Public Order "Other" violations, removing these failure to appear or fugitive crimes would only slightly decrease the overall rearrest rate.

200. Table 3 gives, for each initial charge, the incidence of release along with the incidence of rearrest among those released.

201. Violent crimes refer to the first five categories in Table 3: murder, rape, robbery, assault, and other violent crimes. Property crimes include burglary, larceny/theft, motor-vehicle theft, forgery, fraud, and other property crimes. Drug crimes are sales and possession/other, and public order crimes are the last three felonies in Table 3: weapons, driving-related felonies, and other public order crimes.

202. Robbery is classified as a violent crime, but it is also a property crime.

rearrest for violent crime, with rape defendants at 3.2%, and assault defendants at 2.9%. These rearrest rates were higher than those in other categories, except for motor-vehicle theft, which turns out to be more closely connected to violent crime than other property crimes.

While there is a large range of dangerousness pretrial, those released pretrial are perhaps much less dangerous than most people would anticipate.[203] For almost all crimes, except for three categories,[204] defendants were only about 1%–3% likely to be arrested for a violent crime pretrial. These data also show that the initial charge is linked with the crime the defendant is arrested for after release. Thus, those charged with violent crimes are more likely to be rearrested for violent crimes than those charged with nonviolent crimes.

Because we are most interested in predicting and preventing violent crimes, we focus on describing and then modeling *violent* crime rearrests for the various categories of crime. In subparts IV(F) and IV(I) we use the same modeling techniques to add information about all crimes and flight risk. Below, we will discuss evidence of how well judges integrate this information in their decisions about whom they release.

D. Past Conduct as a Predictor of Future Crime

Thirty-four states and the District of Columbia conduct some review of the defendant's prior convictions as a factor in pretrial release.[205] However, scholars have disagreed about whether past conduct or previous convictions are accurate predictors of future criminal conduct.[206]

Our analysis finds that a key predictor of future crime is past crime. The data show that the number of previous convictions is directly correlated with future likelihood to commit crime. However, our data demonstrate, surprisingly, that rearrest rates are not much higher for those who have four

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203. While some may argue that the public should be disappointed with any pretrial crime, our society has always been willing to risk some pretrial crime in favor of protecting the presumption of innocence and due process rights. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358 (describing the maxim that society would rather acquit the guilty than imprison the innocent).

204. These categories are murder, rape, and robbery.

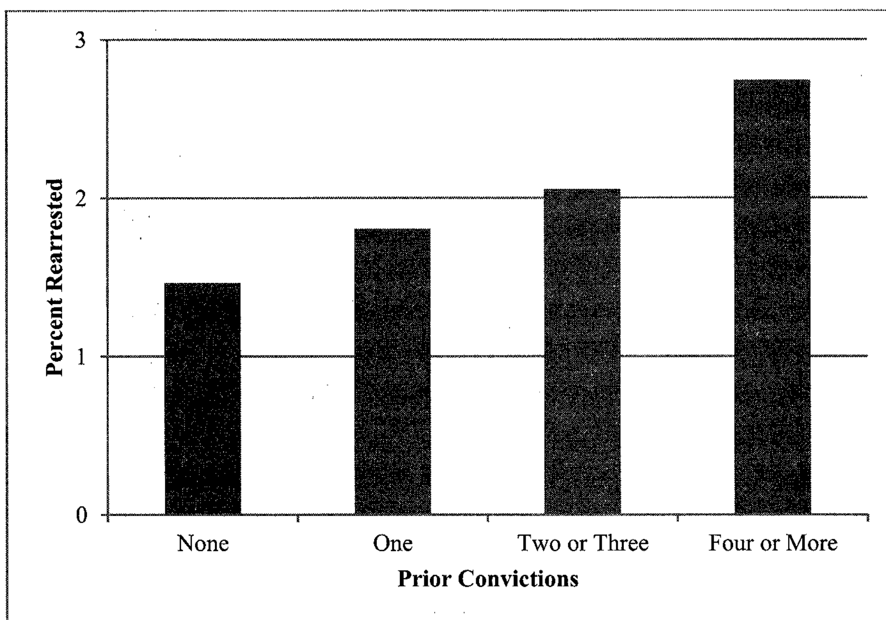
205. *See, e.g.*, ALA. R. CRIM. P. 7.2(a)(3); ALASKA STAT. § 12.30.011(c)(6) (2010); CAL. CONST. art. 1, § 12. For a full listing, see *supra* note 63.

206. *See* NBS STUDY, *supra* note 96, at 40–41 (concluding that an accurate predictive instrument must rely not only on past criminal behaviors but also on other factors such as situational adjustment); Angel et al., *supra* note 111, at 313 (finding past conduct and convictions to have some predictive value about future criminal conduct); *see also* COHEN & REAVES, *supra* note 168, at 10 ("Compared to those without prior arrests (29%), defendants with an arrest record were predicted to be charged with misconduct more often, especially if they had previously failed to appear in court (47%). This pattern was observed for both failure to appear and re-arrest. Defendants with prior felony convictions (39%) had a higher predicted misconduct rate than other defendants (33%). This pattern also existed for re-arrest, but not failure to appear.").

or more prior convictions than for those who have no convictions or just one prior conviction.[207]

An analysis of prior convictions shows that even those with many prior convictions are still unlikely to be rearrested for a new violent crime while on release. Figure 1 divides all those released into four groups based on their number of prior convictions. We then calculate the fraction of each group that was rearrested for a violent crime. About 1.5% of those with no prior record were rearrested, a number that rose only slightly for defendants with one conviction. On the other end of the spectrum, about 2.5% of those with four or more prior convictions were rearrested. Thus, the rearrest rate was not quite twice as high for those with many convictions as for those with none. A single past conviction, though, hardly appears to predict any increased dangerousness. Repeat offenders—those who have four prior convictions—were only arrested for pretrial violent crime in about 1 in 30 instances.[208]

Figure 1. Percent of Defendants Rearrested for Violent Crimes, by Prior Convictions

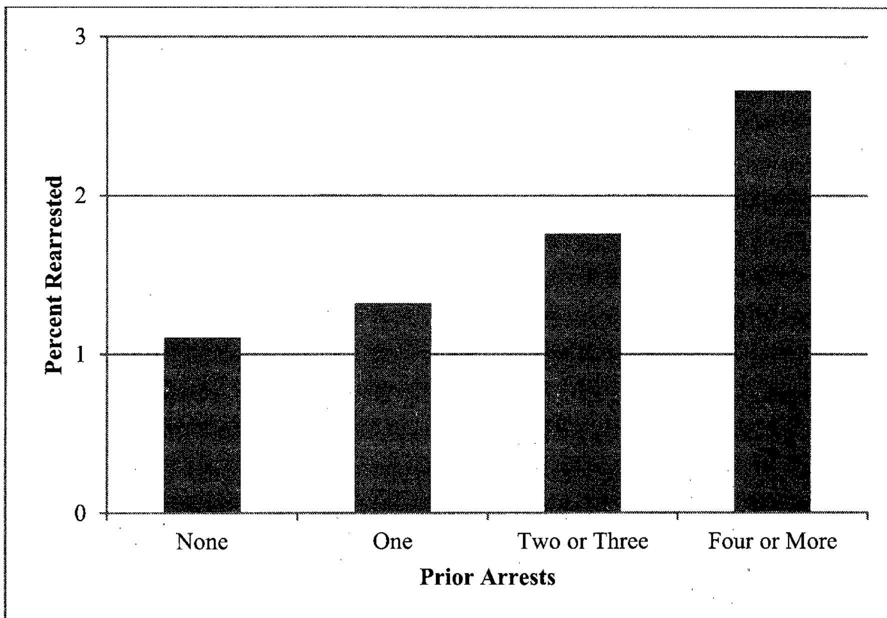


207. *See infra* Figure 1. *Contra* Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 34 (2010) (arguing that "serial offenders (persons with more than one felony conviction within the last three years) are much more prone to commit violent crimes during their time on bail than are those without a recent criminal record").

208. *See infra* Figure 1. However, rearrest rates by no measure fully account for all of the crime committed.

Another measure of past criminality is the number of prior arrests, which we examine in Figure 2. We see the exact same pattern here that we saw in past convictions: the more prior arrests a defendant had, the more likely it is that the defendant was rearrested for a violent crime. Nonetheless, a person with a given number of *convictions* does appear to be systematically more dangerous than a person with only that many *arrests*. Looking at the data, about 1.8% of defendants with one prior conviction were rearrested for violent crimes, whereas only 1.2% of those with prior arrests were rearrested for a violent crime on release. Again, rearrests for violent crime were fairly unlikely, though our dataset is large enough that even with such a rare occurrence, there are enough defendants that the margin of error is very small.[209]

Figure 2. Percent of Defendants Rearrested for Violent Crimes, by Prior Arrests



E. Probit Estimation of Rearrest Probabilities

The above estimates give us some insight into how the initial charge or prior record predicts future rearrests, but to form a good prediction we need

209. This might lead one to believe that judges should be warier of considering past arrests than of considering past convictions in examining the prior conduct of defendants. We show in subpart IV(G) that while arrests predict a lower crime rate than convictions, in a model that considers many factors simultaneously, prior arrests are actually a more robust independent indicator of pretrial rearrest than are prior convictions.

to bring to bear as much information as possible, accounting for all of it simultaneously. To that end, in this subpart we specify and estimate a probit model with a wide range of potential indicators of future rearrest.

1. Probit Model Specification.—We use a standard probit model and specify the probability of being rearrested to be a function of the type of felony in the original arrest, the defendant's age, the year of the offense, and various characteristics about the person's prior record.[210] We also allow rearrest rates to vary depending on the overall crime level in the county. For each person i living in county c in year t, suppose that the value V_{itc} equals one for those who were rearrested for a violent crime at any time while on bail and zero for all those who were not.[211] We wish to predict this V_{itc} for any given person.

A probit models the latent or unobserved index, y_{itc}, that is positive for those that are rearrested and negative for all others. Thus, it is a continuous theoretical version of the observed behavior V_{itc}. If we had this y_{itc} index, our job would be done. Instead, all we observe about it is whether it is positive or negative for a given person. Since y_{itc} is unobserved, we model it as

$$y_{itc} = \alpha_t + X_{itc}\beta + Z_{tc}\gamma + \varepsilon_{itc}$$

where X_{itc} is a list of person i's observed characteristics (initial felony charge, past convictions and arrests, criminal status or prior incarcerations or failures to appear, and age) and β is a vector we wish to estimate that determines how much weight to give a particular X_{itc} characteristic in determining y_{itc}. α_t is a set of year-indicator variables that track secular changes over time and are common across all counties and defendants. Z_{tc} is a vector of the natural log of county population and the county felony crime rates per thousand people in the survey month, with γ, the associated coefficient vector. The crime rates are divided out into the four major felony categories: violent, property, drug, and public order. In unreported results,

210. The drawback to this approach is that we are assuming enough commonality across people that we can use information from one group to help us form predictions about another. For example, as people age, their crime rate tends to change, and we are assuming that the change in crime rates with age is related across initial charges and prior records. This assumption and its implications can be explored in later work, but as we discuss in note 207, *supra*, the assumption is perhaps not as important as may be initially assumed. One area of particular concern would be if we were using the model to estimate the crime rates for mixtures of characteristics that never occur in the data. Since we are most interested in predicting crime for the most common groups—because these are the ones that appear before judges—our model does not face this problem.

211. Our estimates are all for the bail period as a whole—typically three to four months—rather than a crime rate per month. Later, when we compare crime rates with general population, we discuss how to compare the monthly population crime rates with the estimates we give here.

we also considered a county fixed-effects model, but the results were identical.[212]

Of course, because there are many factors about people and their circumstances on which we do not have data, we also have an unobserved error term, ε_{itc}, which is part of the index y_{itc}. Because of this unobserved error term, no matter how good or bad the set of characteristics a person has, we can never be positive about who will or will not commit a crime. Thus, a probit model is built around matching probabilities by picking the parameters that are the most likely given the rearrests we see. Taken jointly across all *n* observations, this means maximizing the log of the following probability:

$$\prod_{i=1}^{n} P(y_{itc} > 0)^{V_{itc}} P(y_{itc} \leq 0)^{1-V_{itc}}$$

Once we estimate the model precisely, we *can* make very good predictions about the *average* rearrest rates for a group of people with a given set of characteristics. All of our measures predict future effects rather than an attempt to prove causal effects.[213] This focus on prediction rather than causation has a large effect on how to think about the coefficients. For example, it does not matter for the purposes of this analysis that those charged with more serious crimes may be released under more restrictive bail conditions. We do not need to account for these restrictions because we observe the *outcome* of these restrictions with empirical rearrest rates, which is adequate for this analysis. Our goal is to determine what the rearrest rate actually will be, not what it hypothetically would be under laboratory-controlled circumstances. Similarly, if prosecutors have a great deal of latitude in what initial charge to bring, it might seem that the initial charge becomes somewhat arbitrary. While this may be true, it does not affect our ability to estimate how that somewhat arbitrary choice of initial charge is related to later crime. If, in fact, there is no useful predictive information in

212. A fixed-effects specification allows each state to have its own unobserved effect on crime rates. As one can see in Appendix A, county characteristics do matter, they just do not change the other estimated coefficients and therefore do not affect the results we present here. Nevertheless, a county looking to use a more data-driven approach to bail might be well advised to estimate a model like the one presented here but for that county alone, so as to get the highest quality predictions for its particular situation.

213. Thus, we are not saying that the sole act of charging a person with robbery as opposed to rape changes that person in a way that affects his likelihood of future rearrest. Rather, we are saying that people charged with robbery systematically have different unobserved characteristics than those charged with rape. Although we never see these characteristics, we do see the person's initial charge, which is correlated with those characteristics. This makes our job statistically much easier, as many of the sharpest pitfalls in empirical work come from trying to determine causal effects rather than making simple predictions.

the initial charge, our model will not spuriously claim that there is. Rather, the estimates will assign no weight to initial charge as a predictor.[214]

Table 4 gives summary statistics for the X_{itc} variables of initial offense and prior criminal record for the 116,000 felony defendants in our sample and then again for the subset of 72,000 released defendants. For example, we see that the most common initial crimes were the two categories of drug crimes (each about 17%–18% of all defendants) followed by assault, theft, and burglary. Twenty-eight percent of defendants had no prior arrests, but about half had a substantial record of four or more prior arrests. Convictions follow a similar, if lower, pattern. Forty-five percent had previously been incarcerated. Over half had multiple charges against them, 30% had failed to appear in the past, and 33% of them had an active criminal status at the time they were arrested. Eleven percent of defendants had previously been convicted of a violent felony.

Table 5 gives the age distribution and the county characteristics, Z_{tc}. About 14% were teenagers and only 4.5% were over the age of fifty. Each month, the average county had 0.18 violent felony arrests per thousand people with slightly more than that in property and drug arrests. Public order felonies were noticeably less common at 0.06 per thousand people.

Appendix A, Column 1, reports on our standard version of this model, estimated on those who were released. Each number gives the average change in probability based on a person having that characteristic, holding fixed all his other characteristics.[215] For example, the first row of Appendix A tells us how much more likely murder defendants were to be rearrested for a violent crime than a person brought in on a drug charge other than sales—typically possession—because the drug charge is the model baseline. This number is 4.74%. To calculate it, let the variable tracking murder be $X_{itc}^{murder}=1$ if the defendant was facing a murder charge. Then the number reported in the first row of Appendix A is calculated as

$$\sum_{i=1}^{n} P\left(y_{itc} > 0 \middle| X_{itc}^{murder} = 1, X_{itc}, Z_{tc}\right) - P\left(y_{itc} > 0 \middle| X_{itc}^{murder} = 0, X_{itc}, Z_{tc}\right)$$

214. If prosecutors gamed the initial charge to get a desired bail outcome, this would also not matter for our prediction unless judges started using a new model for determining bail. Thus, for example, if judges adopted a model akin to the one we present here, prosecutors might respond to the change with a different mix of initial charges, which might upset the predictions. Judges could then re-estimate their model under this new mix. One, then, can imagine an iterative process as prosecutors adapt and judges respond, likely ending fairly quickly in new stable equilibrium behavior by judges and prosecutors.

215. For the probit and all other calculations, we use the survey weights to correct for the fact that some districts were over or underrepresented. In practice, the unweighted results are largely the same.

Likewise, each of the other numbers in the table tells us how the given characteristic changes the probability of a person being rearrested for a violent crime.

2. Average Rearrest Rates for a Given Group.—Table 6 simulates rearrest rates for teenagers and those over age fifty based on their initial crimes and their criminal records for a variety of possible scenarios. For example, 4.1% of teenagers brought in on a robbery charge with no prior record who are released would be rearrested for a violent felony. If we look at teenagers with a hefty prior record (e.g., a felon with four or more arrests, an active criminal justice status, and a prior violent felony conviction) that probability of rearrest almost quadruples to 15%.[216] Below each number we list, in brackets, the standard error of the prediction.[217] While most of these values are estimated quite precisely, a few are still fairly imprecise.

Table 6 illustrates that age is a strong predictor of future rearrests. Those over the age of fifty were always substantially less likely to be rearrested, typically on the order of one-third to one-fourth as likely as the teenager. This pattern also shows up at the intermediate ages—the younger the person, the higher the chance of rearrest.[218] We also see that both prior record and initial charge make substantial differences in the probability of rearrest. A defendant on a theft charge with no prior record has a 1.4% chance of rearrest, whereas even one prior arrest increases the odds by one-third, to 1.8%.

Through this analysis, we also determine which are the least and most dangerous groups of suspected felons.[219] The most dangerous group consists of teenagers brought in on a murder charge with four or more prior arrests, a currently active criminal justice status, and a prior violent felony conviction. This group has about a one-in-five chance of being rearrested for another violent crime if released. The least dangerous group, with a probability of

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216. We fix all the characteristics listed in the table, but we let all unlisted regressors take on the values they have in the original data, so in that sense, we recover an average across those characteristics. As one can see from Appendix A, Table 6 deals with almost all the statistically significant individual characteristics.

217. We cluster these standard errors at the county level, which produces about seventy clusters. This makes our results robust to correlations within a county across individuals or over time. The clustered standard errors are about one-third larger than the unadjusted (and unreported) standard errors that assume independence. We also explored clustering at the state level, which we recognize is preferable, but we only have twenty-six states, making the asymptotic argument substantially weaker. We found the state-clustered standard errors to be approximately the same as the county ones.

218. See *infra* Appendix A, Column 1, which illustrates age coefficients.

219. We look at these groups with the obvious caveat that we might find slight differences if we included more covariate interactions and that our measure of dangerousness is being rearrested for a violent crime, as we discuss in the text.

rearrest of about one in a thousand, consists of those over the age of fifty with no prior record brought in on a fraud charge.[220]

Prior work has discussed whether criminal history or current charges are better predictors of future criminal behavior.[221] In Table 6, for a given age, this amounts to comparing the movement from left to right (as criminal history gets worse) with movement up and down (where current charge varies). Focusing on teenagers, it appears that both aspects matter a great deal. Prior criminal history can easily triple the probability that a person would be rearrested, even controlling for the initial charge. On the other hand, those brought in on violent charges were two to three times more dangerous than those brought in on drug crimes. Thus, for predicting future violent crime among a sample of felony defendants, both past history and current charge have substantial, independent predictive power.

As a side note, analyzing Appendix A, which contains the full results of the probit model, reveals a couple of interesting facts. A person's number of previous arrests is a large predictor of future rearrest; however, whether or not that prior arrest turned into a conviction is largely irrelevant as an additional predictor.[222] This may be due to a lack of pursuit of certain crimes during plea bargaining, bail cooperation, or prosecutorial discretion, though it is not clear from the data. A second fact is that prior failures to appear are not statistically significant predictors of future violent behavior, an issue we will return to later when discussing flight risk.

Given the probit results, we can assign a rearrest probability to every released person in our sample.[223] This is extremely helpful in determining if

220. Our data include sixty teenagers brought in on murder charges with at least four prior arrests. Thirty-six of them had an active criminal justice status and four had previously been convicted of a violent felony. Murder, fortunately, is a fairly rare charge. Among the least dangerous group, our data records 112 people over the age of fifty with no prior record brought in on fraud charges.

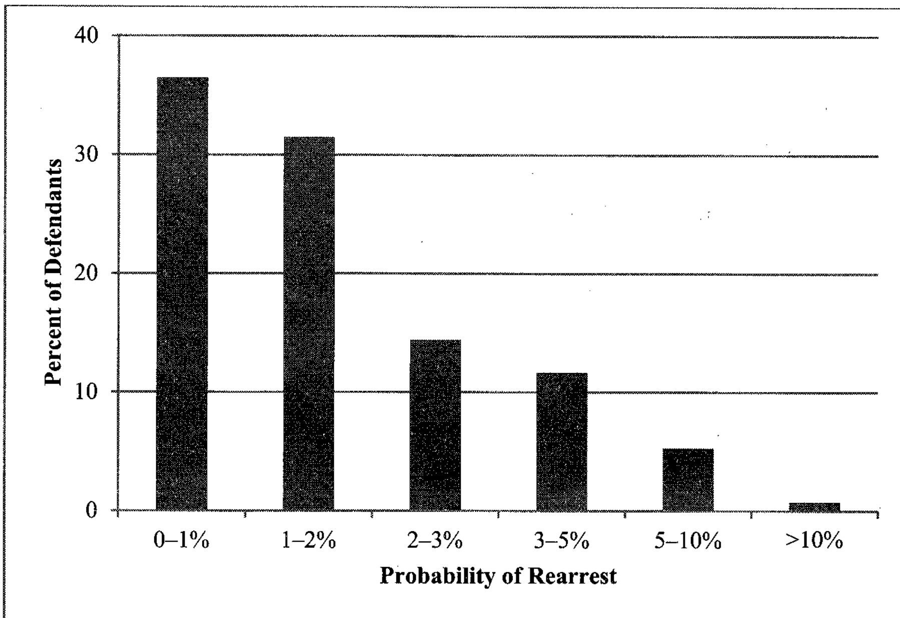
221. *See supra* Part III.

222. We have not explored the underlying cause for this, although it may be an interesting avenue for future research.

223. This is based on the probit framework where we have assumed that characteristics can be modeled commonly across ages and prior records. A natural extension would be to relax this assumption further by allowing "interaction effects" so that the effect of being a felon, for example, is allowed to be different depending on one's age. We do not do that here for several reasons. First, the number of coefficients to be reported grows very quickly as one includes interactions, thus it becomes more trying for the reader to follow the discussion or interpret the table we present in the Appendix. Second, by its nature, a probit includes some allowances for interaction effects, because it is modeling a probability that is assumed to be normally distributed. As one moves closer to the threshold for rearrest, all the effects become more important for determining the probability. Conversely, for a person with only one indicator suggesting a future rearrest, that one indicator does not increase the probability very much because rearrest is still very unlikely. Third, in the absence of interaction effects, the estimated coefficients will still be a particular average of these unmodeled interactions with more weight given to the more common groups in the data. Thus, the more common the category, the better the fit. The implication of this is that the places where we are most seriously in danger of being off are the least important places, because there are relatively few defendants with that mix of characteristics. Fourth, we originally explored a number of possible interactions, and they rarely offered substantial improvement in overall model fit, though this does

we are over- or under-detaining defendants pretrial. Figure 3 shows the fraction of our sample that has each rearrest probability. For example, a little over one-third of the released defendants have less than a 1% chance of being rearrested, and another third has a 1%–2% chance of being rearrested. Additionally, about 80% of pretrial defendants have less than a 3% chance of being rearrested. Because currently only about 40%–60% of federal and state defendants are released,[224] we explore whether more defendants can be safely released pretrial, given how unlikely they are to be rearrested pretrial. On the other hand, it is worth noting that 5% of defendants have more than a 5% chance of being rearrested on a violent felony charge, with a few having higher than a 10% chance.

Figure 3. Percent of Released Defendants, by Given Probability of Rearrest



Note: Each bar indicates the percentage of the released suspects that have the given probability of being rearrested for a violent felony, based on their prior record and age.

F. Likelihood of Pretrial Crime for Defendants Held

Until this point, we have strictly relied on information for those who were, in fact, released. But we also need to know how likely those that are

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not rule out the possibility that such interactions could be very important for at least some characteristics. All of that said, a natural and useful extension of this Article would be to explore which interaction effects are the most pertinent.

224. *See infra* notes 253–67 and accompanying text.

held are to commit crimes. Otherwise, we cannot know how crime rates will be affected if we release more defendants. We proceed as follows. First, we show that those who are held pretrial systematically have observable characteristics associated with higher crime rates. Second, we compare counties with high release rates and low release rates to determine if those held are also more dangerous in ways not accounted for by their observable characteristics. Lastly, we use information from counties that hold relatively few people to estimate the dangerousness of the held population.

A simple, though possibly inaccurate, way to deal with those who are held is to use the probit model we previously estimated and assume that those who are held fit the same statistical model as those who are released. This would be true if, for example, judges held or released people solely on the basis of the characteristics we observe. It would not be true if judges systematically brought to bear information about the defendants that we do not have in our dataset. For example, consider two people with the exact same prior record brought in on an aggravated-assault charge. One of the defendants spends his entire pretrial hearing attacking those around him and yelling. The other is quiet and penitent. To the extent that these facts affect the probability that the person will be rearrested, they represent changes in the value of ε_{itc}, the unobserved component in our regression model. A judge may decide to hold the yeller and let the penitent go, but our statistical model would treat them both the same.

The problem, though, is that if judges systematically use information that we as statisticians do not have to improve their predictions, then those who are released will systematically be safer than those who are held. Thus, our previous statistical model, which was based entirely on the behavior of the released, will be a poor estimator for the held. We would expect that it would systematically underestimate the rearrest rates of held defendants.

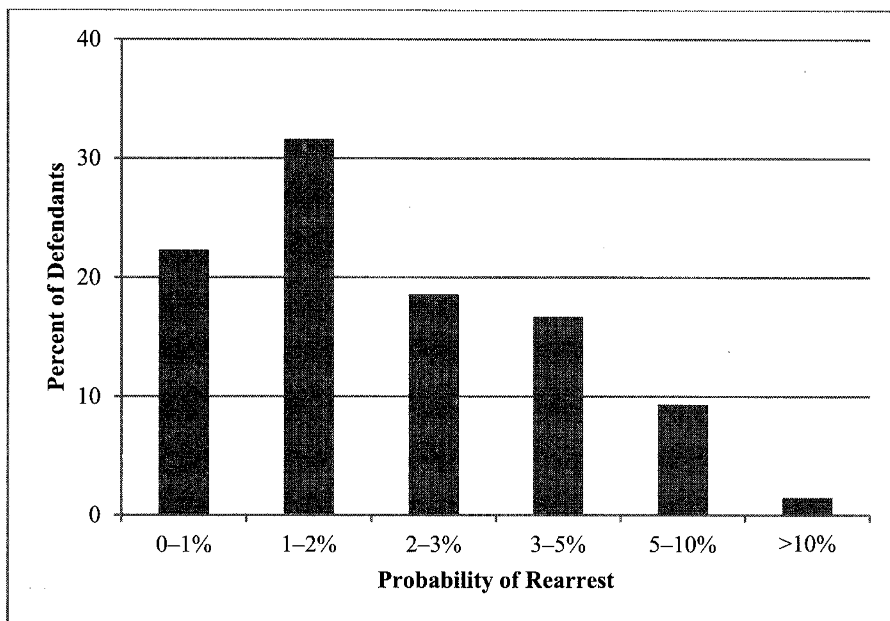
1. Effectiveness of Judges in Determining Dangerousness.—The first thing we need to know is whether those whom judges keep behind bars are more dangerous than those let go, at least in terms of their observable characteristics for which we have data, such as their prior records. We can use the characteristics of those held to generate their chance of committing a violent crime if (1) they had been released and (2) they were otherwise similar to those who were released. As we noted before, this probability was 1.9% for the overall set of released prisoners.[225]

Those who are held, though, appear systematically to have observable characteristics that are associated with higher violent-crime rearrest rates. Based on their observed characteristics, we would predict that 2.8% of them would be rearrested—about a 50% higher rate than for the released. Figure 4 is the counterpart to Figure 3, but for those who were held rather than

225. *See supra* subpart IV(C).

released. Whereas about a third of those released had less than a 1% chance of committing a crime, the age, prior record, and initial charge of those held were associated with higher rearrest rates. A little over 20% of those held had less than a 1% chance of being rearrested. In fact, the entire distribution has shifted rightward, with about 10% of those held projected to have at least a 5% chance of being rearrested.

Figure 4. Percentage of Held Defendants, by Given Probability of Rearrest



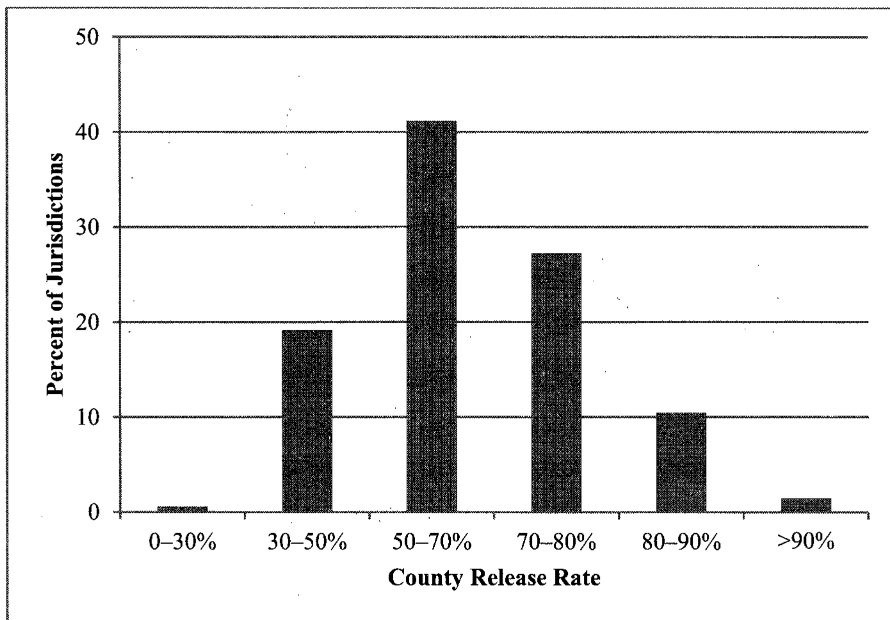
Thus, we have strong evidence that those who are held are more dangerous. By itself, this is not a problem for our statistical model. The concern is that, in addition to being more dangerous due to factors we can see and account for, those held might also be more dangerous for reasons not captured in their observed characteristics. This would be the case, as we discussed above, if judges systematically saw things that we missed in our regression model and used that information to put the more dangerous defendants behind bars. Then our model, and any other study based on those typically released, would underestimate the dangerousness of the held, even controlling for their observed characteristics.

One way to see if this might be happening is to compare across counties and years and see if, in places where systematically more convicts are released, those convicts are more dangerous than we would expect based on our probit model, while in places that hold more people, those that are released are safer than we would expect. For example, a county that releases everyone will not just be releasing people like those we see released in our

national data but also their more dangerous counterparts that would normally be kept behind bars. In that case, our expected rearrest rate would be too low, because it fails to account for the unobservable factors that make the people being released extra dangerous.

Figure 5 plots the release rates of each county–year combination in our data. As one can see, counties operate very differently from one another. A few release only 30% or fewer of those arrested, while about 40% of counties release 50%–70% of those arrested. Some counties release almost all of those arrested. Thus, there is a huge difference in county release rates, which should let us see if our predictions are just as valid in high-release counties as in low-release counties.

Figure 5. Distribution of Percent of Suspects Released Across Counties and Years



Note: Each bar gives the percentages of jurisdictions (counties in a given year) that have the given release rate for suspects.

According to our model of judge behavior, if we plot the actual rearrest numbers next to the rearrests predicted by our simple model of those released, we will find that the earlier probit model underestimates rearrests in places that release many suspects and overestimates rearrests in places that release few of them. Figure 6 plots out both our simple model's prediction and the observed rearrest rates for county–year combinations based on their

release rates.[226] Thus, in counties that release 30%–50% of defendants, we observe about 1.3% of those released being rearrested, which is approximately the same as our model's prediction. Notice that as the county releases more people, both the predicted and the observed rearrest rates climb; thus, the people who are being released are more dangerous as release rates rise, in ways our model can readily identify.

Figure 6. Predicted and Observed Rearrests for a Violent Crime, by County Release Rate

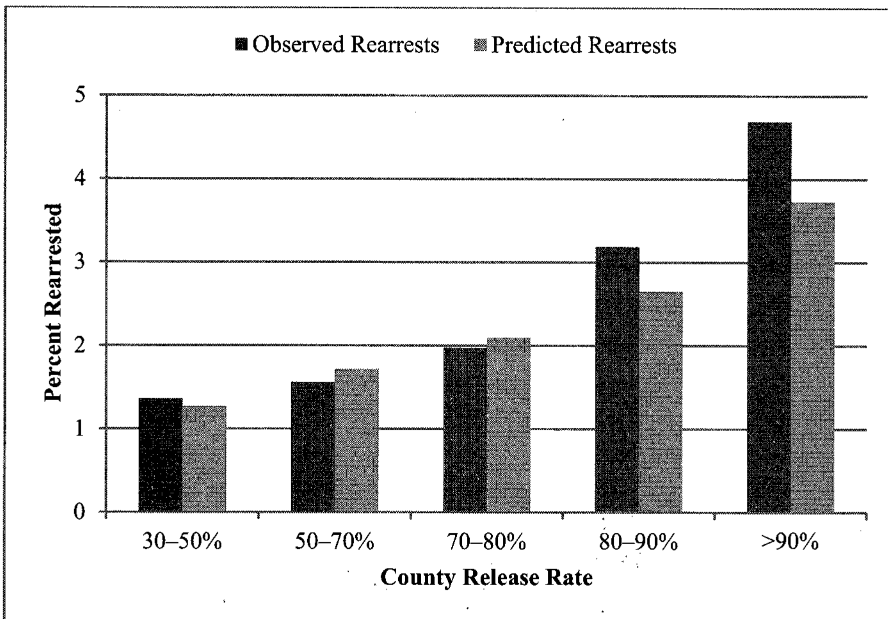


Figure 6 shows some mild evidence for our hypothesis. The simple model fits crime rates very well for counties that release less than 80% of inmates. As a county releases more than 80% of those arrested, the model begins to slightly underpredict how dangerous these inmates are. The model expects that about 2.5% would commit a crime, but in reality, over 3% did. The problem continues in counties releasing more than 90% of suspects; 4.7% of them were rearrested, but the model's prediction is 4%. This suggests that, overall, judges are performing only slightly better than our model; in other words, there are not many additional, statistically unobserved factors on which judges are relying in detaining the most dangerous defendants. However, the figure above does show that there may be at least some suspects that judges can systematically predict are more likely to commit a new crime, even though our probit model is unable to identify these people. In

226. We also considered predictions that included race and gender information, but the resulting predicted rearrest rates were the same as those reported here.

most jurisdictions, these people are detained, but in those jurisdictions that release almost all suspects, these higher crime suspects are released and may drive up the rearrest rate.

Note that as we move through jurisdictions, our simple model predicts an ever-increasing crime rate. This might be because those counties were releasing more people with worse records, but in exploring this, we found that the largest effect was that counties with higher predicted overall crime rates, on average, did let more people go. This may have been due to completely unrelated facts, or it may have been that the jails were already full, but once we account for this overall county crime rate, we can explain most of the rise in the rearrest rate, suggesting that the rise is not due to the selection effect we are concerned about.

2. Evaluating the Underestimation of Dangerousness Using County Release Rates.—The results above suggest that our basic probit model may slightly underestimate how dangerous the unreleased are in some counties. The ideal way to deal with this problem is to estimate the probit model on a set of counties that released all inmates. Of course, no such county is available, and our sample of counties with release rates over 90% is so small that estimating the probit model on them alone provides little useful information.[227] Thus, we consider two alternative approaches. Our first approach is to estimate the model on all the data but add in another set of county–year variables to control for each county's release rate. Using this augmented model, we can simulate what crime rates would be like if all counties released 95% of suspects. Our second approach is to use a more extensive estimation procedure that jointly estimates the release and rearrest outcomes. If we assume that the unobserved parts of both outcomes follow a bivariate normal distribution, we can estimate this joint model and use it to simulate how dangerous all defendants are, whether or not they are held.[228]

Table 7 reports estimates from these two alternative estimation methods. We report the average probability of rearrest for a twenty- to twenty-five-year-old brought in on one of the four major crime categories and with either a slight or extensive criminal record (using the same definitions as our prior table). For simplicity, we do not report on each possible initial offense, but rather on the weighted average of the larger felony groupings: violent,

227. The study includes 827 released defendants from counties with over a 90% release rate and for whom we have complete data on their characteristics. While this is still twice the size of some of the early studies on pretrial crime, it is still low for subdividing people into many mutually exclusive groups, such as initial offense. Only 4.7% of these people committed a violent crime, which gives us about forty violent crimes spread over about two dozen characteristics. The resulting estimation, available from the authors, is sufficiently imprecise to be useless as a comparison to the baseline.

228. For a discussion of simultaneous equation models with binary dependent variables, see G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS (Angus Deaton et al. eds., 1983).

property, drug, and public order. Also, we report on all defendants, rather than just those released.

The first two columns report our baseline estimation. Accordingly, a person with only one prior arrest brought in on a property crime has a 1.3% chance of being rearrested if released. The standard error of 0.2 shows that this number is fairly precisely estimated. The middle columns come from estimating the augmented model that includes as regressors indicator variables for the county's release rate, then simulating crime rates if all counties had a 95% release rate.[229] Thus, we are getting an estimate that should be closer to the latent dangerousness of the population. Though the rearrest rates rise in all cases, the increase is sometimes quite small. For violent offenders with one prior arrest, the rate goes from 3.1% to 4.6%. Drug offenders' rates rise relatively more from 1.1% to 1.7%, but the standard error of 0.4 on the 1.7% rate makes us hesitant to make much of this difference.

The final two columns estimate a joint model of both the release decision and the rearrest outcome.[230] This model gives similar numbers to those in the middle columns though often with slightly lower probabilities. Our findings in both models suggest that while counties with higher release rates do have much higher rearrest rates per person released, this increase is largely due to observable differences in the compositions of the counties. In other words, these differences can mostly be explained by our data. The remaining differences may result for one of two reasons. Judges may be releasing defendants that they can tell are more dangerous than our model predicts, which would suggest that judges see more than our model does. Alternatively, the counties may simply be slightly more dangerous for some other reason not fully accounted for in our model. We cannot determine conclusively which of these two reasons accounts for the remaining differences. Both models rely on the assumption that after we control for defendant characteristics, time trends, and overall county crime levels, counties that hold many people can be used as a control group for those that release many people. This assumption, while not ludicrous, is not bulletproof because there may be other unobservable differences between counties that are correlated with the decision to hold defendants. As such, the results in Table 7 and Figure 6 are suggestive rather than definitive on the matter.

Given that we cannot formally reject the simple model, for the work that follows, we stick with our baseline probit, recognizing that this may

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229. The indicator variables are 0/1 binary variables, one for each of the bins in Figure 6.

230. Both equations use the same regressors, but we exclude the county-release-rate indicator variables from the rearrest model as excluded regressors to help with identification. In estimating that model, we cannot reject that the two decisions are independent once one controls for the observed characteristics. Thus, we cannot formally reject that the baseline probit estimates are correct.

somewhat underestimate the rearrest rates for counties holding fewer than 10% to 20% of defendants. When we discuss a revised detention regime and estimate how many people could safely be released, we also give numbers from the alternate selection model as a point of comparison.

G. Predicting Rearrest for Pretrial Felons as Compared to the General Population

Our data allow us to predict rearrest rates for those brought in on a felony charge.[231] Federal and state case law and statutory law assumes that felons are more dangerous than the general population. Most states consider prior convictions as a factor in detaining a defendant. As a point of comparison, we take our data on felony rearrests and look at the probability that a person in the general population is brought in originally on a violent felony charge. We also compare our sample with a demographic much more likely to be arrested—male teenagers.[232]

Our data tell us the monthly number of arrests on violent felony charges and the age of those arrested. We use data from the year 2000 and divide by the county's 2000 census population data for the relevant group: either the entire population over the age of fifteen or just male teens over the age of fifteen. Dividing the number arrested by the population, we have the probability of arrest for a violent felony. In the general population, the probability that someone over the age of fifteen is arrested on a violent-felony charge is 0.02%, which translates into about 1 in every 5,000 people.[233] Among teenage boys, the probability is 0.06%, so a little over 1 in every 2,000 teenage boys is arrested in a given month on a violent-felony charge.

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231. We note here that out-of-sample predictions are not going to be a concern for us because an out-of-sample prediction would mean that none of the over 80,000 defendants released had this particular combination of characteristics. That would mean in turn that while our prediction for that combination of attributes might be poor, we would never, or almost never, actually need that prediction, because almost no one has those characteristics. Thus, we acknowledge that our predictions may be worse for characteristic combinations that have a less than 1 in 80,000 chance of occurring.

232. We note here, as was pointed out in helpful comments from J.J. Prescott, that it is possible that the chances of being arrested for a drug crime are lower than for murder, so overall rearrest rates may not be adequate measures of all crime, even if they are better measures of violent crime. For instance, an individual may make one hundred drug sales and get caught for only one, but if an individual has one violent fight at a bar, the arrest rate may be close to 100%. Of course, this highlights the value of focusing on rearrest for violent crime, both because these crimes are more likely to be reported and because violent crime is typically considered much more harmful. *See generally* Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995) (attributing the growth in youth-committed homicides to the recruitment of juveniles into the illicit-drug market).

233. We use the year 2000 iteration of our survey, which, when we use the survey weights, gives us an estimate of the number of people arrested in one month (May) on felony charges in forty counties. We then divide by the total population of those age fifteen and over in these same forty counties in the 2000 census. We perform the same calculations for our comparison with teenage boys, but in that case, the denominator is the population of boys age fifteen to nineteen.

In order to compare these monthly arrests rates with pretrial rearrest rates, we multiply the 0.06% probability of arresting these teens in *one* month by the three to four months over which a felony defendant is typically out on bail. This gives us an arrest probability of about 0.2% for teenage boys over a period of time equivalent to a typical pretrial release.[234] It makes little sense to hold anyone in our sample who has a lower chance of violence than 0.2% while on release. Referring back to Table 6, those over the age of fifty arrested on fraud charges with no prior record—about 0.2% of defendants overall—are actually safer than the general population of teenage boys. Given that we certainly are not going to incarcerate all teenage boys because they might be dangerous, it probably does not make sense to hold this safer group for fear of dangerous behavior.

In fact, 1.5% of our sample had a predicted rearrest rate for violent crimes less than 0.2% over the duration of their pretrial release. Twelve percent of those low-risk people[235] were, in fact, detained by the courts pretrial, demonstrating that a number of people detained are no more "dangerous" statistically than some members of the general population. We could almost certainly identify socioeconomic groups in the general population with even higher monthly rates of arrest than teenage boys. For example, arrest rates among inner-city populations are likely to be much higher than the 0.2% used here for teenage boys. Once again, because we are not going to incarcerate these groups wholesale, it probably does not make sense to incarcerate some of the equivalently safe felony defendants.

On the other hand, a teenager with a substantial prior record brought in on a robbery charge has a 15.0% chance of being rearrested over the next several months. This higher chance of rearrest may justify pretrial detention. Thus, there are identifiable groups of people arrested whose probability of committing a new violent crime is far higher than any member of the general population. However, there are also groups of pretrial defendants who have the same risk of being arrested for a crime as some members of the general population, and thus, it is difficult to justify holding them on safety grounds.

H. Judicial Reliance on Flight Risk or Dangerousness

We now turn to the question of judicial behavior—why judges hold the people they do. In addition to the relatively new consideration of dangerousness, the traditional criterion judges consider is flight risk. We would like to know which of these two risks weighs more heavily with judges or, in other words, which risk better models judicial behavior. For

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234. If some of the arrests in the following month were of the same person, then this back-of-the-envelope calculation will exaggerate the three-to-four-month arrest-rate probability of the median person in the general population.

235. This 12% of 1.5% refers to about 230 people in our sample that could be safely released. However, given that we only have a sample from a subset of counties over one month, this represents a far larger number of people in the United States over the course of a year.

each person, we already have a probability that he will be rearrested for a violent crime, $\widehat{V}_{itc}$, some values of which are given in Table 6. We can estimate a model of flight risk by re-estimating our probit model, but rather than modeling $\widehat{V}_{itc}$, we model the variable "multiple failures to appear," which we will denote F_{itc}. F_{itc} equals one for those with multiple failures to appear after their pretrial release (about 3.5% of cases) and zero otherwise. The second model in Appendix A gives those probit results.[236]

Just as we provided simulated results for the violent-crime risk in Table 6, Table 8 looks at flight risk. Once again, we look at risks by initial offense, age, and prior record, although this time we consider those with no prior record versus those with a prior failure to appear. Flight risk varies some with age, but the difference between teenagers and those over fifty is not as pronounced as it was for violent-crime risk. For example, a teenager with no prior record brought in on a burglary charge has a 2.6% chance of flight, compared to 1.7% for the equivalent person over fifty. If we take that same teenager and add a prior failure to appear, his flight risk jumps from 2.6% to 6%. Thus, prior record is very important for determining flight risk; a prior failure to appear more than doubles the chance of flight. This is significant because, historically, courts looked at flight risk in order to determine whether to release an individual on bail.[237] Judges granted bail unless the defendant was not likely to appear in court.[238] However, in the 1970s and 1980s, judges relied more on predictions of dangerousness to determine whether to release an individual on bail, and defendants were detained if they were thought to be likely to commit a violent crime on release.[239] As discussed above, failure-to-appear rates are not predictors of future arrests for violent crime.

Lastly, initial offense is also a strong predictor but in a very different pattern compared to violent crime. For violent-crime risk, an initial violent-crime charge predicted the highest chances of a rearrest for violence. But for flight risk, the highest risk does not come from those accused of violence but rather from those accused of drug crimes. Of teenagers with no prior record brought in on a possession charge, 5% fled, compared to only 1.1% of equivalent teenagers brought in on robbery charges. The least likely to flee were those over the age of fifty with no prior record brought in on violence-related offenses, with probabilities between 0.4% and 1%, although we should note

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236. The baseline offense in Appendix A is drug use, but while drug users have a comparatively low chance of being rearrested for a violent crime, they have a much larger chance of being a flight risk. Thus, in these estimates, all the other crimes have a negative sign, because they exhibit less flight risk than the baseline category of drug users.

237. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 5 n.3 (1951) (quoting FED. R. CRIM. P. 46(c) (1951) (repealed 1956)).

238. *See id.* at 5 (holding that courts may only restrict the release of noncapital defendants to ensure appearance at trial, which generally may be accomplished by setting a reasonable bail).

239. Goldkamp, *supra* note 33, at 1–2, 5 (noting that the bail reforms of the 1970s and 1980s authorized the expanded use of preventive detention, ostensibly to promote public safety).

that we lacked enough data on those charged with murder to estimate an effect for that group. The most likely to flee were teenagers with a prior failure to appear brought in on possession charges—one in ten are predicted to not appear for multiple court dates.

This new model lets us form a flight prediction, $\widehat{F}_{itc}$, for any person in our model. So if drug users are more likely to flee but less likely to commit a crime, one wonders just how correlated the two dangers are in general. The answer is that the two prediction indices, $\widehat{V}_{itc}$ and $\widehat{F}_{itc}$, are almost completely uncorrelated ($\rho = 0.029$).[240] Thus, the things that a judge can easily observe about a defendant that make him more likely to flee are unrelated to the things that make him likely to be rearrested for a violent crime. This is not to say that the two events are uncorrelated. Rather, it indicates that the things *one can predict* about future violent-crime risk are uncorrelated with the things *one can predict* about flight risk. Given that, which one best explains why a person is held?

Table 9 gives results of a probit model where the dependent variable to be explained is "being held" and the explanatory variables are $\widehat{V}_{itc}$ and $\widehat{F}_{itc}$. Thus, in Column 1 we see that, on average, increasing the probability of a person fleeing—from 1% to 2%, for example—increases the probability that he will be held by 0.9%—approximately a one-for-one movement. Increasing his dangerousness by a similar amount has a much more dramatic effect, raising his chance of being held by 3.3%. Since both events—flight and violence—are about equally likely and both predictions have similar variances, it appears that judges are basing their decisions far more on predicted violence than on predicted flight.

Column 2 provides a natural log probability specification that better captures the functional form of how judges hold defendants based on risk.[241] In this case, the interpretation is slightly more difficult as a one unit increase in the log would be like moving from a 1% to 2.7% chance of flight or from a 2% to 5.4% chance. The results in Column 2 once again point to violence as a much larger predictor, approximately fivefold, than flight risk. Increasing the flight risk from 1% to 2.7% increases the chance of being held by only about 2%. But a similar increase in predicted violence would lead to a 10% increase in the probability of being held.

As we noted before, county hold rates vary dramatically and are correlated with underlying violence patterns. We can control for this county-level correlation by adding a control variable for the average hold rate in each person's county. Then we are comparing how individuals of differing danger are treated *within* a county, rather than across counties.[242] We report

240. In unreported results, we find the same result here and for our results below even if we allow the predictions to depend on race, ethnicity, or gender.

241. Column 2 redoes the analysis in logs to capture a nonlinear relationship.

242. County hold rates would confound our regression results if, for example, counties that had high release rates also had high violence rates. In that case, our results would be a mix of a county-

on this model in Column 3.[243] As expected, a person's probability of being held goes up approximately one for one with the overall county hold rate.[244] Controlling for the confounding county effect makes both flight risk and violence more important in predicting whether a person will be held: the coefficients on both predictions are now larger. Increasing flight risk from 1% to 2.7% now predicts a 2.3% increase in the probability of being held, while a similar increase in the probability of rearrest for a violent crime predicts a 13.4% increase in the probability of being held. Table 3 shows that only about 39% of people are typically held. So, an increase in flight risk would move this up slightly to a 41.3% chance of being held, while an increase in violence risk would give the person a 52.4% chance of being held. Once again, violence risk trumps flight risk for judges.

I. States that Do Not Consider Dangerousness or Ban Preventive Detention

Two states do not allow preventive detention or consideration of dangerousness.[245] Both states, New York and New Jersey, appear in our dataset. One question that prior work has not considered is whether prohibiting consideration of preventive detention and dangerousness has any effect on the detention and rearrest rates. Table 10 compiles some information about these two states compared to the others in our dataset. The percentage of defendants released in New York and New Jersey, at 76%, is

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wide correlation and the relationship we want to capture—how individuals with different characteristics are detained when brought before a *given* judge. By controlling for the county's hold rate, we control for this county-wide pattern and can focus on how an individual's risk affects his chance of being held, controlling for county differences.

243. An alternate approach would be to use county-fixed effects, which we estimate in results available from the authors. The county-fixed-effect version gives results largely identical to those reported here, although the coefficients are slightly higher.

244. One might expect that this effect should be exactly one for one. This is true in a simple regression framework with no other regressors.

245. *See* N.J. STAT. ANN. § 2A:162-13 (West Supp. 2011) (providing that in determining whether to grant bail to someone charged with a crime with bail restrictions, the court "may inquire into any matter appropriate to its determination, including, but not limited to, the following:" the character of the person posting cash bail; the relationship of the person posting cash bail to the defendant; the source of any money posted as cash bail and whether the money was gained by criminal conduct; the character of any person who has indemnified an obligor on the bond; the character of any obligor; the source of any money deposited by any obligor as security and whether such money was gained by criminal conduct; and the source of any money delivered by any obligor as indemnification on the bond and whether such money was gained by criminal conduct); N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2009) (providing that when a court must use its discretion to grant or deny an order of recognizance or bail, the determination shall be made on the basis of the following factors: the principal's character, reputation, habits, and mental condition; his employment and financial resources; his family ties and the length of his residence, if any, in the community; his criminal record, if any; his record of previous adjudication as a juvenile delinquent; his previous record, if any, in responding to court appearances when required; the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; and the sentence which may be, or has been, imposed upon conviction).

noticeably higher than the average of 59% in other places.[246] The predicted rearrest rate for those released is noticeably higher in these two places, suggesting an overall higher level of violent crime. In other states the probability is about 1.7%, but it is 2.8% in New York and New Jersey. When we look at actual rearrests, we find that New York and New Jersey are above their predicted rates and other states are below their own predicted rates. This is not too surprising given our county evidence in subpart IV(F) that crime rates relative to predictions rise with the release rate. But the gap is not too extreme—most of the differences between the two places can be readily explained by our model.

Given our available data, we can actually see to what extent New York and New Jersey judges appear to be following their laws. Columns 4 and 5 of Table 9 divide the sample into New York and New Jersey, where danger may not be considered, and the other states in our sample, where it may. Focusing first on the no-dangerousness states of New York and New Jersey, it turns out that the legal regime has a strong effect on our coefficients. Flight risk becomes dramatically more important for determining whom to hold, with a coefficient of 9.9% for a unit log change. And while these states actually do appear to use predicted violence as a consideration, the coefficient on violence drops to 8%—making it less important than flight risk. For example, a defendant in New Jersey with heightened flight risk (e.g., moving from a 1% to a 2.7% chance of multiple failures to appear) would increase his chance of being held by about 10%. Given that the average chance of being held in New Jersey or New York is only 24%[247] an increase to a 34% chance of being held is substantial. And, in fact, it is a bigger response than one sees in these states from increased violence risk, where a comparable increase in risk only increases the chance of being held by 8%. Thus, although judges in these states may not be following the law perfectly, flight risk is a bigger consideration than expected danger.

Other states claim to consider both flight risk and dangerousness in determining whom to release pretrial. However, while the coefficient on flight risk was about 10% in New York and New Jersey—suggesting that in these places flight risk plays a big role in incarceration—in all other places it is at best only a marginal consideration with a coefficient of 1.1%. Outside of New York and New Jersey, increasing one's flight risk hardly changes the likelihood of being detained at all. Instead, these other states place tremendous weight on predicted violence. A person with a higher-than-average risk of violence would see a 14% rise in the probability of being held. Most state judges consider dangerousness at a much higher rate than flight risk, though

246. Our data on New Jersey and New York contain 15,300 defendants with about 11,700 of them released. *See infra* Table 10. For all the remaining counties in our sample, we have release data on about 102,000 defendants with about 60,000 released. *Id.*

247. *See infra* Table 10.

most states claim to consider both factors in release decisions and some even state that flight risk is the primary consideration.[248]

J. Misdemeanor and Other Rates on Release

Our current model only considers violent crime, but obviously there are many more defendants who are rearrested on less serious charges. If we make the dependent variable "any rearrest," including for misdemeanors, we can re-estimate our model and see what predicts any rearrest. Model 3 of Appendix A reports on the underlying probit model, while Table 11 gives simulated results. Here we see quite a shift upward in the probabilities and a shift in who are the most likely to commit crimes. For example, even teenagers with no prior record have a 10%–15% chance of being rearrested once they have been brought in on a felony charge. And for those with an extensive record, the probability of rearrest for any reason reaches close to 40%. While those arrested for murder are specifically at risk for committing another violent crime, they are actually less likely to be rearrested than those who are arrested for robbery or, for that matter, any of the property or drug crimes listed in Table 11.[249]

Once again, we see both from Table 11 and the underlying results in Appendix A that overall rearrest probabilities drop with age. Prior arrests, incarceration or failures to appear, or a current criminal status all contribute to substantial increases in the likelihood of more crime.[250]

K. Potential Impacts of the Model on Pretrial Detention Rates

A few natural follow-up questions after considering this data include: what optimal national detention rates would be; what national detention rates have historically been; and, of course, why this matters for defendants.[251] As to the first point, depending on how willing we are to abide the risk of crime, we may determine the optimal number of people to hold. While a closer look at the costs and benefits to the state, society, defendants, and victims is in order to really determine accurate thresholds for detention,[252] we can still consider this question preliminarily. The following three sections look at state and federal pretrial detention rates historically and then examine current detention rates and how they could potentially be reduced without increasing

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248. *See supra* notes 58–60, 237–39, 245 and accompanying text.

249. Murderers' rearrest rates for violent crimes are higher. *See infra* Table 6. They are lower here for measures of all rearrests.

250. The effect of county crime rates on rearrest rates, on the other hand, is estimated very imprecisely, such that no strong claims can be made.

251. We do not advocate using a national model to create local release rates. In fact, in section IV(K)(2), *infra*, we advocate using a predictive model with local county rates to best dictate appropriate release rates for each county.

252. A follow-up article will more closely analyze the costs of pretrial release for defendants and society.

the overall level of pretrial crime. The final section comments briefly on the impacts of detention on defendants and society.

1. Pretrial Detention Rates Historically.—Overall, both federal and state detention rates have increased since the 1980s. Additionally, over the last two decades, local jails have housed more pretrial detainees than actual convicts.[253] In 1990, the percentage of pretrial detainees was about 50%,[254] but in 2007, the pretrial detainee population increased to 62% of the jail population.[255] State detention trends can be gleaned from a number of small studies on state pretrial detention. Wayne Thomas analyzed release rates in twenty cities in 1962 and 1971 and found that, during that time frame, pretrial release rates had increased from 48% to 67% for felony defendants.[256] Lee Silverstein also completed a study in 1962 that found that 44% of defendants were released pretrial.[257] Mary Toborg completed a study using data from 1976 to 1978 that analyzed pretrial release in eight cities. The overall pretrial release rate was 85%, and she suggested that her findings demonstrated a continuation of a trend toward higher pretrial release rates.[258] In 1969, Paul Wice surveyed seventy-two cities and found that 65% of detainees were released pretrial using cash bonds.[259] State pretrial release rates were fairly constant at 64% to 62% through the 1990s and into the first part of the 2000s.[260] In 2004, there was a distinct drop in release rates where

253. This is based on the authors' calculation from the *Annual Survey of Jails* for the years 1985–1987, 1989–1992, 1995–1997, 2000–2004, and 2006, produced by the Bureau of Justice Statistics. To obtain the underlying databases, see INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/7/studies?archive=ICPSR&sortBy=7.

254. *Compare* BURDEEN, *supra* note 15, at 4 (reporting the pretrial detainee population to be about 200,000 in county jails in 1990), *with* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 1995, at 7 (1995) (reporting the total local jail population to be 403,019 in 1990). In 2000, the percentage rose to 56%. INMATES AT MIDYEAR 2000, *supra* note 15, at 7.

255. INMATES AT MIDYEAR 2007, *supra* note 15, at 7.

256. WAYNE H. THOMAS, JR. ET AL., PRETRIAL RELEASE PROGRAMS 29 (1977). Thomas also reported an increase from 60% to 72% in release rates for misdemeanor defendants. *Id.*

257. *See* 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 8 (1965) (finding that 56% of defendants were not released on bail before trial).

258. TOBORG, *supra* note 166, at 5–6.

259. WICE, *supra* note 132, at 8–9.

260. Since the 1990s, pretrial-release records have been kept more consistently, and the numbers reveal a steady decline in pretrial release of defendants, both on a state and federal level. In the state detention system in 1992, 63% of defendants were released pretrial across the seventy-five largest counties in the United States. BRIAN A. REAVES & PHENY Z. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, at 17 (1995). The release rate remained steady at an average of 63% from 1992 to 2003, but in 2004, pretrial-release percentages began to decline again, and in 2006, they dropped to 58%. *See* BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1994, at 16 (1998) (reporting a pretrial release rate of 62%); TIMOTHY C. HART & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS,

about 5% more defendants were being held pretrial than in 2002, and this drop largely carried over into 2006.[261]

In the years before the federal Bail Reform Act of 1984, the government failed to keep consistent records on federal pretrial release. But, in 1982, a study of ten federal districts found high pretrial release rates: 90% in 1978, 89% in 1979, and 87% in 1980.[262] However, subsequent to the passage of the 1984 federal Bail Reform Act, pretrial release dropped. A 1987 General Accounting Office (GAO) report concluded that pretrial incarceration increased with the new law.[263] For instance, in 1984, 74% of defendants were released pretrial, and in 1986 after the passage of the Act, the percentage dropped to 69%.[264] However, under the new law, the number of defendants detained because of inability to meet bail dropped by almost 50%.[265] In the federal detention system in 1994, 61% of defendants were released pretrial, which was a decrease from 1986 when 69% of defendants were released pretrial.[266] The federal numbers continued to decline over the next decade until they reached a 40% release rate in 2004.[267]

FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1996, at 16 (1999) (reporting a pretrial release rate of 63%); BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1998, at 16 (2001) (reporting a pretrial release rate of 64%); GERARD RAINVILLE & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 16 (2003) (reporting a pretrial release rate of 62%); THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 16 (2006) (reporting a pretrial release rate of 62%); 2004 FELONY DEFENDANTS, *supra* note 10, at 2 (reporting a pretrial release rate of 57%); 2006 FELONY DEFENDANTS, *supra* note 10, at 6 (reporting a pretrial release rate of 58%).

261. Pretrial release rates in 2004 were 56% and in 2006 they were 58%. *See infra* Table 2.

262. U.S. GEN. ACCOUNTING OFFICE, GGD-82-51, STATISTICAL RESULTS OF BAIL PRACTICES IN SELECTED FEDERAL DISTRICT COURTS 7 (1982).

263. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 18 (1987) ("Our analysis of criminal cases in the four districts showed that overall, a greater percentage of defendants remained incarcerated during their pretrial period under the new law than under the old law." (footnote omitted)).

264. *See id.* (observing a pretrial incarceration rate of 26% under the old law and a rate of 31% under the new law, which corresponded to 74% and 69% pretrial release rates, respectively).

265. *See id.* at 17 (observing that, under the old law, all defendants in a sample size were detained because they did not meet bail, while under the new law, only 51% of defendants in a sample were detained for that reason).

266. *See id.* at 18; OFFICE OF THE FED. DET. TR., U.S. DEP'T OF JUSTICE, DETENTION NEEDS ASSESSMENT AND BASELINE REPORT: A COMPENDIUM OF FEDERAL DETENTION STATISTICS 3–4 (2006) [hereinafter FEDERAL DETENTION STATISTICS], *available at* http://www.justice.gov/ofdt/compendium_final.pdf (showing the changing pretrial detention rates of federal defendants).

267. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 47 tbl.3.2 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf (illustrating the types of pretrial release for cases terminated in 2004 and showing an overall release rate of 40% for the year); FEDERAL DETENTION STATISTICS, *supra* note 266, at 4 tbl.3 (listing the release rates for 1995 (60%), 1996 (57%), 1997 (54%), 1998 (53%), 1999 (49%), 2000 (48%), and 2001 (48%)); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 37 (2004) (listing the overall release rate at 45% for 2002); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 41 (2005) (listing the overall release rate at 41% for 2003).

2. *Current Pretrial Detention Practices.*—In our dataset, we know detention rates and predicted crime rates for 116,000 defendants from 1990 to 2006. Of those, approximately 45,000 were held and 72,000 were released. If we wanted to release everyone with less than a 20% chance of being rearrested, that would be approximately 73,500 people—very comparable to the current rate. However, as it stands, almost exactly half of those *held*—22,500—in reality have a lower than 20% chance of rearrest, while an equivalent number of those *released* have higher than a 20% chance of committing a crime. Thus, if we are releasing people based on a threshold of 20%, then we are often releasing the wrong groups of people. In other words, about half of those detained have a lower chance of being rearrested pretrial than many of the people released.[268]

To prove this point in a different way, we can change the threshold of people we are willing to release pretrial. Currently, we release about 72,000 defendants, and this rate generally matches the number of people we could release if we were to release everyone with a less than 20% chance of being rearrested for any crime pretrial. We can also choose to release all of those who are less than 30% likely to commit a crime pretrial to see what the impact would be. With this 30% threshold, we would release 99,882 defendants, which is 85% of defendants—a much larger proportion than our current percentage. In that world, 14.7% of those released would be predicted to commit a crime. This is lower than where we end up now with a 16% rate,[269] mostly because we are assuming a somewhat different methodology for predicting crime—one where we rely on our predicted crime model and nothing else. This consideration raises our efficiency such that we can release more defendants and still decrease the pretrial crime rate. This is not even accounting for any prohibited factors such as race or gender, though it does consider the age of the defendant. Thus, our predicted model can provide guidance for judges to make more efficient decisions and increase the number of people released pretrial while not causing increased danger to the public.[270]

If we were particularly interested in violent crimes, rather than just total crime rates, we could establish a double threshold. Suppose that we only release those who have both a less than 30% chance of being rearrested for any crime *and* less than a 3% chance of rearrest for a violent crime. Under this double threshold, we would release 84,000 defendants, or 72% of all defendants. Even with this increase in releases, because we are better targeting which defendants to release, pretrial violent-crime rates would

268. If we wanted to release everyone with less than a 10% chance of being rearrested for a crime pretrial, we would release 34,000 defendants in our sample, leading us to detain around three-fourths of all defendants. In contrast, if we were willing to release all of those with a 30% or less chance of committing a crime, we would release 102,202 defendants.

269. *See infra* Table 3.

270. It is important to note that we are not arguing that efficiency in prediction should be favored at the expense of the civil rights of defendants.

decrease from 1.9% to 1.24%, which is a significant improvement. The overall crime rate would be 13.8% under this model, as opposed to 17% currently.

Compared to this statistical-threshold model, it appears that judges often overhold older defendants, people with clean prior records, and people who commit fraud and public-order violations.[271] The probability of being overheld steadily rises as a defendant's prior conviction and arrest record gets better, whereas prior failures to appear in court and prior incarceration make being overheld less likely.[272]

As we discussed in subpart IV(F), our baseline probit model may not adequately track the riskiness of those released by underestimating the extent to which those held are more dangerous in unobservable ways. Though we could not formally reject our baseline model of violent crime, there was at least some evidence that this "selection on unobservables" was occurring. If we restrict ourselves to just looking at violent crime, we can use the augmented two-equation probit model, reported in Columns 5 and 6 of Table 7, which jointly accounts for release and rearrest, to re-estimate how many people should be released. For simplicity, we considered a single threshold of less than a 3% chance of committing a violent crime.[273] In that case, we would release 79,000 people, and the violent-crime rate would be 1.35%. Once again, even under these alternate assumptions, we could potentially release more people and have lower crime rates.

Rather than judges relying on these national conclusions, we recommend that local counties estimate a jurisdiction-specific model based on the probit illustrated here. This will provide them with a prediction model best attuned to local circumstances. Once judges have in hand these baseline risks based on past record, initial charge, and age, they can supplement them as needed if there are extenuating circumstances *beyond* the data we have already accounted for. We also recommend a county-specific estimation

271. Those charged with violent crimes are less likely to be overheld. Those charged with property and drug crimes form a second tier.

272. In order to determine which groups were overheld relative to their chances of committing a crime, we ran a regression on all those held using the same regressors as in Appendix A. The dependent variable was 1 for those who were held but had less than a 30% chance of rearrest for any crime and less than a 3% chance of rearrest for a violent crime. What do these individuals who were held but would be released under this new threshold look like? Fifty-seven percent have four or more prior arrests, about half are over the age of thirty, about half have a prior felony conviction, one-third have a prior failure to appear and 88% are male. This model does not say who exactly is being overheld but instead identifies factors that make it more likely that judges would overhold someone. Thus, it is similar to the model predicting crime rates, but in reverse.

273. Methodologically, we simulated an error term for the release equation that represents judges' idiosyncratic release decisions. We know from the joint probit model how correlated this decision is with future rearrest, and so we used it to form a simulated probability that each defendant would be rearrested. Thus, we were simulating a world where the judge started from an empirical model like the one presented here and then added a certain amount of private information based on individual circumstances not captured in our data. We then simulated rearrest rates as if the judge had released all those with rearrest probabilities below 3%.

because, as one can see in the Appendix, differences across counties can lead to substantial differences in rearrest probabilities.

3. *Impacts of Detention on Defendants and Society.*—As to the third point, there are several documented effects on defendants who are detained pretrial and on society when pretrial defendants commit crimes. These assertions rely on studies whose merits we do not test here.[274] The largest impact may be that incarcerating a defendant pretrial prejudices the defendant's case in favor of guilt. Several studies show that incarcerated defendants are more likely than those released pretrial to be found, or to plead, guilty and serve prison time.[275] Detention leads to the loss of employment and other negative financial conditions[276] and to less likelihood of obtaining private counsel, which can harm the defendant's chances of acquittal[277] or favorable sentencing.[278] In addition, living conditions in jail are often poor and have been shown to have a negative influence on a defendant's trial demeanor.[279] In addition, increased detention increases costs to counties, which currently struggle with hard decisions regarding budget cuts.

On the other side, there is the obvious consideration that there is a large cost to victims and society when there are more crimes committed. The costs of murder, rape, burglary, robbery, and other felony offenses are tremendous

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274. A fuller discussion of the normative claims surrounding the impacts on defendants and society of applying this model will be included in a forthcoming article.

275. *See* Foote, *supra* note 8, at 1053 tbl.2 (observing that 22% of defendants on bail and 59% of detained defendants received prison sentences); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 643 n.6 (1964) (finding that detained defendants are more likely to receive prison sentences than bailed persons); Patricia Wald, *Foreword: Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 639 (1964) (finding that "defendants released any time before sentencing received more favorable treatment than those who stayed in jail the entire time"). In the study presented in this Article, 74% of those detained were found guilty and 69% served prison sentences, while 53% of those released were found guilty and 26% served prison time.

276. *See* Angel et al., *supra* note 111, at 354 (explaining that 40% of defendants were steadily employed, but almost 90% had savings of less than $300, which meant that detention often forced dependents onto welfare).

277. Defendants with appointed counsel were found guilty 65% of the time as compared to 49% for those with private attorneys, and 17% of defendants with appointed counsel were found not guilty as compared to 35% of those with private counsel. *See id.*, at 347–49 (stating that detained defendants are less able to afford the costs of witnesses and private investigators, are more ready for police lineups, and go to court with the baggage of having been detained pretrial).

278. *Id.* at 350–51.

279. William A. Brockett, Jr., *Presumed Guilty: The Pre-trial Detainee*, YALE REV. L. & SOC. ACTION, Spring 1971, at 10, 17–18 ("Time in jail may alter the defendant's appearance for the worse. One inmate, when first seen, appeared to be a young, clean-cut, and cheerful country boy. Two weeks later, the same inmate, who had spent his past few days in administrative segregation as an escape risk, had acquired an unmistakable pallor—'jailhouse grey'—had sunken eyes, trembling hands, a few days stubble on his jaw, and had become completely withdrawn, sinking his chin onto his chest and answering questions in monosyllables only. . . . The appearance of the defendant is not likely to go unnoticed by a jury.").

both financially and in other intangible ways.[280] Indeed, recent scholars have argued that pretrial release costs society more than detaining innocent people, because it allows the release of a greater number of suspected felons on the street for several more months.[281] While we leave the determination of whether (and at what level) the costs of crime outweigh the benefits of releasing more individuals for another day, we conclude here that release rates can be increased in most U.S. counties without a commensurate increase in crime rates.

V. Conclusion

We have high expectations that our government will keep us safe from crime and violence.[282] We are much less patient with government when those who cause us harm are already part of the criminal justice system.[283] Others tackling the pretrial crime and prediction problem have advocated speedy trials,[284] an increase in pretrial supervision programs,[285] bail

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280. *See Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1990–2009*, FED. BUREAU INVESTIGATION (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_01.html (citing the number and rates of these types of crimes); *see also* Mark A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIMINOLOGY 5, 17 (1998) (finding that a typical criminal career causes between $1.3 million and $1.5 million in external costs after discounting to present value); Mark A. Cohen et al., Willingness-to-Pay for Crime Control Programs 27 (Nov. 2001) (unpublished manuscript), *available at* http://ssrn.com/abstract=293153 (finding victim costs due to armed robbery and burglary to be about five to ten times higher than previous estimates).

281. Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 27 (2010) (pointing out that an individual has a 0.25% chance of being wrongfully convicted of a serious crime sometime in his life but an 83% chance of being the victim of a serious crime).

282. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 (2001) (analyzing the demand for symbolic legislative action and the influence of public pressure on the formulation and enforcement of criminal law).

283. *See, e.g.*, Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U.S. Attorney Wished to Detain*, 30 AM. J. CRIM. L. 45, 48 (2002) ("While support for bail reform came from all quarters . . . the rationale as seen by conservatives originated in the perceived need to protect the public from criminal behavior by defendants who had been released on bail."); *id.* at 48 n.8 ("The impetus for pretrial incarceration did not come from criminal justice professionals but from politicians responding to public sentiment."); Thomas Henry, *Reflections on the 25th Anniversary of the Pretrial Services Act*, FED. PROBATION, Sept. 2007, at 4 ("The vast majority of citizens, although recognizing the right to bail (especially if they are the arrestees), resent the fact that those arrested for crime are free on the streets and back in their neighborhoods. Safety is the concern, voiced most frequently by law enforcement frustrated that 'criminals' (not defendants) are back on the street before they finish their paperwork.").

284. Foote, *supra* note 8, at 1077–78. While working to make trials speedier, Foote also recommended that failure to appear in court be a criminal offense, cash bail be phased out in favor of nonfinancial conditions like personal recognizance, and bail amounts be reduced in order to reduce economic bias in the bail system. *Id.* at 1073–74; *see also* Ervin, *supra* note 22, at 299 (advocating speedy trials and noting that most defendants do not commit crimes within the first sixty days of bail release). For examples of recent speedy trial innovations, see Stephen Hunt, *Early Resolution Program Aims to Unclog Courts*, SALT LAKE TRIB. (Jan. 19, 2011), http://www.sltrib.com/sltrib/home/51080841-76/cases-program-ecr-county.html.csp and Emiley Morgan, *Early Resolution Plan in Works To Move Criminal Justice System Along*, DESERET NEWS (Dec. 22,

forfeiture,[286] more visibility of judicial detention decisions,[287] and setting bail amounts in a more logical way.[288] Some of these proposals deserve serious consideration. While our model is not the panacea to solving the problem of predicting pretrial violence, it contributes in several important ways.

First, prior work has disagreed on how likely reported pretrial arrest actually is, and our study shows that it is actually quite unlikely. This is especially the case considering that this data looks exclusively at felony defendants in urban counties, arguably the most dangerous recidivists in the system. Of all of the defendants released, only 16% are rearrested for any reason, 11% are rearrested for a felony, and only 1.9% are rearrested for a violent felony. To look at it another way, about 80% of released pretrial defendants have less than a 3% chance of being rearrested pretrial for a violent crime. And for almost all crimes, the average rearrest rates are only about 1%–2% for a pretrial violent crime.[289]

Second, scholars have said that there are no accurate predictors of pretrial crime.[290] We disagree with that, showing that the present offense, prior convictions, and prior failures to appear are all important predictors of pretrial rearrest. As to the present offense, while scholars have commented

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2010), http://www.deseretnews.com/mobile/article/705363391/Early-resolution-plan-in-works-to-move-criminal-justice-system-along.html. For an editorial in support of the program, see *Early Case Resolution*, KSL (June 11, 2010), http://www.ksl.com/index.php?nid=238&sid=11121088.

285. Studies have shown that high-risk defendants could safely be released into the public by imposing harsher conditions on them instead of the lighter conditions imposed on low-risk defendants. Toborg & Bellassai, *supra* note 174, at 106. For instance, programs that would force defendants who test positive for drugs to be sent back to jail have been shown to be helpful. *See* PAUL BERNARD WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 66 (1973) (supporting pretrial supervision programs rather than detention pretrial and noting that a 1972 Department of Justice survey of cities revealed that 72% of cities with pretrial rearrest rates below the national average used pretrial supervision). Wice further noted that these supervision programs have a stronger influence on rearrest rates than release criteria such as community ties and the present charge. *Id.* at 66–67.

286. Bail forfeiture is when a defendant is released on bail and is informed that if he gets arrested for another crime while free on bail, he waives his right to bail for the subsequent crime. Angel et al., *supra* note 111, at 365–68 (noting that bail forfeiture should be accompanied by strong procedural protections, an expedited trial, and a detention hearing).

287. Goldkamp, *supra* note 33, at 55–56 (suggesting the development of methods for judges to review bail policies, organize discretionary and improvisational release and detention practices, and monitor their consequences so that judges will be more able to make informed decisions based on rational policy).

288. Karnow, *supra* note 85, at 21 (noting that if the likelihood of getting caught is low, then the defendant will commit the offense, and if bail is high enough that the defendant does not want to risk losing it, but is able to achieve it, he is adequately deterred from being rearrested or committing additional crimes). Note, though, that defendants often do not lose money bail for committing additional crimes but only for failing to appear for court dates.

289. This is true except for three categories: murder, rape, and robbery.

290. *See* NBS STUDY, *supra* note 96, at 40–41 (contending that current data is inadequate to develop and validate a high quality prediction device for pretrial crime); Foote, *supra* note 8, at 1071–72 (arguing that it is "impossible" to determine how much weight should be given to the possibility that "the type of defendants who are now jailed are so much more unreliable as a group that their pre-trial freedom would substantially increase the incidence of non-appearance").

that it provides little information, we show that those charged with robbery, burglary, and motor-vehicle theft are more likely to be rearrested for any crime on release than the average defendant. We also show that though defendants with drug felonies are presumed to be dangerous, they are among the *least* likely to be rearrested for a violent crime. In fact, people charged with drug felonies are about as likely to be rearrested as those brought in on driving-related offenses.[291] As to prior convictions, while many states consider this factor and prior work has disagreed as to its importance as a predictor of pretrial misconduct, we find that the number of previous convictions is directly correlated with future likelihood to be arrested.[292] Again showing that the instance of pretrial crime is exaggerated, we show that even repeat offenders[293] only get arrested for a pretrial crime in about one in thirty instances. With failure-to-appear rates, we show that previous failures to appear are a significant predictor of future multiple failures to appear, though past failure to appear is not a good predictor of violent crime. Past failure to appear also predicts being rearrested for a nonviolent crime.

Third, our analysis also considers an issue of first impression in this area: which of two risks weighs more heavily with judges—dangerousness or flight risk? In states where judges should consider both factors, we find that judges consider dangerousness at a much higher rate than flight risk, almost to the exclusion of flight risk. In states not permitted to consider dangerousness, flight risk is a bigger consideration, though judges still consider dangerousness at a smaller level.[294]

Finally, recognizing that overall detention rates have increased in both federal and state systems, our study examines whether we can release more defendants safely. In the most significant finding in our study, our analysis shows that if the goal is to prevent crime, judges are often releasing and detaining the wrong groups. In other words, about half of those detained have a lower chance of being rearrested pretrial than many of the people released. Indeed, we would be able to release 25% more defendants while decreasing pretrial crime levels if we released defendants using our evidence-based model. This model would not allow judges to consider prohibited factors such as gender and race, but it demonstrates that judges could safely release some older defendants, people with clean prior records, and people who commit fraud and public order violations, without increasing danger to the public.

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291. In addition, we conclude that, in general, those charged with violent crimes are the most likely to be charged with violent crimes while released on bail.

292. However, our data surprisingly finds that rearrest is not much higher for those who have four or more prior convictions than those who have no convictions or just one prior conviction.

293. By repeat offenders, we refer to defendants with four or more convictions.

294. On this point, our study focused on New York and New Jersey and did not analyze data in other states that prohibit considerations of dangerousness.

Table 1. Determining Dangerousness: General Statutory Discretions

Possible Discretionary Considerations	Level of Discretion	Number of States
Present offense charged	*Objective*	44
Restrict scope of pretrial detention authority		35
Require/permit consideration of present offense		31
Presumption of detention/release based on nature of crime		7
Past conduct	*Objective*	33 (+D.C.)
Full review of criminal record		17
Limited review related to determination of dangerousness		2
Limited review of certain types of crimes		2
Past appearances, conduct during bond/supervised release		25
Review past conduct, especially history of drugs or violence		10
Character and present circumstances	*Subjective*	25 (+D.C.)
Bail Reform Act factors:		
• Family situation		
• Employment		
• Finance		
• Character and reputation		
• Record of appearances/history of flight		
• Community ties		
Factors not included in Bail Reform Act:		
• Alien status		3
• Gang involvement		4
• Possession or control of weapons		4
• Propensity for violence		2
• General attitude and demeanor		1
• History of depression		1
• Treatment of animals		11
Consider "any other factor" relevant or "including but not limited to"		16
No list of factors		7

Table 2. Observations and Percentage of Defendants Released by Year

Year	Defendants (Observations)	Percentage Released (Weighted)
1990	12,257	64%
1992	10,518	63%
1994	12,922	63%
1996	13,192	64%
1998	13,432	63%
2000	12,738	61%
2002	13,414	61%
2004	12,596	56%
2006	15,828	58%

Table 3. Releases and Rearrests by Offense

Original Offense	Percentage of All Defendants	Percentage Released	Percentage of Those Released Who Are Rearrested: For Any Crime	For a Felony	For a Violent Felony
All Defendants	100%	61%	16%	11%	1.9%
Violent Crimes					
Murder	0.9%	19%	12%	9%	6.4%
Rape	1.5%	53%	9%	6%	3.2%
Robbery	6.6%	42%	21%	13%	5.8%
Assault	12.0%	63%	12%	7%	2.9%
Other	3.7%	62%	11%	5%	2.5%
Property Crimes					
Burglary	8.7%	49%	19%	13%	1.9%
Larceny/Theft	9.4%	67%	16%	10%	1.4%
Motor Vehicle	3.1%	48%	20%	16%	2.4%
Forgery	2.7%	70%	15%	9%	1.3%
Fraud	2.8%	80%	9%	6%	0.3%
Other	4.4%	71%	18%	12%	2.3%
Drug					
Sales	17.2%	63%	21%	14%	1.6%
Possession/Other	18.3%	66%	17%	11%	1.1%
Public Order					
Weapons	3.0%	64%	12%	8%	2.1%
Driving Related	2.7%	73%	13%	9%	1.0%
Other	3.0%	61%	13%	8%	1.1%

Table 4. Summary Statistics for Initial Offense and Past Criminal Record Variables

	All Defendants	Released Sample
Violent Crimes		
Murder	0.9%	0.3%
Rape	1.5%	1.3%
Robbery	6.6%	4.6%
Assault	12.0%	12.3%
Other	3.7%	3.7%
Property Crimes		
Burglary	8.7%	6.9%
Larceny/Theft	9.4%	10.3%
Motor Vehicle	3.1%	2.4%
Forgery	2.7%	3.1%
Fraud	2.8%	3.6%
Other	4.4%	5.1%
Drug		
Sales	17.2%	17.5%
Other	18.3%	19.6%
Public Order		
Weapons	3.0%	3.2%
Driving Related	2.7%	3.2%
Other	3.0%	3.0%
Prior Arrests		
None	27.7%	35.4%
One	8.9%	10.0%
Two or Three	13.6%	14.0%
Four or More	49.8%	40.5%
Prior Convictions		
None	41.8%	52.1%
One	13.4%	13.7%
Two or Three	16.4%	14.5%
Four or More	28.4%	19.8%
Prior Incarceration	44.9%	33.1%
Multiple Charges	55.9%	55.3%
Prior Failure to Appear	29.7%	24.3%
Criminal Status	32.5%	23.4%
Felon	40.4%	29.7%
Prior Violent Felony Conviction	10.9%	7.7%

Note: Each cell gives the fraction of the sample that has the given characteristic. Thus, 2.8% of all defendants in the sample were arrested on fraud charges. For the full and released samples, n = 116,887 and 71,943 respectively. Data are all weighted to be representative of large urban counties.

Table 5. Summary Statistics for Demographic and County Variables

	All Defendants	Released Sample
Age		
Under 20	13.9%	15.6%
20–24	21.8%	22.3%
25–29	17.8%	17.6%
30–39	28.2%	26.8%
40–49	13.8%	13.0%
50 and above	4.5%	4.8%
County Crime Rate per Thousand People		
Violent	0.18	0.19
Property	0.21	0.22
Drug	0.25	0.26
Public Order	0.06	0.06
County Population (log)	14.37	14.24

Table 6. Rearrest Probabilities Based on Observable Characteristics

Initial Felony Charge	Teenager			Over 50		
	No Prior Record	One Prior Arrest	Extensive Record	No Prior Record	One Prior Arrest	Extensive Record
Violent Crimes						
Murder	5.9%	7.2%	19.4%	1.7%	2.2%	8.0%
	[2.4]	[2.8]	[6.2]	[0.9]	[1.1]	[3.4]
Rape	3.4%	4.2%	13.0%	0.9%	1.2%	4.7%
	[0.7]	[0.9]	[2.3]	[0.3]	[0.4]	[1.4]
Robbery	4.1%	5.1%	15.0%	1.1%	1.5%	5.7%
	[0.4]	[0.7]	[1.6]	[0.3]	[0.4]	[1.3]
Assault	2.7%	3.4%	11.0%	0.7%	0.9%	3.8%
	[0.3]	[0.4]	[1.1]	[0.2]	[0.2]	[0.8]
Property Crimes						
Burglary	1.5%	2.0%	7.2%	0.3%	0.5%	2.3%
	[0.2]	[0.3]	[0.9]	[0.1]	[0.2]	[0.6]
Larceny/Theft	1.4%	1.8%	6.6%	0.3%	0.4%	2.0%
	[0.2]	[0.3]	[0.8]	[0.1]	[0.1]	[0.5]
Motor Vehicle	2.0%	2.6%	8.8%	0.5%	0.6%	2.9%
	[0.4]	[0.6]	[1.2]	[0.2]	[0.2]	[0.8]
Forgery	1.4%	1.8%	6.6%	0.3%	0.4%	2.0%
	[0.3]	[0.5]	[1.3]	[0.1]	[0.1]	[0.6]
Fraud	0.4%	0.6%	2.8%	0.1%	0.1%	0.7%
	[0.2]	[0.2]	[0.9]	[0.0]	[0.1]	[0.3]
Drug Crimes						
Sales	1.2%	1.6%	6.0%	0.3%	0.4%	1.8%
	[0.2]	[0.3]	[0.8]	[0.1]	[0.1]	[0.4]
Possession/Other	1.2%	1.6%	6.0%	0.3%	0.4%	1.8%
	[0.2]	[0.3]	[0.6]	[0.1]	[0.1]	[0.5]
Public Order						
Weapons	1.8%	2.3%	8.2%	0.4%	0.6%	2.6%
	[0.3]	[0.4]	[1.2]	[0.1]	[0.2]	[0.7]
Driving Related	1.1%	1.4%	5.5%	0.2%	0.3%	1.6%
	[0.3]	[0.4]	[1.3]	[0.1]	[0.1]	[0.6]

Note: "Extensive Record" is a person previously convicted of a violent felony with at least four prior arrests and active criminal justice status. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. For the underlying probit estimation used to form the estimates, see Appendix A. For the sample, $n = 71,943$. Estimates are weighted to be representative.

Table 7. Probability of Rearrest for a 20–25 Year Old Under Different Modeling Assumptions

	Baseline		Predict 95% County Release Rate		Maximum Likelihood Joint Selection Model	
Initial Felony Charge	One Prior Arrest	Extensive Record	One Prior Arrest	Extensive Record	One Prior Arrest	Extensive Record
Violent Crimes	3.1%	10.2%	4.6%	13.6%	4.1%	13.5%
	[0.4]	[1.1]	[0.8]	[1.9]	[0.9]	[2.9]
Property Crimes	1.3%	5.2%	2.0%	7.3%	1.7%	6.9%
	[0.2]	[0.5]	[0.4]	[1.2]	[0.4]	[1.6]
Drug Crimes	1.1%	4.4%	1.7%	6.3%	1.4%	5.9%
	[0.2]	[0.4]	[0.4]	[1.1]	[0.3]	[1.4]
Public Order	1.2%	4.8%	1.9%	6.8%	1.5%	6.3%
	[0.2]	[0.6]	[0.4]	[1.3]	[0.4]	[1.5]

Note: "Extensive Record" is a person previously convicted of a violent felony with at least four prior arrests and active criminal justice status. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. All probabilities are estimated latent probabilities for the whole population of defendants, rather than just those released. Baseline estimates are those in Appendix A, model (1). The next estimates add county hold rate as an explanatory variable to the estimation, then simulate rearrest rates if all counties released 95% of defendants. The last estimates jointly model being held and being rearrested to estimate the latent risk of a person being rearrested if he or she were released. Estimates are weighted to be representative.

Table 8. Predicting Multiple Failures to Appear

Initial Felony Charge	Teenager: No Prior Record	Teenager: Prior Failure to Appear	30–35: No Prior Record	30–35: Prior Failure to Appear	Over 50: No Prior Record	Over 50: Prior Failure to Appear
Violent Crimes						
Murder			insufficient data			
Rape	0.7%	1.9%	0.7%	1.8%	0.4%	1.2%
	[0.3]	[0.7]	[0.3]	[0.6]	[0.2]	[0.5]
Robbery	1.1%	2.9%	1.1%	2.8%	0.7%	1.9%
	[0.2]	[0.7]	[0.2]	[0.6]	[0.2]	[0.5]
Assault	1.6%	3.8%	1.5%	3.7%	1.0%	2.5%
	[0.3]	[0.7]	[0.2]	[0.6]	[0.2]	[0.5]
Property Crimes						
Burglary	2.6%	6.0%	2.6%	5.9%	1.7%	4.1%
	[0.3]	[1.1]	[0.3]	[0.9]	[0.4]	[0.9]
Larceny/Theft	3.0%	6.7%	3.0%	6.6%	2.0%	4.7%
	[0.5]	[1.4]	[0.4]	[1.3]	[0.4]	[1.1]
Motor Vehicle	3.6%	7.8%	3.5%	7.7%	2.4%	5.5%
	[0.8]	[1.8]	[0.7]	[1.6]	[0.6]	[1.4]
Forgery	3.4%	7.3%	3.3%	7.2%	2.2%	5.1%
	[0.6]	[1.5]	[0.5]	[1.4]	[0.5]	[1.2]
Fraud	2.4%	5.5%	2.4%	5.4%	1.5%	3.8%
	[0.3]	[1.0]	[0.3]	[0.9]	[0.3]	[0.9]
Drug						
Sales	2.9%	6.5%	2.8%	6.4%	1.9%	4.5%
	[0.5]	[1.4]	[0.4]	[1.2]	[0.4]	[1.1]
Possession/Other	5.1%	10.4%	5.0%	10.3%	3.5%	7.5%
	[0.8]	[2.0]	[0.7]	[1.7]	[0.8]	[1.7]
Public Order						
Weapons	2.0%	4.6%	1.9%	4.5%	1.2%	3.1%
	[0.4]	[1.1]	[0.4]	[1.0]	[0.4]	[1.0]
Driving Related	1.5%	3.7%	0.5%	3.6%	0.9%	2.4%
	[0.4]	[1.0]	[0.3]	[0.9]	[0.2]	[0.7]

Note: We simulate the probability of multiple failures to appear for a given person while varying their age, original offense, and whether or not they have previously failed to appear. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. For the underlying probit estimation used to form the estimates, see Appendix A. $n = 71{,}763$. Estimates are weighted to be representative.

Table 9. Predicting Holds Based on Predicted Flight Risk and Violence

	(1) Linear Covariates	(2) Log Covariates	(3) Add County Hold Rate	(4) New York and New Jersey	(5) Other States
Predicted Flight	0.9%*** [0.06]				
Predicted Violence	3.3%*** [0.08]				
Log (Predicted Flight)		1.9%*** [0.21]	2.3%*** [0.19]	9.9%*** [0.47]	1.1%*** [0.20]
Log (Predicted Violence)		9.8%*** [0.16]	13.4%*** [0.15]	8.0%*** [0.41]	14.4%*** [0.16]
County-Year Hold Percentage			1.1%*** [0.01]	1.0%*** [0.04]	1.1%*** [0.01]
Observations	115,889	115,889	115,889	15,289	100,600

Note: Coefficients and county-clustered standard errors are multiplied by 100 to be in percentage terms. Each value gives the average over the sample of the change in probability of being held from a change in the covariate. Thus a 1 log-point movement (a 170% increase) in (2) predicts a 1.9 percentage point rise in the probability of being held. Predicted Flight Risk and Violence are formed from the model (1) and (2) estimates in Appendix A. Estimates are weighted to be representative. The county-fixed-effects version of column (3), available from the authors, gives similar results.

Table 10. No Detention vs. Detention States

	New York and New Jersey	Other States
Percent Released	76%	59%
Predicted Rearrest Percentage, Based on Observable Characteristics	2.79%	1.71%
Observed Rearrest Percentage	2.95%	1.57%

Note: Estimates are weighted to be representative. The New York and New Jersey sample has 15,289 observations. The "Other States" sample has 100,600 observations. In the first row, the New York and New Jersey sample has 15,430 observations and the "Other States" sample has 101,457 observations. For the following two rows, the sample sizes are 11,738 and 60,205 and respectively.

Table 11. Predicting All Rearrests

Initial Felony Charge	Teenager			Over 50		
	No Prior Record	One Prior Arrest	Extensive Record	No Prior Record	One Prior Arrest	Extensive Record
Violent Crimes						
Murder	9.1%	12.8%	28.8%	2.5%	4.0%	11.9%
	[3.0]	[3.8]	[6.5]	[1.1]	[1.6]	[3.9]
Rape	8.0%	11.4%	26.5%	2.2%	3.4%	10.6%
	[0.9]	[1.2]	[2.6]	[0.3]	[0.5]	[1.4]
Robbery	13.8%	18.7%	37.7%	4.4%	6.6%	17.5%
	[1.1]	[1.5]	[2.4]	[0.6]	[0.8]	[1.8]
Assault	9.6%	13.4%	29.8%	2.7%	4.2%	12.5%
	[0.7]	[1.1]	[2.0]	[0.4]	[0.6]	[1.4]
Property Crimes						
Burglary	13.4%	18.1%	36.9%	4.2%	6.3%	17.0%
	[1.0]	[1.4]	[2.2]	[0.5]	[0.8]	[1.7]
Larceny/Theft	12.8%	17.5%	35.9%	4.0%	6.0%	16.4%
	[1.0]	[1.3]	[2.3]	[0.4]	[0.6]	[1.5]
Motor Vehicle	14.5%	19.5%	38.8%	4.7%	6.9%	18.3%
	[1.6]	[2.0]	[2.6]	[0.8]	[1.1]	[2.1]
Forgery	12.5%	17.0%	35.3%	3.8%	5.8%	16.0%
	[1.2]	[1.6]	[2.7]	[0.5]	[0.8]	[1.8]
Fraud	9.4%	13.2%	29.5%	2.6%	4.1%	12.3%
	[1.4]	[1.8]	[3.3]	[0.6]	[0.8]	[2.1]
Drug Crimes						
Sales	14.7%	19.8%	39.2%	4.8%	7.1%	18.6%
	[1.1]	[1.4]	[2.2]	[0.5]	[0.7]	[1.5]
Possession/Other	13.9%	18.8%	37.8%	4.4%	6.6%	17.6%
	[1.2]	[1.5]	[2.3]	[0.6]	[0.8]	[1.8]
Public Order						
Weapons	9.4%	13.2%	29.4%	2.6%	4.1%	12.3%
	[1.0]	[1.5]	[2.3]	[0.5]	[0.7]	[1.6]
Driving Related	10.2%	14.3%	31.1%	2.9%	4.6%	13.3%
	[1.0]	[1.2]	[2.6]	[0.5]	[0.7]	[1.8]

$n = 71{,}943$

Note: "Extensive Record" is defined as a person previously convicted of a violent felony with at least four prior arrests and active criminal justice status. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. For the underlying probit estimation used to form the estimates, see Appendix A. $n = 71{,}943$. Estimates are weighted to be representative.

Appendix A. Determinants of Being Rearrested or Having Multiple Failures to Appear

	(1) Violent Felonies		(2) Multiple Failures to Appear		(3) All Crimes	
	Coefficient	S.E.	Coefficient	S.E.	Coefficient	S.E.
Initial Felony Charge						
Violent Crimes						
Murder	4.74%*	[2.43]	N/A		-5.35%	[3.38]
Rape	2.23%***	[0.77]	-5.10%***	[0.82]	-6.59%***	[1.43]
Robbery	2.97%***	[0.46]	-4.55%***	[0.77]	-0.06%	[1.17]
Assault	1.53%***	[0.26]	-4.05%***	[0.74]	-4.83%***	[0.93]
Other	1.60%***	[0.51]	-4.55%***	[0.74]	-4.75%***	[1.17]
Property Crimes						
Burglary	0.35%*	[0.21]	-2.77%***	[0.69]	-0.60%	[0.81]
Larceny/Theft	0.18%	[0.19]	-2.33%***	[0.69]	-1.17%	[1.06]
Motor Vehicle	0.82%**	[0.36]	-1.68%**	[0.81]	0.60%	[1.41]
Forgery	0.16%	[0.32]	-1.95%**	[0.90]	-1.52%	[1.35]
Fraud	-0.82%***	[0.23]	-3.05%***	[0.80]	-5.02%***	[1.95]
Other	0.78%**	[0.31]	-2.14%***	[0.67]	0.02%	[1.15]
Drug						
Sales	0.01%	[0.17]	-2.48%***	[0.67]	0.89%	[0.91]
Other			baseline			
Public Order						
Weapons	0.62%**	[0.30]	-3.57%***	[0.66]	-5.06%***	[1.20]
Driving Related	-0.13%	[0.31]	-4.11%***	[0.78]	-4.07%***	[1.09]
Other	-0.07%	[0.28]	-3.19%***	[0.79]	-4.18%***	[1.25]
Prior Arrests						
One	0.33%**	[0.17]	-0.07%	[0.31]	3.70%***	[0.53]
Two or Three	0.82%***	[0.20]	0.36%	[0.29]	7.21%***	[0.64]
Four or More	1.61%***	[0.19]	0.89%**	[0.43]	12.30%***	[1.15]
Prior Convictions						
One	-0.31%	[0.19]	-0.90%***	[0.30]	-2.88%***	[0.71]
Two or Three	-0.45%**	[0.21]	-1.45%***	[0.44]	-2.60%***	[0.99]
Four or More	-0.04%	[0.23]	-1.26%***	[0.47]	1.00%	[1.35]

Appendix A (*continued*)

	(1) Violent Felonies		(2) Multiple Failures to Appear		(3) All Crimes	
	Coefficient	S.E.	Coefficient	S.E.	Coefficient	S.E.
Prior Incarceration	0.21%	[0.20]	0.98%**	[0.38]	2.27%***	[0.84]
Multiple Charges	0.13%	[0.13]	0.63%**	[0.27]	1.54%**	[0.62]
Prior Failure to Appear	0.30%**	[0.13]	2.85%***	[0.52]	4.04%***	[0.79]
Criminal Status	0.50%***	[0.12]	0.57%***	[0.19]	4.40%***	[0.58]
Felon	-0.21%	[0.19]	-0.77%***	[0.27]	0.10%	[0.61]
Prior Violent Felony Conv.	0.95%***	[0.15]	0.46%	[0.39]	1.27%**	[0.59]
Age						
Under 20			baseline			
20–24	-0.82%***	[0.18]	-0.45%	[0.31]	-5.68%***	[0.63]
25–29	-1.63%***	[0.19]	-0.31%	[0.37]	-8.67%***	[0.92]
30–39	-1.78%***	[0.20]	-0.06%	[0.32]	-9.76%***	[0.88]
40–49	-2.20%***	[0.19]	-0.45%	[0.34]	-11.85%***	[0.90]
50 or more	-2.37%***	[0.28]	-1.23%**	[0.49]	-14.01%***	[1.03]
Year						
1990			baseline			
1992	-0.06%	[0.43]	1.18%*	[0.60]	-2.59%	[2.11]
1994	0.14%	[0.37]	0.05%	[0.47]	-1.76%	[2.08]
1996	-0.12%	[0.34]	-0.03%	[0.52]	-0.48%	[2.08]
1998	0.00%	[0.37]	0.29%	[0.53]	-1.04%	[1.85]
2000	0.09%	[0.31]	-0.69%	[0.55]	0.20%	[2.23]
2002	0.00%	[0.41]	1.16%*	[0.69]	2.22%	[2.62]
2004	0.09%	[0.43]	0.63%	[0.67]	4.85%	[3.41]
2006	0.08%	[0.45]	-0.01%	[0.55]	0.92%	[2.47]
County Crime Rate/1000 People						
Violent	3.82%***	[0.81]	0.41%	[3.15]	13.03%*	[7.57]
Property	-2.49%**	[1.10]	1.67%	[3.24]	-9.16%	[8.60]
Drug	-0.50%	[0.84]	0.59%	[3.02]	5.78%	[3.95]
Public Order	-0.21%	[1.84]	-8.15%	[8.05]	-8.57%	[14.66]
County Population (log)	-0.30%*	[0.15]	-0.44%	[0.48]	-2.47%***	[0.77]

n = 71,943

Note: Coefficients give the average percentage change in probability for a person having the given characteristic, compared to having the baseline. Standard errors are clustered at the county level and are in brackets. Estimates are weighted to be representative.

The Case for "Trial by Formula"

Alexandra D. Lahav*

The civil justice system tolerates inconsistent outcomes in cases brought by similarly situated litigants. One reason for this is that in cases such as Wal-Mart Stores, Inc. v. Dukes,[1] *the Supreme Court has increasingly emphasized liberty over equality. Litigants' right to a "day in court" has overshadowed their right to equal treatment. However, an emerging jurisprudence at the district court level is asserting the importance of what this Article calls "outcome equality"—similar results reached in similar cases. Taking the example of mass tort litigation, this Article explains how innovative procedures such as sampling are a solution to the problem of inconsistent outcomes. Outcome equality, achieved through statistical adjudication, is gaining force on the ground. Despite the Supreme Court's principled stance in favor of liberty in a series of recent opinions, a victory for outcome equality is good for our civil justice system.*

To date, the discussion about civil-litigation reform has focused on the conflict between the individual's right to participation and society's interest in the efficient disposition of the great volume of outstanding litigation. This conflict is real and is particularly troublesome in mass torts, where tens of thousands of plaintiffs file related cases, making it impossible for the courts to hold a hearing for each claimant. But the fixation on this conflict ignores the fact that an individual's right to equal treatment is also a critical value and can conflict with the individual's right to participation. This Article reframes the debate about procedural justice in the mass tort context as a conflict between liberty and equality rather than liberty and efficiency. The rights at stake are not only the individual's right to a day in court to pursue his claim as he wishes, but also the right to be treated as others in similar circumstances are treated. This Article defends district court attempts to achieve equality among litigants by adopting statistical methods and advocates greater rigor in the use of these methods so that courts can more effectively promote outcome equality.

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1. 131 S. Ct. 2541 (2011).

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Introduction

That like cases ought to be treated alike is a basic common law principle. Judges recognize that consistency in case outcomes is a characteristic of the rule of law.[2] Yet our civil justice system tolerates a great

2. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624–26 (2008) (lamenting unpredictability in punitive damages awards); Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."). Scholars have also noted this principle but have rarely analyzed it. *See* Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 137, 147 (1990) (describing random outcomes in tort cases as "a flaw in the system that undermines the system's accuracy and fairness"); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 39 (1994) ("[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to the rule of law."); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 858 (1984) ("Procedural systems are supposed to treat like cases alike; consistency is the systematic analogue to the impartiality feature demanded of individual decisionmakers."); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1866–67 &

deal of inconsistency in outcomes. Study after study has shown that both jurors and legal professionals assess damages inconsistently in tort cases.[3] The procedural law reinforces this inconsistency. Juries deliberate without knowing what other juries have done in similar cases.[4] In the federal courts, judges may overturn jury verdicts only if the judge finds that no reasonable juror could have reached the verdict and may remit an award only if it is so large that it "shock[s] the conscience."[5] Litigants may settle cases without ascertaining what similar litigants received in settlement.

This is a curious disconnect. Why would a system committed to the rule of law so cavalierly permit similar cases to come out differently from one another? The procedural law's failure to enforce consistency in outcomes—even as judges laud the well-worn common law principle that like cases ought to be treated alike—reflects a deep tension in civil litigation between liberty and equality. Liberty in civil litigation is summed up as the "deep-rooted historic tradition that everyone should have his own day in court."[6] Equality is embodied in the common law principle that like cases ought to be treated alike.[7]

Liberty and equality are not inherently at odds with one another.[8] In our system of decentralized decision makers, however, a tension between liberty

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n.8 (2002) (describing how most scholars assert equality as a value in civil procedure without explaining it).

3. *See infra* subparts I(B)–(C) (discussing unexplained variation in jury verdicts and in the evaluation of damages by potential jurors and legal professionals).

4. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 781–83 (1995) (describing and analyzing lack of information in jury instructions). *See generally* Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712, 714, 716, 723–24 (2000) (collecting and analyzing jury instructions).

5. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2815, at 160–62 (2d ed. 1995); *see also* FED. R. CIV. P. 59 (announcing the standard for granting a new trial or altering a judgment). In some state courts, the standard is lower. In New York, for example, the standard is whether the verdict "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c) (McKinney 1995).

6. Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1st ed. 1981)); Richard v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (same); Martin v. Wilks, 490 U.S. 755, 762 (1989) (same), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076–77; *accord* Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008) (citing *Richard*, 517 U.S. at 798). The fact that the Court transitioned from citing Wright & Miller in *Ortiz*, *Martin*, and *Richard* to citing *Richard* in *Taylor* indicates that the Court has internalized the day in court ideal as part of its own jurisprudence, as opposed to an outsider's description.

7. The principle of equality has other expressions in civil procedure, such as equality of access to the courts and equality of resources in litigation. *See* Rubenstein, *supra* note 2, at 1867–68 (summarizing several equality concerns addressed by civil procedure, including "equality in the litigants' capacities to produce their proofs and arguments" and "achiev[ing] consistent outcomes in like cases"). This Article is exclusively concerned with equality of outcomes between similarly situated persons.

8. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (noting the widespread understanding that "equality and liberty claims are often intertwined").

and equality is inevitable. In the procedural law—by which I mean federal constitutional law, common law doctrines, and interpretations of the formal procedural rules of our civil justice system—liberty has been the clear victor in the doctrinal contest between the two values at the appellate level.[9] Nevertheless, equality is winning many battles on the ground.

The Supreme Court has consistently favored the liberty of individual adjudication over equality. For example, in his opinion in *Wal-Mart Stores, Inc. v. Dukes* last term, Justice Scalia disparaged the idea of "Trial by Formula" because it does not provide individualized adjudication.[10] In *AT&T Mobility LLC v. Concepcion*,[11] the majority assumed that the baseline of adjudication is individualized suits,[12] leading Justice Breyer to ask, "Where does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration?"[13] Similarly, the Court has limited the availability of class actions to resolve mass tort cases in the interest of protecting individual litigants, especially persons whose injuries have not yet manifested.[14] In *Taylor v. Sturgell*,[15] the Court held that individuals cannot be precluded from bringing their own suits even if those suits are completely duplicative and brought by parties who are

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Sometimes the "day in court" ideal can serve equality, as when the Supreme Court reversed certification of a mass tort settlement class on the grounds of adequacy of representation when the future claimants were treated inequitably. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997) (describing "[t]he disparity between the currently injured and exposure-only categories of plaintiffs").

9. The latest victory for the liberty principle is *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011), in which the Court expressed concern about individuals being precluded from pressing compensatory damages claims in the aftermath of a class action seeking only injunctive relief and back pay. As Judith Resnik points out, the recent cases discussed here limit litigant access to justice using the language of individual rights. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 80 (2011) ("[T]he constitutional concept of courts as a basic public service provided by government is under siege.").

10. *Id.* at 2561 ("We disapprove [of] that novel project.").

11. 131 S. Ct. 1740 (2011).

12. *Id.* at 1750 (describing the "often-dominant procedural aspects of certification," such as the protection of absent parties).

13. *Id.* at 1759 (Breyer, J., dissenting) (alteration in original).

14. Three cases are widely understood to have ended the possibility of certifying a mass tort class action. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821–22, 864 (1999) (overturning use of Federal Rule of Civil Procedure 23(b)(1)(B) to certify a mandatory limited-fund class action arising out of injuries caused by exposure to asbestos); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597, 619–20 (1997) (overturning class settlement of large numbers of asbestos claims in part on grounds of inadequate representation); Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 (2d Cir. 2001) (permitting collateral attack on class settlement of Agent Orange litigation on grounds of inadequate representation), *aff'd per curiam in part by an equally divided court, vacated in part*, 539 U.S. 111, 112 (2003); *see also* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208 ("[C]lass actions seemed to drop out of the available set of tools for attempting to settle most mass torts, absent some extraordinary willingness of a settling defendant to allow some form of future claims to return to the tort system." (footnote omitted)).

15. 128 S. Ct. 2161 (2008).

virtually identical.[16] And in *Martin v. Wilks*,[17] the Court held that individuals who failed to intervene in an earlier employment discrimination suit in which consent decrees were entered could challenge employment decisions made pursuant to those decrees.[18] Each of these decisions stressed the importance of individualized adjudication.

Although liberty dominates the Supreme Court's jurisprudence, an equality principle is emerging at the district court level. Because the Supreme Court's case law has limited litigants' ability to use the class action device to resolve mass torts on an aggregate basis as a formal matter, district courts are using *informal* procedures to facilitate settlements of mass tort cases. These innovative procedures include informational bellwether trials, a distant cousin of statistical sampling or Trial by Formula. For example, the judge in *In re World Trade Center Disaster Site Litigation* (WTC Disaster Site Litigation) scheduled a series of sample trials to promote settlement.[19] Had these trials gone forward, the results would have been used by the parties and the judge to inform the contours of a settlement. When the parties ultimately settled, the judge reviewed the settlement to ascertain that all the litigants were treated fairly.[20] The judge used his discretion to achieve informally the equality-promoting processes the Supreme Court has limited so severely in its emphasis on liberty.

Long a topic of significant scholarship, mass torts have received more attention recently because of attempts to resolve high-profile cases using statistical techniques.[21] The problem in mass tort litigation is that so many cases are brought that it is impossible to adjudicate them in a traditional way.

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16. *Id.* at 2178.

17. 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076–77.

18. *Id.* at 761–63.

19. Order Amending Case Management Order No. 8, at 1–3, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 19, 2009), *available at* http://www.nysd.uscourts.gov/docs/rulings/21MC100 Ord Amend CMO8 FEB19 2009 1118.pdf.

20. *See* Fairness Order—Decedent's Estates at 2, *In re* World Trade Center Disaster Site Litig., No. 21 MC 100 (AKH) & *In re* World Trade Ctr. Disaster Site & Lower Manhattan Disaster Site Litig., No. 21 MC 103 (S.D.N.Y. June 3, 2011), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=911&id=641 (noting that an earlier proposed settlement had been rejected by the court). A revised settlement was approved by the judge and resolved the litigation. *Id.* Between the filing of the initial proposed settlement and the ultimate approval, the defendants filed for a writ of mandamus from the judge's order rejecting the first settlement. Order Regulating Proceedings at 1–2, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH), *In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., No. 21 MC 102 (AKH) & *In re* Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig., No. 21 MC 103 (AKH) (S.D.N.Y. Apr. 19, 2010), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=911&id=534.

21. *E.g.*, Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 277–80 (2011) (describing the Vioxx settlement); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 153–56 (2009) (criticizing certification of the class in *Wal-Mart Stores, Inc. v. Dukes* and the role that statistical analysis played in that certification); Symposium, *Aggregate Litigation: Critical Perspectives*, 79 GEO. WASH. L. REV. 293 (2011) (considering current issues in group litigation).

For this reason, the debate has focused on whether resolving these cases using more efficient procedures, such as sample trials, merits abrogating individuals' rights to control their own litigation. Most scholars have framed this debate as expressing a tension between individual liberty and aggregate social welfare. David Rosenberg has argued in favor of mandatory class actions to "secur[e] optimal deterrence and insurance through mass tort liability" and thereby promote both individual and collective welfare.[22] Similarly, Michael Saks and Peter Blanck advocated adjudication through sampling as a more precise and reliable method of resolving mass tort cases.[23] Laurens Walker and John Monahan have made cogent arguments that sampling is both efficient and accurate.[24] Others have focused on litigant participation as a counterweight to aggregate social welfare arguments. For example, Robert Bone has offered a normative evaluation of arguments for sampling in light of the right to participation.[25] But few have addressed the issue of outcome equality in any significant way.[26]

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22. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002) [hereinafter Rosenberg, *Mandatory-Litigation Class Action*]. Rosenberg has written a series of influential articles advocating class treatment for mass torts. *E.g.*, David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989). As noted earlier, this proposal runs against the tide of the Supreme Court's jurisprudence in the area. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999) (rejecting a mandatory mass tort class action).

23. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992) (arguing that aggregation of cases "systematically increase[s] accuracy" and "reduce[s] bias"); *accord* Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1066 (2007) (arguing for the use of multiple verdicts to informally resolve mass tort cases).

24. Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 567 (1998) (noting the availability of highly efficient survey techniques); Laurens Walker & John Monahan, *Sampling Evidence at the Crossroads*, 80 S. CAL. L. REV. 969, 988 (2007) (noting that random sampling may provide "a *more* accurate picture of the facts at issue than the study of each case one-by-one").

25. Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 619–21 (1993); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 259–73 (2004) (articulating a theory of procedural justice grounded in a right to participation).

26. Sometimes scholars briefly mention outcome equality without discussion. *See, e.g.*, Saks & Blanck, *supra* note 23, at 831 (briefly noting that aggregation sometimes facilitates outcome equality and then moving on to a discussion of other issues). There are a few exceptions. *See* Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 137, 147 & n.30 (1990) (explaining that any objection to the "randomness" of outcomes in the tort system based on fairness is grounded in "the venerable principle of treating like claims equally"); Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1513–14 (1992) (concluding that aggregation may contribute to outcome equality by making it more likely that similar cases will be adjudicated by similar standards); Rubenstein, *supra*

This Article reframes the debate by reconceptualizing the core tension in civil litigation generally, and mass torts in particular, as one between liberty and equality. It demonstrates that district court judges are pursuing procedures that promote litigant equality and that this presents a procedural counterweight to the individualistic emphasis of the Supreme Court's jurisprudence. In mass torts, similar cases arising out of the same conduct are brought by the tens of thousands and consolidated before one judge. These judges are using sample trials and other innovative procedures to equalize outcomes among these litigants. Until recently, the procedural law has favored liberty because equality is difficult or perhaps impossible to achieve in a system of decentralized decision makers. But where adjudication is centralized, as in mass torts, the possibility of promoting outcome equality surfaces. This Article explains *how* equality—in the form of consistent outcomes—is gaining traction and *why*—despite the Supreme Court's consistent preference for liberty—a victory for equality in this context is good for our civil litigation system.

In order to understand how outcome equality is emerging as a valuable principle on the ground through informal sampling and evaluate whether this is good for our civil justice system, it is first necessary to understand how outcomes are reached in "ordinary" civil litigation. Part I of this Article explains how injuries are ordinarily valued, focusing on tort cases. This part explains why the application of this legal framework can result in inconsistent damages awards in similar cases. This part then considers how other facets of the political economy of individualized civil litigation, particularly settlement, are limited in their capacity to achieve outcome equality between similarly situated litigants. Finally, Part I contrasts the inequalities present in ordinary tort litigation with the equality-promoting procedures available in mass tort litigation.

Part II sets forth the arguments in favor of outcome equality and considers the doctrinal support for this principle. This part begins by considering whether equality is an independent principle that makes sense to invoke at all. Some scholars have argued that equality is derivative of the substantive requirements of the law and the duty to apply the law accurately.[27] I argue that equality is an independent and useful principle to

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note 2, at 1893–97 (discussing how the design of civil procedure doctrines contributes to outcome equity). These are the only articles I know of that discuss equality in the context of variability in the outcomes in mass tort cases. They do not conceptualize the problem as a manifestation of the tension between equality and liberty. Similarly, proposals to increase consistency in tort verdicts (outside the mass tort context) do not address this tension. *See, e.g.*, Geistfeld, *supra* note 4, at 832–40 (discussing various methods of achieving horizontal equity among jury verdicts but failing to mention the tension between liberty and equality); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 318–19 (1989) (pondering the use of the jury as a survey mechanism to evaluate the price of nonpecuniary losses in tort cases).

27. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982) ("[T]he idea of equality is logically indistinguishable from the standard formula of distributive justice . . . .").

consider. But establishing the importance of outcome equality is an important first step. The correct application of the law does not do the work of an equality principle because the law is ambiguous and can permit a wide range of outcomes. Simply applying the law "correctly" does not lead to outcome equality. Equality ought to be understood as a comparative right that requires judges to give legally valid reasons for treating similarly situated persons differently. The justification should demonstrate that litigants who are being treated differently are in fact different in legally relevant ways, and therefore differential treatment does not violate their right to equal treatment under the law. Once a principle of equality is established, it is still necessary to determine which differences among litigants merit differential treatment. Outcome equality also requires consideration of the timing of litigation, which has a substantial effect on outcomes but is often ignored by scholars.

The doctrinal support for outcome equality as a legal right is very limited. Part II analyzes subconstitutional common law and rule-based procedural doctrines that promote outcome equality, including remittitur, preclusion, and collective litigation. It also analyzes constitutional doctrine, considering the extent to which the Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment require outcome equality in litigation. Although judicial interpretations of the United States Constitution and the procedural laws do not prioritize outcome equality, gestures towards a principle of outcome equality are visible in the existing doctrine.

Part III considers what judges have already done to promote outcome equality in mass torts and analyzes what could be done better. Lower courts are using informal sampling to achieve outcome equality, as illustrated by the high-profile WTC Disaster Site Litigation. Sampling and similar innovative procedures promote outcome equality by extrapolating the results of sample trials to the rest of the plaintiff population, by adjusting the timing and the order that cases are heard by the court, and by increasing transparency. Each of these goals is achieved better in collective litigation than in individual litigation. Yet there are flaws in the procedures courts currently use to promote outcome equality. This Article responds to the most serious challenges that judges face in implementing a sampling process: (1) the problem of adverse selection, (2) the risk of sample bias, (3) the significance of uncertainty, especially in the form of unexplained variability in trial outcomes, and (4) cost. Judges should implement a more rigorous method of sampling to improve the capacity of the courts to treat like cases alike and to justify differential treatment where it is warranted.

The conclusion sets the district courts' procedural innovations aimed at achieving outcome equality in the context of other procedural revolutions, most notably in pleadings doctrine, which also began with the lower courts and percolated upward. There is reason to think that if equality wins the war on the ground, the appellate courts may recognize that they have tilted the

balance too far in favor of liberty. This is more likely to happen if the higher courts recognize that what is at stake in these innovative procedures is not only cost savings or the greatest good for the greatest number, but the right to equal treatment that is the foundation of the rule of law.

I. The Problem: Inconsistency in Injury Valuation

Our civil justice system claims to value equality of outcomes, as evidenced by the persistence of the maxim that like cases ought to be treated alike. But the reality is that the system tolerates a great deal of inexplicable variety in outcomes. The result is inequality between similarly situated litigants.

The methods participants in the tort system use to monetize injuries present three key problems. First, there is no agreed-upon metric for measuring or monetizing injury in tort cases. Second, the tort system is a complex, private, and largely hidden system of compensation.[28] We do not know enough about outcomes in tort cases. The dearth of empirical evidence about how cases settle is symptomatic of this problem. The best datasets of case outcomes are likely those owned by insurance companies, the entities that pay for a lot of litigation and settlements. Insurance companies do not ordinarily make this data available.[29] To the extent that insurance companies are willing to sell their data to researchers, this would be a fantastic resource. The legal system needs good qualitative empirical studies of case valuation outside the context of juries. The third problem with the way injuries are monetized in the current system is a result of the interaction of the first two problems. The basis for assigning damages is comparison to other cases with which the decision maker is familiar. This process depends on the dataset used by the adjudicator. Comparison may entrench existing inequalities or errors by comparing the new case to past cases. If some types of cases have been undervalued in the past for illegal reasons, such as the race of the plaintiff, then using those outcomes as a benchmark for current or future

28. *See* Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 413–15 (2007) (describing the private creation of a quasi-administrative agency as a result of the Diet Drugs settlement as a particularly complex model for resolving a mass tort and detailing the numerous challenges and subsequent amendments required to determine a proper settlement); Judith Resnik, *Uncovering, Disclosing, and Discovering: How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 555–57 (2006) (explaining that some settlements, some predispute contracts, and some claimant-payment systems created by mass tort settlements impose confidentiality requirements); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 261 (2007) (describing tort law as having created a "far-flung, decentralized, and often virtually invisible private bureaucracy").

29. Tom Baker, *Transparency Through Insurance: Mandates Dominate Discretion* 4 (Univ. of Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 09-20, 2008), *available at* http://ssrn.com/abstract=1411197.

cases will perpetuate that undervaluation.[30] Monetizing injuries based on past outcomes also produces a static value. But if the value of cases is dynamic and evolving, then the previous valuations may not reflect the current consensus on the appropriate pricing of a given case.

This part lays the foundation for understanding the problem of outcome inequality in litigation. The first subpart describes the legal framework for monetizing injury in tort law. The second subpart describes the latest research on variation in jury awards. The third subpart explores similar variation among legal professionals' assessment of damages in tort cases. The final subpart looks at damages awarded by mass tort claims-administration facilities as a counterpoint to jury and lawyer assessments of damages in individual cases.

A. The Legal Framework

The normative ideal of litigation outcomes is that a plaintiff ought to receive what she is entitled to under the substantive law. For example, if the defendant is not liable, then the plaintiff is entitled to nothing under the substantive law. If the defendant is liable, then the plaintiff is entitled to some measure of damages. Tort damages are usually understood to consist of three components: (1) economic or pecuniary damages; (2) noneconomic damages such as compensation for pain and suffering, disfigurement, emotional distress, and loss of quality of life; and (3) punitive or exemplary damages.[31] The result of litigation is supposed to approximate the actual damages suffered by the plaintiff as a result of the defendant's misconduct. Settlement is supposed to approximate the outcome that litigation would reach. Accordingly, in settlement, the plaintiff ought to receive the appropriate amount of damages under each of the three categories discounted by the possibility that the defendant will be found not liable in the course of litigation.[32]

The problem with this understanding of injury valuation is that the tort system does not approximate the actual damages suffered by the plaintiff. The tort system is an institution that is supposed to monetize injuries, yet injuries are not readily monetizable. What the tort system does is *assign a*

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30. *See, e.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 158–60 (2010) (describing the use of gender- and race-based economic data in the calculation of lost income in tort cases and noting that the use of such data can systematically undervalue tort damages).

31. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (describing "three types of damages"); *id.* §§ 903–909 (describing pecuniary compensatory damages, nonpecuniary compensatory damages, and punitive damages).

32. *See, e.g.*, ROBERT BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 71–76 (2003) (constructing an economic model of settlement and noting that plaintiffs should accept any settlement offer that exceeds the plaintiff's expected value of going to trial). Surprisingly, most scholars analyzing the economics of litigation do not define "accuracy" of valuation explicitly. *See, e.g.*, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307–11 (1994) (discussing the value of accuracy to law but failing to define *accuracy*).

value to the damages suffered by the plaintiff. The amount of money damages the system assigns to injuries is contextual and cultural. This means that tort values are comparative; the value assigned to a given injury is dependent on values assigned to other injuries. The cultural contingency of tort damages is the reason that the amounts awarded in tort cases are sometimes controversial. This is also the reason that critics of the tort system are able to say that the system is unpredictable.[33] The problem of valuing injury is not limited to the trial context. In settlement, even if one is able to accurately discount the amount of damages by the probability of the defendant being found liable, the damages assigned to a plaintiff—the amount that is to be discounted—will still be contested.

Some scholars have proposed administrative methods for resolving the problem of valuing injury.[34] For example, Eric Posner and Cass Sunstein note that administrative agencies value loss of life based on what people would be willing to be paid to accept risk.[35] Such valuations are also contested,[36] and the authors admit that the act of pricing human life is contextual.[37]

The assertion that injuries are difficult to monetize could be understood in two ways. First, it could be read to say that it is impossible to know what an injury is actually worth, even from a God's eye point of view. Second, it could be interpreted as an epistemic problem: we lack the tools to accurately monetize injuries. For the purposes of this Article, it does not matter which of these explanations is right. We do not have the tools to accurately monetize damages either because the task is impossible or because it is beyond our current capabilities.

Despite the limitations of its tool kit, the tort system nevertheless needs to monetize injuries in order to compensate plaintiffs. To do this, the law provides a set of guidelines to juries, who hear evidence regarding the

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33. *See* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 149, 171–74 (2004) (describing the media's role in shaping common legal knowledge and noting that the media can reflect the rhetorical excesses of the litigation system); Sandra F. Gavin, *Stealth Tort Reform*, 42 VAL. U. L. REV. 431, 444–47 (2008) (citing the various criticisms of the tort system based on inequality of outcomes such as "litigation lottery" and "runaway juries," and citing studies demonstrating that these accusations are inaccurate).

34. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 587 (2005) (proposing that hedonic losses could be based upon the values given by administrative agencies); *see also* Geistfeld, *supra* note 4, at 819 (advancing a similar proposal that determines the optimal value of compensation based on people's willingness to accept risk but does not incorporate the values used by administrative agencies).

35. Posner & Sunstein, *supra* note 34, at 551.

36. For example, Douglas Kysar has made a trenchant and convincing criticism of this approach. *See* DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 111–13 (2010) (arguing that these valuations rest upon the questionable assumptions that laborers possess adequate risk awareness and free mobility, that valuations of risk are scalable, and that all societal strata have the same preferences for risk).

37. *See* Posner & Sunstein, *supra* note 34, at 554 n.64 (noting that people would be willing to pay different amounts to avoid different kinds of statistically identical risks).

plaintiff's damages and assign a monetary value to them. A closer look at the law of damages in torts demonstrates how it is that tort damages are varied and contextual rather than fixed and objective.

Of the three kinds of tort damages—economic, noneconomic (pain and suffering), and punitive damages—economic damages are generally considered the most objectively ascertainable, so they are the best doctrinal area to explore. Economic damages concern things we are accustomed to measuring, such as wages. Although noneconomic and punitive damages are most often criticized for being outrageous, excessive, or emotionally driven,[38] economic damages suffer from many of the same difficulties of valuation. Depending on the case, economic damages may include lost wages (past and future), medical expenses (past and future), and other financial costs.[39] Measuring economic damages is not easy or obvious and the measure of economic damages is perhaps as contested as other forms of tort damages.

First, predicting future lost income—a substantial part of any economic damages award—requires the exercise of a great deal of judgment and leaves plenty of room for argument: "It is very difficult to make an accurate prediction, especially about the future."[40] Consider the intuitive example of predicting the future lost income of a law student in May 2007 as compared to the same law student in May 2009 after the meltdown of the financial markets in 2008 and the effects of the Great Recession on the legal job market. Empirical evidence supports this intuition. A study of the 9/11 Victim Compensation Fund demonstrated that economic-loss awards were influenced by testimony from forensic economists and that economic awards varied across similarly situated claimants.[41] There is a range of acceptable awards that is justifiable, rather than a specific amount that reflects an individual's entitlement. Moreover, that range can shift over time.[42]

Second, economic damages are an evolving category that courts have stretched to include damages that once were considered noneconomic. In

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38. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624–26 (2008) (describing criticisms and expressing concern over "unpredictability of punitive awards"); Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1224–31 (1994) (describing and arguing against criticisms of noneconomic damages).

39. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 398–99 (2005) ("[D]isputes arise over how to compensate for future losses (how to predict future earnings, working life expectancy, etc.) and jurisdictions differ over how to calculate economic damages (present discounted value, taxation of tort recoveries, medical and general inflation) . . . .").

40. *See* Henry T. Greely, *Trusted Systems and Medical Records: Lowering Expectations*, 52 STAN. L. REV. 1585, 1591 n.9 (2000) (discussing the unknown origins of this quotation, often attributed to Yogi Berra or Niels Bohr).

41. Frank D. Tinari et al., *Did the 9/11 Victim Compensation Fund Accurately Assess Economic Losses?*, 6 TOPICS ECON. ANALYSIS & POL'Y, no. 1, art. 2, 2006, at 2–3, *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1438&context=bejeap.

42. *See infra* notes 96–99 and accompanying text.

wrongful death cases, for example, recovery was historically limited by statute to pecuniary damages such as lost wages, which are often quite low.[43] Recovery for grief and loss was not permitted. To ameliorate the harshness of the law, judges permitted plaintiffs to demonstrate the value of services the decedent provided, even if these were not compensated and did not have a market value.[44] These types of additional damages included both loss of services and loss of consortium.[45] In this way, survivors were permitted to collect damages for the loss of wives who were uncompensated for work in the home and children who did not work at all.[46]

Third, the lines between the three different categories of tort damages are fluid. Award amounts can often be reasonably assigned to more than one legal category, rendering the measure of damages malleable. For example, an empirical study by Catherine Sharkey demonstrated that when noneconomic damages are capped by statute, there is "little to no effect" on compensatory damages in medical malpractice cases.[47] She showed that lawyers can use expert testimony and innovative theories to expand categories of damages such as future wages and the costs of future medical care.[48] Thus, economic losses replace other forms of damages, with the overall total held roughly constant.

In sum, valuing injuries in tort cases is a cultural and contextualized exercise that results in the assignment of a socially acceptable monetary value to an injury. The doctrine governing damages is sufficiently malleable to allow this flexibility. This is why it makes sense to speak of accuracy of a tort award as an *assignment* of value, not as an *approximation* of actual value.

B. *Juror Valuations of Injuries*

Sociological studies of juries show that jurors understand damages categories as fluid and malleable, supporting Sharkey's thesis. For example, jurors interviewed by sociologist Neil Vidmar about their participation in a medical malpractice case considered the effects of emotional trauma and

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43. *See* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 735 (2000) (discussing the New York wrongful death statute of 1847, which limited recovery to pecuniary damages).

44. *Id.* at 741–46; *see also* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 138–68 (1985) (discussing the monetization of housework and children's future income in wrongful-death cases).

45. Witt, *supra* note 43, at 723–24, 743–46.

46. *Id.* at 745.

47. Sharkey, *supra* note 39, at 445.

48. *See id.* at 438–40 (remarking that "experts can exploit controversies surrounding calculations of lost wages and future medical costs, thereby breathing life into the crossover effect").

disfigurement on a plaintiff's likelihood of obtaining a promotion.[49] Damages for disfigurement should ordinarily be considered as part of the category of noneconomic or pain and suffering damages, whereas loss of future income ought to be considered economic damages.[50] Jury treatment of disfigurement demonstrates how porous these categories can be.

The idea that categories of damages are fluid and malleable is consistent with the premise that many participants in the legal system think of damages as a single, all-inclusive number as opposed to discrete legal categories. Studies based on interviews with jurors have shown that jurors consider damages holistically, despite the law's mandate to parse damages into the three familiar types.[51]

Accordingly, jurors exercise substantial leeway in determining damages, which in turn permits variation in outcomes of similar cases. Studies confirm that there is some variability in jury awards, but they are not conclusive with respect to the extent of or the reasons for this variability. To understand the truth about variability of jury verdicts, a brief discussion of the state of empirical research is necessary.

Jury studies use two methods. One method for studying jury verdicts is to compare verdicts in past cases.[52] This is sometimes referred to as using archival jury awards.[53] Researchers might also interview judges or jurors who participated in actual cases about their experience. Another method for studying variability in jury verdicts is the simulation.[54] A simulation can consist of conversations with potential jurors or judges about a hypothetical case or can simulate the trial environment by having groups of juries view a mock trial or a video of a trial and deliberate.[55] The benefit of simulation-based studies is that they allow researchers to control the information that the

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49. Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9, 28 (2002).

50. RESTATEMENT (SECOND) OF TORTS §§ 905–906 (1979).

51. *See* Vidmar & Brown, *supra* note 49, at 28 (noting that the simple labeling of damages as general or special fails to account for the "complex human judgments" that judges, lawyers, and juries make in evaluating and assigning damages).

52. Studies using historical data like this include VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 100–04 (1986) and HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 33 & n.1 (1966).

53. *See, e.g.*, Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 474 (2005) (explaining the advantages of using archival studies of jury decisions).

54. Studies based on simulations include Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 303 (1998) and Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 246 (1997).

55. *See* Diamond et al., *supra* note 54, at 303 (describing how the simulated juries were shown a videotape of a simulated jury trial and then asked to come up with an award); Saks et al., *supra* note 54, at 248–49 (explaining that the simulated juries read a description of the plaintiff's injuries and a list of jury instructions).

"jurors" receive and compare outcomes reached by different adjudicators in response to identical fact patterns.[56] By contrast, research based on archival verdicts must make the argument that the cases they are comparing are in fact similar. It is easier, therefore, to measure the variability in jury decisions in a simulation study. Studies using simulation methodology are also flawed, however. Simulation studies may not include all the information a jury would have in a real case.[57] And simulations may not provide the decision-making environment that is ordinarily present in a trial. For example, a simulation that asks individual potential jurors how they would decide a hypothetical case might yield different results than a study that allows twelve potential jurors to deliberate before rendering a decision.[58]

In one famous early study led by Harry Kalven, researchers interviewed 600 judges regarding 8,000 civil and criminal cases.[59] With respect to the civil cases, when the researchers compared the outcomes of actual jury verdicts and hypothetical judicial "verdicts," they found that 79% of the time, judges and juries agreed on liability.[60] When judges and juries disagreed, the different adjudicators favored plaintiffs in the same proportion; that is, the study found no pro-plaintiff bias on the part of juries.[61] A 1992 study of federal and state judges in Georgia similarly found that the judges interviewed mostly approved of jury determinations of which party should prevail.[62]

The researchers found much sharper divisions on the *amount* of damages. In the universe of cases where both adjudicators found for the plaintiff, they only agreed on the amount of damages to award 9% of the time.[63] In approximately 52% of those cases where judge and jury agreed on

56. *See* Saks et al., *supra* note 54, at 246 (describing how three different levels of injury severity were given to simulated juries, along with guidance variables including "the average award, the award interval, the average award plus the award interval, and example awards").

57. Neil Vidmar has provided a trenchant critique of one simulation study. *See* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359, 1383–88 (2004) (critiquing the methodology used in CASS SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURORS DECIDE (2002), for biasing simulation with the presentation of one-sided evidence).

58. *See* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 554–57 (1992) (conducting a study demonstrating an increase in jury awards after deliberation); David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1140–41 (2000) (same).

59. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063 (1964).

60. *Id.* at 1065.

61. *Id.*

62. *See* R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 102–07, 115 (1991) ("The Georgia trial judges' articulated perception is that they often agree with jury decisions on which party should prevail in negligence cases."); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59, 74–78 (1992) ("All 16 responding federal trial judges attested that in at least 79% of all negligence cases, they agreed with the jury's determination of the prevailing party.").

63. Kalven, *supra* note 59, at 1065. In the Kalven study, the judge and jury both decided for the plaintiff in 44% of the cases. *Id.* In 4% they were roughly in agreement, in 17% the judge

liability, the jury favored a higher award.[64] And in approximately 39% of cases, judges favored a higher award.[65] Jury awards averaged 20% higher than judicial awards.[66] Subsequent studies show loose agreement between judges and juries as to the appropriateness of jury verdicts and awards most of the time. A 1987 *National Law Journal* survey of a sample of 348 state and 57 federal judges found evidence of agreement between judges and juries.[67] Two-thirds of the judges said that jury awards are excessive in only a few or in "virtually no" cases.[68]

Simulation studies seem to confirm that there is unexplained variability in damages determinations.[69] But the findings are by no means definitive. To some extent, the nature of the simulation affects the results. Simulations that permit potential jurors to deliberate, for example, may yield different outcomes than those that ask individual jurors to make evaluations. A 1992 simulation study conducted by Shari Seidman Diamond and Jonathan Casper found that deliberation increased jury verdicts.[70] The researchers showed a videotaped mock trial of an antitrust price-fixing case to 1,022 potential jurors in Cook County, Illinois.[71] "On average," the researchers wrote, "the juries produced awards about $56,000 (or 26%) higher than the average of their members prior to deliberation."[72] More recent simulation studies of jury deliberations using potential jurors evaluating mock personal injury cases have found similar increases in awards that the authors attribute to the process of deliberation.[73]

Empirical studies of archival jury verdicts also find variability across cases. Studies have found that damages amounts increase with injury

would have awarded more, and in 23% the jury awarded more (totaling 44%). *Id.* I have adjusted these numbers in the text to reflect percentages of the cases that the judge and jury agreed that plaintiff should win, rather than the percentage of the total cases studied.

64. *Id.*

65. *Id.*

66. *Id.*

67. Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 854 (1998) (citing *The View from the Bench: A National Law Journal Poll*, NAT'L L.J., Aug. 10, 1987, at 1).

68. *Id.*

69. *See, e.g.*, HANS & VIDMAR, *supra* note 52, at 124–25 (describing a study testing the effectiveness of judicial admonishments and noting the variability and unpredictability of the jurors' damage determinations); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 919–24 (1989) (discussing the variability and unpredictability of awards and why variability in damages determinations is problematic).

70. Diamond & Casper, *supra* note 58, at 557.

71. *Id.* at 521.

72. *Id.* at 553.

73. *See* Schkade et al., *supra* note 58, at 1140–41 (finding that deliberation increased the awards over individual evaluations made prior to deliberation). This study divided 3,000 prospective jurors into 500 six-person juries and asked them to deliberate on a mock personal injury case. *Id.* at 1140. There remains a question of whether the observed increase in awards was justified.

severity.[74] These same studies found variability between juries hearing cases of similar severity.[75] Because these studies are of archival verdicts, it is hard to know whether the cases they are comparing were in fact sufficiently similar across key variables such that the variation in verdicts was unwarranted. One study that found variability among juries hearing cases of similar injury severity also noted that there may have been differences between the injuries in question that resulted in the higher awards in some of the cases, but that these differences were not accounted for in the data.[76] For example, the study did not take into account the different ages of the plaintiffs or other salient factors that would legitimately affect pecuniary damages.[77]

Since both archival and simulation studies confirm some variation in awards in similar cases, the natural question is whether that variation is specific to juries or present across all decision makers. Simulation studies demonstrate with some confidence that variation is present across the board. In one study conducted by Neil Vidmar, medical malpractice arbitrators (lawyers and judges) and potential jurors were given the same simulated medical malpractice case in which the doctor had admitted liability.[78] The mean and median awards for both groups were around $50,000.[79] The awards in the juror group fell between $11,000 and $197,000 while the range for the legal professionals was from $22,000 to $82,000.[80] This demonstrates that there is variability among both laypersons and experts. When the researchers studied a sample of 100 twelve-person mock juries who deliberated on the same case file, they found that the awards ranged between $29,500 and $69,000, making the awards of the twelve-person juries less

74. *See* HANS & VIDMAR, *supra* note 52, at 161–62 (noting that damage awards in personal injury cases were higher in cases involving "serious injuries such as loss of hands, legs, or eyes, or for a wrongful death"); Bovbjerg et al., *supra* note 69, at 921 (finding that injury severity directly influences the level of damages in that "more severe injuries result in larger recoveries").

75. *See* HANS & VIDMAR, *supra* note 52, at 162 (analyzing two categories of personal injury claims—"[c]laims that involved wrongful death, medical malpractice, products liability, and street or sidewalk hazards" and "claims involving automobile accidents or injuries on someone else's property"—and asserting that "[e]ven when the seriousness of the injury was similar, someone hurt in an automobile accident was likely to receive only one-third of the money that someone hurt in a workplace accident received"); Bovbjerg et al., *supra* note 69, at 924 (noting the absence of "horizontal" equity with the extent of variation within a single category of cases with similar injury severity); *see also* Neil Vidmar et al., *Jury Awards in Medical Malpractice and Post-verdict Adjustments of Those Awards*, 42 DEPAUL L. REV. 265, 280–99 (1998) (evaluating special verdict sheets in medical malpractice cases and finding some variability in the proportion of awards for noneconomic damages in relation to injury seriousness).

76. Bovbjerg et al., *supra* note 69, at 923–24.

77. *Id.* at 923.

78. Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 890–91 (1993).

79. *Id.* at 892.

80. *Id.* at 901 tbl.1.

variable than those of the legal professionals.[81] It is not clear how to square these studies with those finding that deliberation increases the size of awards.

Yet studies also show that jury awards do not differ substantially from those judges and lawyers would give. One study by Roselle Wissler, Allen Hart, and Michael Saks (the Wissler study) interviewed respondents, including potential jurors (whose names were obtained from the phone book), civil judges, and lawyers.[82] The researchers summarized two cases over the phone for study participants and asked them "how much money they would award the plaintiff for general damages, how much they thought the average juror would award the plaintiff, and to rate the plaintiff's injury on five dimensions."[83] The study found that injury ratings were predictable based on the case descriptions and that sociodemographic factors did not substantially affect injury ratings among jurors, judges, or lawyers.[84] In the translation to monetary awards, the researchers found greater variance.[85] Sociodemographic factors had only a small effect on the amount awarded by jurors, judges, and lawyers.[86] It is not clear what effect deliberation would have had on these findings.

In the Wissler study, defense lawyers' monetary awards were the most predictable. The researchers hypothesized that this predictability may have been due to a more mechanical assessment of damages.[87] Because the scenarios presented to potential jurors, judges, and lawyers over the phone did not simulate the elements of a trial and did not contain all the information an adjudicator would ordinarily have in deciding a case (such as the mock plaintiffs' history prior to the injury),[88] it is difficult to draw firm conclusions

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81. *Id.* at 897.

82. Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 766–69 (1999). The researchers interviewed 558 potential jurors from urban and rural settings in two states, 244 judges, and 248 lawyers. *Id.* at 767–68.

83. *Id.* at 769.

84. *Id.* at 782. For all groups, none of the sociodemographic characteristics made a "significant contribution" to overall severity; however, defense lawyers differed from jurors, judges, and plaintiffs' lawyers in that mental suffering had a greater effect on injury severity than disability. *Id.*

85. *See id.* at 783 ("In contrast to the high degree of predictability of perceptions of injury severity, models for general damages awards show less predictability and greater decisionmaking complexity.").

86. *See id.* at 784 ("[J]urors gave larger awards when they saw the injuries as involving a greater degree of disability and mental suffering and when the jurors were male or had a higher household income."). The researchers hypothesized that the order in which jurors were given case summaries had a significant effect on variation. *See id.* at 794 ("[H]ad we been able to include an order term in the jurors' model to reflect the fact that there was a significant order effect for jurors (which was not found for the other groups), the error variance for jurors likely would have been reduced.").

87. *See id.* at 794 ("The somewhat lower variability in awards for defense lawyers when the same person was reacting to different injuries suggests they may be less responsive to case details.").

88. *See id.* at 795 n.104 (noting that judges and lawyers sought information that was not legally relevant, "which revealed their own search for shortcuts to estimating general damages").

from the study. The study subjects may have been importing their own assumptions about the scenario, affecting their assessment of damages.[89]

In sum, there is some evidence of variability in jury awards, although not in jury evaluations of severity of injury. Evidence that variability in jury awards is greater than among lawyers or judges is weak. All three groups reach outcomes that are subject to unexplained variability. Because extant empirical studies are flawed or incomplete, it is unwise to draw firm conclusions from them.

C. *Lawyer Valuations of Injuries*

Lawyers have a holistic perspective on damages, just as jurors do. As one plaintiff's attorney told a researcher, "[I]n most instances a jury has a figure in mind, and when you have a figure in mind, it can come in the guise of compensatory damages or in the guise of punitive damages."[90] It makes sense for lawyers to look at cases holistically because most cases settle, and they settle for a single number. Lawyers on both sides may argue about what types of damages they think are likely to be awarded in a given case. At the end of the day, however, the overall damages award is more important to lawyers and juries than are legal categories.

Studies comparing lawyers to juries have found that lawyers' estimates of the value of a given case are also variable. The Wissler study discussed in the previous subpart found variation among plaintiffs' attorneys, defense attorneys, and judges.[91] As one would predict, plaintiffs' attorneys awarded higher damages on average than did defense attorneys.[92] Another study assigned lawyers to the role of plaintiff's attorney and defendant's attorney; both were given the same documents to review.[93] Researchers found substantial variation in case valuations within each group.[94] Variation is found among other professionals as well. For example, scholars have noted the differences among insurance adjusters in valuing claims.[95]

Even if a lawyer's valuations are more predictable than a juror's, that does not mean they are better. Because tort cases are rarely tried, most comparable values come from settled cases informed by the outcome of pretrial

89. *Id.* at 795.

90. Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 227.

91. Wissler et al., *supra* note 82, at 810.

92. *Id.* ("Averaged over all cases, jurors and plaintiffs' lawyers tended to give the highest awards, defense lawyers the lowest, and judges gave an intermediate amount.").

93. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 6 (1983).

94. *Id.* at 6–7 & tbl.1-1.

95. *E.g.*, Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1214–15, 1222 (1992).

motions that are either partially or wholly dispositive of a case.[96] In cases resolved through negotiation, settlements are based largely on the lawyers' sense of the "market" in settlements and verdicts.[97] Lawyers develop a sense of the "going rate" of settlement with respect to a particular set of cases, of which their client's case is but one.[98] This going rate is determined by comparison to other cases.[99] By comparing the outcomes of similar cases, lawyers can evaluate what the outcome should be in their client's case.

Statisticians call this method "convenience sampling."[100] Convenience sampling is a form of inductive reasoning based on establishing consistency of a given case with a nonrandom sample of cases readily available to the researcher.[101] While convenience sampling bears some rough similarity to qualitative social science research methodology, it is flawed. Good social science methods require a random sampling to avoid bias.[102]

A sampling process based on anecdotal evidence culled from whatever cases the lawyer may have come across is vulnerable to bias. The lawyer may only see a particular subset of cases. Defendants and insurers have an interest in hiding larger settlement amounts to protect themselves in negotiation. In some areas there may be competition among lawyers and a disinclination to share information about settlement amounts. Moreover, embarrassment or the fear of spurring litigation may encourage defendants to require secrecy as a condition of settlement.[103] It is possible that lawyers will have access to a comprehensive universe of cases—for example, because they are repeat players in a discrete geographic and legal space—but there is little reason to count on this being the case most of the time. Unfortunately, little empirical evidence exists regarding the datasets possessed by lawyers or the methods lawyers apply to those datasets. There is no reason to trust that a sampling method based on the cases the lawyer happens to know about will yield a reliable assessment of the value of a particular case relative to similar cases.

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96. *Cf.* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 525 (2004) (listing factors other than legal doctrine that influence settlements).

97. *Cf.* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1532–33 (2009) (explaining that settlement negotiators and insurance adjusters have a common understanding of certain injuries' values).

98. *Id.* at 1533.

99. *See id.* at 1533–34 (noting that going rates bear some relation to past trial verdicts but that claims are assigned value mainly based on agreed-upon formulas).

100. VoonChin Phua, *Convenience Sample*, *in* 1 THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 197, 197 (Michael S. Lewis-Beck et al. eds., 2004).

101. *Id.*

102. *See* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 935–36 (2011) (discussing the importance of randomization in the design of statistical experiments).

103. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878 (2007). On the ethics of such secret settlements, see generally Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481 (2008).

Finally, sometimes settlement amounts are not based on jury verdicts or comparable settlements but on the limits of the defendant's insurance coverage. Insurance in these cases acts as a cap on damages so that the assigned value of a case will be more closely tied to the defendant's coverage than the plaintiff's condition.[104] As a method of injury valuation, insurance coverage is arbitrary. It is an important reminder, however, that in the real world, damages awards are driven by a variety of factors, not all of which are consistent with the applicable (and admittedly ambiguous) legal standards.

D. The Matrix: Claims-Administration Facilities

The process of settling mass torts mimics on a grand scale the process lawyers use to resolve ordinary cases, except that lawyers have better access to data about the universe of related cases. Lawyers will look to the pool of jury verdicts and previous settlements, the range of injuries, and the likelihood of a liability finding in order to determine what their clients' cases are worth. The history of tort law in the United States demonstrates that this type of "scheduling" of tort cases has been the norm since the Industrial Revolution.[105] Mass tort litigation exposes the fact that how litigants are treated in relation to one another is an important, if neglected, element of procedural justice.

In mass torts, judges oversee a resolution process that some have called a temporary administrative agency.[106] Lawyers determine compensation in the individual case based on a preset amount according to various factors such as injury severity. This process is sometimes referred to as "scheduling" damages and often involves creating a matrix and a point system.[107]

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104. *Cf.* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 281–83 (2001) (quoting personal injury attorneys who express clear preferences for receiving judgments from a defendant's insurance money rather than blood money—"money that individual defendants pay from their own funds").

105. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1585 (2004) (explaining that beginning in the 1880s, work injuries were often compensated by using standardized settlement practices).

106. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2020 (1997); *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 97, 223 (2007) (discussing grids used in mass tort settlements that match injuries with payouts); *see also* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1803 (2005) (discussing the phenomenon of settlement-administration facilities); Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1361–62 (2005) (same).

107. *See* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 188 (2001) ("In mature mass torts, where there may be a widely-shared understanding of the value of certain types of claims, thousands of lesser-value claims may be resolved en masse according to negotiated schedules of damages that pay little attention to individual claim differences and involve little adversarial litigation."); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 38 (1991) ("While in theory and in form each case is separate, in practice lawyers on both sides deal

The Vioxx litigation was settled using such a matrix.[108] Vioxx was a painkiller that was associated with a higher risk of heart attack and stroke.[109] Thousands filed lawsuits against Merck, the manufacturer of Vioxx.[110] These lawsuits were ultimately consolidated in a few state courts around the country and in the United States District Court for the Eastern District of Louisiana.[111] After a number of trials yielding mixed outcomes, the parties settled.[112] Because the lawsuits could not be consolidated in a settlement class action, Merck sought a mechanism that would allow it to settle with all the plaintiffs and achieve a global closure of all the Vioxx cases pending against it.[113] Merck agreed to pay approximately $5 billion, but the settlement would only come into effect if 85% of the plaintiffs in each of several categories agreed to be bound by it.[114]

The settlement provided that Merck would put $4.85 billion into a settlement fund that would be administered by a third-party claims administrator.[115] In order to be eligible to collect from the fund, plaintiffs would first have to demonstrate that they had suffered either a heart attack or stroke and that they had taken Vioxx over a certain period.[116] After determining whether a claimant was eligible, the claims administrator was to score the claim. The claimant would receive a number of points depending on how serious their stroke or heart attack was, how long they had taken Vioxx, their age, and the presence other risk factors such as diabetes or heart disease.[117] The basis for creating this system was a series of bellwether trials held over a period of several years.[118] Claimants with more serious conditions and who had taken Vioxx for longer durations would receive more points; claimants who had suffered less serious heart attacks or strokes, had

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with the cases as a group, sometimes making 'block settlements'—in which defendants give a lawyer representing a group of plaintiffs money that is then allocated among a set of clients.").

108. *See* Erichson & Zipursky, *supra* note 21, at 279 (describing the Vioxx settlement agreement where claimants were scored on a point system).

109. *Id.* at 266.

110. *Id.*

111. *Id.* at 277–78.

112. *See id.* at 278 ("Looking toward the possibility of settlement, both Merck and the plaintiffs' lawyers undoubtedly knew what the win–loss record suggested: a plaintiff's chance of winning a verdict at trial was less than one in three, and the chances after appeal were closer to one in six. On the other hand, both sides also knew that juries awarded punitive damages in all five of Merck's losses. Moreover, the compensatory damages for pain and suffering were high in all five cases. In other words, five juries [out of eighteen] found enthusiastically for plaintiffs.").

113. *Id.* at 275–76.

114. *Id.* at 279.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 278; *see also* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 602 n.145 (2007) [hereinafter Lahav, *Bellwether Trials*] (discussing Merck's strategy); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2394 & nn.106–07 (2008) [hereinafter Lahav, *Recovering Social Value*] (collecting Vioxx trial outcomes).

taken Vioxx for shorter periods, or had other risk factors would receive fewer points.[119] Claimants would not know what their settlement amount was before enrolling in the settlement; they would only find that out once the claims administrator had determined their eligibility and scored their claim.[120] The Vioxx settlement is different from those that came before in that the individual claimants did not know the amount of their settlement before agreeing to it.[121]

The biggest difference between a mass tort settlement such as Vioxx and an "ordinary" individual case is that a mass tort case exposes the private, hidden aspects of the tort system. The awards given out by mass tort claims administrators can be publicized and made centrally available, in contrast to the ordinary case where comparable values are not easily accessible. This transparent process requires judges and policy makers to think more thoroughly about the problems raised by assigning damages based on sampling. It also highlights the often-ignored valuation problems inherent in "ordinary" litigation. Claims-resolution facilities shift our attention from the individualized trials that are often the focus of the procedural law to the quality of outcomes. A shift of focus from the right to participation to equal treatment reveals how the process of damages valuation is always comparative, although this comparison is often invisible.

II. The Case for Outcome Equality in Litigation

Part I defined the problem of unexplained variability in outcomes in similar tort cases. The process of monetizing injury involves the culturally contingent assignment of value, rather than approximation or divining of "true" value. This results in variation in the outcomes of similar cases among juries and legal professionals. These variations are often hidden from view in the ordinary case and revealed in the mass tort context. This part considers the case for outcome equality and explores the doctrinal support for an equality principle.

The legal system tolerates a great deal of inconsistent treatment of like cases. The reason for this tolerance is not that such inconsistency is in itself a virtue. Rather, inconsistency is accepted because it is the result of a preference for decentralized decision making, which makes equalizing outcomes among litigants very difficult. Because courts centralize mass tort cases in

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119. Erichson & Zipursky, *supra* note 21, at 279.

120. *Id.* at 280. An online calculator was made available to help plaintiffs estimate what they would receive in the settlement. *Vioxx Settlement Calculator*, OFFICIAL VIOXX SETTLEMENT, www.officialvioxxsettlement.com/calculator.

121. *Compare* Erichson & Zipursky, *supra* note 21, at 271–72 (noting that in the 1990s, prior to the Supreme Court's decisions in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), the preferred device to achieve settlements in mass tort cases was a settlement class action), *with id.* at 279–80 (describing the structure of the Vioxx settlement and noting that this "structure meant that claimants had to decide whether to enroll before knowing what their payments would be").

one courtroom, the mass tort context gives judges an opportunity to promote equality that is not available in ordinary litigation. In the absence of other, competing goals (such as decentralized adjudicators or the right to a jury trial), it is a general principle of law that similar cases ought to reach similar outcomes. Doctrinally, the principle requiring equality of outcomes is weakly supported, but it nevertheless remains an aspirational principle. For example, we would expect a single adjudicator to reach the same liability findings and award the same amount of damages when deciding functionally identical cases. If these cases were treated differently despite appearing to be the same, the adjudicator ought to provide a reason for the inequitable treatment.

A. Equality, Reason Giving, and Respect for Persons

Outcome equality is rooted in "the basic principle of justice that like cases should be decided alike."[122] In legal philosophy, there is a debate about whether equality is a principle that we should evoke at all. Two strong objections to outcome equality have been that equality begs the key question of which cases are in fact alike and that what is really at issue when equality is invoked is the duty to apply the law correctly.

Some philosophers argue that formal equality—the principle that like cases ought to be decided alike—is really an empty concept because it begs the key question of which cases are alike.[123] The answer to that question can only be determined by reference to some other normative principle about which similarities and differences matter and why.[124] In the type of tort cases

122. Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005). Because we also tolerate a great deal of inconsistency, more work remains to be done to justify and refine this equality principle. For a different approach to accessing the role of equality in tort law, see, for example, Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181, 182 (2006) (proposing a "criterion of strong egalitarian fairness to evaluate the normative principles and institutional practices dealing with accidental injuries and risk creation" and arguing in favor of rules that reduce "the operation of undeserved luck in the operations of justice").

123. *See generally* PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE (1990) (focusing on the confusion created by resorting to principles of equality); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1256 (1997) (arguing that "prescriptive equality" is a self-contradictory norm); Westen, *supra* note 27, at 596 (arguing against the use of equality as a normative principle). For some responses to these arguments, see generally Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265 (1997) [hereinafter Greenawalt, *Prescriptive Equality*]; Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000); and Jeremy Waldron, *The Substance of Equality*, 89 MICH. L. REV. 1350 (1991) (reviewing WESTEN, *supra*).

124. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 79–97 (2d prtg. 1991) (discussing the role of popular ideas about difference and how they operate as unstated assumptions generated by institutions). For example, a robust consideration of equality might also include principles such as antisubordination, in which case

discussed here, the demand for treating injured plaintiffs similarly requires the adjudicator to establish what parts of the plaintiffs' stories matter for purposes of assessing damages. The principle that like cases ought to be treated alike, standing alone, does not help the adjudicator in this inquiry. A variety of factors, such as the events leading to the injury, the plaintiffs' charisma, prior medical history, or the lawyer's talent and experience, may influence the damages award. The adjudicator ought to use only legally relevant variables to determine which members of the plaintiff population are alike. Asserting that similarly situated plaintiffs ought to be treated similarly is the beginning of the inquiry, not the end of it.[125] Because the law of torts is open to multiple interpretations, this is not an easy task, but as the description of the use of matrices in the previous part demonstrates, it is possible.

Relatedly, some have argued that the principle that like cases be treated alike is in fact derivative of the duty to apply the law accurately.[126] Instead of saying that like cases ought to be treated alike, the argument goes, we might more correctly assert that the adjudicator should accurately apply the law in all cases.[127] If the adjudicator accurately applies the law to each case, then similar litigants will be treated similarly.[128] But this argument is based on a flawed assumption about the application of law to facts. It assumes a type of mechanical jurisprudence that yields automatic answers to legal questions, which does not describe the realities of tort litigation. With damages in particular, the adjudicator must value injuries based on standards that can yield a variety of plausible results.[129] In other words, reasonable fact

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treating minorities who have been historically discriminated against better than others who have not suffered discrimination is understood as promoting equality. The Supreme Court has moved away from this richer, antisubordination understanding of equality in its recent desegregation jurisprudence. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–11, 748 (2007) (plurality opinion) (striking down a student assignment plan that relied on race classification intended to integrate schools in a de facto segregated community).

125. As Professor Chemerinsky has stated,

> To infer . . . that because equality is *insufficient* it is also unnecessary is to commit a basic logical fallacy. There is a fundamental difference between necessary and sufficient conditions.
>
> . . . Equality is *morally* necessary because it compels us to care about how people are treated in relation to one another. Equality is *analytically* necessary because it creates a presumption that people should be treated alike and puts the burden of proof on those who wish to discriminate. Finally, the principle of equality is *rhetorically* necessary because it is a powerful symbol that helps to persuade people to safeguard rights that otherwise would go unprotected.

Chemerinsky, *supra* note 123, at 576 (footnote omitted); *see also* Greenawalt, *Prescriptive Equality*, *supra* note 123, at 1268 ("The fact that the formal principle [of 'equals should be treated equally'] might otherwise be 'empty' has struck me as a solid reason to ascribe . . . content to it.").

126. *See* Simons, *supra* note 123, at 728 (describing this argument but not agreeing with it).

127. *Id.* at 723.

128. *Id.*

129. *See supra* Part I. When adjudicators use short cuts to determine damages, they may not be accurately applying the law. *See* Wissler et al., *supra* note 82, at 795 n.104 (noting in jury study requests by judges and lawyers for information that was not legally relevant for use as a "shortcut" to determining damages).

finders can disagree about of the amount of damages in a given case. The valuation of injury is an art more than a science. As demonstrated in Part I, the guidelines of the current rule structure are porous, meaning particular damages claims can fall into one of several doctrinal categories. It is not sufficient to tell the adjudicator to apply the formal legal rules without more, because these rules are malleable and do not provide a consistent metric for monetizing injury. This is the reason why tort damages can vary in similar cases. But the fact that reasonable fact finders might disagree is not sufficient justification for awarding different amounts to similarly situated litigants. The law should strive for better than a random (or worse yet, biased) assignment of damages based on the identity of the fact finder. Proponents of the idea that, instead of equality, we should speak of a duty to correctly apply the law might get to the same place as an equality principle if they assume that legal standards applied similarly in similar cases will reach similar results. What equality adds is an additional component to the measure of justice, that similar outcomes be reached in similar cases even where correct law application results in inconsistency.

On the ground, lawyers evaluating mass tort cases already promote outcome equality by comparing cases in order to determine value, although they do not do so rigorously or systematically. Part of that "art" of determining damages among members of the legal profession is to consider how the injuries of other, similarly situated persons were monetized.[130] Accordingly, in valuing tort cases, the duty to apply the law correctly is only part of the valuation process. Another part of that process is comparative. For this reason, equality in the context of adjudication is a comparative right; it considers the relative treatment of different individuals.[131] Comparative treatment is entrenched in procedural doctrines such as remittitur, which allows the judge to offer the plaintiff a choice between reduced damages that are more in line with verdicts in similar cases or retrying the case.[132] Similarly, where the defendant has a limited fund from which to draw to pay plaintiffs, the class action rule permits all the plaintiffs' claims to be adjudicated together in a mandatory class action and the proceeds divided among them.[133] As a result, some litigants might receive a lower award than they would have had there been no class action. A similar procedure is available in bankruptcy for "insolvent debtor[s] facing . . . asbestos liability."[134] The rationale for this procedure is that it prevents injured parties from being denied recompense merely because they file after the defendant's assets have

130. *See supra* subpart I(C) (describing valuations of injuries by legal professionals as based on comparison with like cases).

131. Simons, *supra* note 123, at 709–12.

132. *See supra* note 5 and accompanying text.

133. FED. R. CIV. P. 23(b)(1)(B).

134. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 & n.45 (3d Cir. 2004) (citing 11 U.S.C. § 524(g)); *see also* NAGAREDA, *supra* note 106, at 161–82 (describing bankruptcy proceedings as a way of resolving mass torts).

been exhausted.[135] This procedure also compares individuals to one another in order to rectify inequalities that result from timing.

To the extent that it is a comparative right, the principle of outcome equality in litigation ought to be understood as imposing a requirement that the adjudicator give a reason, supported by the legal framework, for treating one injured person differently than another, apparently similarly situated person.[136] The argument in this Article centers on that idea. Sampling and other forms of Trial by Formula force adjudicators to give reasons for treating similarly situated people who were injured in similar ways differently from one another. The practice of informal sampling in aggregate litigation demonstrates that in being forced to give reasons for how similarly situated people are treated, adjudicators produce a system that is fairer across the board than individual, decentralized litigation.

The process of reason giving is more likely to result in outcomes that realize the ideal of equal treatment than our current system. The strongest argument against this conception of outcome equality is that true outcome equality is impossible to achieve in practice. There may be important individual characteristics that the more flexible, decentralized system of case-by-case adjudication or settlement is able to consider that would be ignored in a statistical-adjudication procedure. For this reason, the current system may be better at doing justice in the individual case. One response to this argument is that doing justice in the individual case also requires equal treatment of similarly situated persons. But it is clear that the risk posed by a system that values equality over liberty is a risk of error—the risk that salient differences between litigants will be missed. The risk posed by a system that values liberty over equality is a risk of a different error—the risk that ignoring salient similarities between litigants will lead to arbitrary or biased results.[137] No system will be perfect, but one that requires a justification for differential treatment is superior to one that permits unexplained inequality of outcomes to persist.

135. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833–35 (1999) (observing that the intent behind Rule 23(b)(1)(B) is to protect absent class members when the defendant has limited funds); *see also In re Combustion Eng'g*, 391 F.3d at 234 n.45 (describing the bankruptcy procedure's requirements as being "tailored to protect the due process rights of future claimants").

136. Simons, *supra* note 123, at 748 ("An equality principle requires the decisionmaker to explain why he departed from the rule in some but not all cases.").

137. Another way to conceptualize a similar idea is to consider the equality right at stake here as the right to a fair distribution of the risk of error rather than a right to the same outcome for similarly situated persons. *See* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1016–17 (2010) (discussing fair risk distribution in relation to the moral right at stake in effectuating the substantive law). For the mass tort context, it seems to me that discussing the right in terms of actual outcomes rather than distribution of risk makes sense. The right at stake is the same of each litigant, the procedures offered are the same—if the litigants are similarly situated, why should they not receive the same damages award?

The requirement that adjudicators provide an explanation is related to Ronald Dworkin's concept of equal respect and concern.[138] The scholarship on procedural justice has long recognized the importance of dignitary values in determining how much process is due.[139] Being treated equally and being given legally legitimate reasons for unequal treatment is also part of the respect for the dignity of individuals before the law. What makes participation meaningful is the capacity to influence the outcome. A system that treats similarly situated litigants unequally also harms their dignity.

Justifying outcomes and demonstrating that like cases are treated similarly also play a role in the moral legitimacy of the tort system.[140] Inconsistent outcomes smack of arbitrariness and open the possibility that results are based on invidious bias. One indicium of the fact that inconsistency erodes legitimacy is that critics of the tort system often point to inconsistent outcomes as a basis of their critique.[141] Transparency and reason giving are necessary to the moral legitimacy of a court system in a democracy.[142] The justice system is a public good because it is the primary system of law enforcement in our society. Citizens should be informed of the workings of the court system, the manner in which cases are resolved, and the ultimate resolution of those cases. For this reason, the resolution of all cases, not only by judicial action but also by settlement, ought to be publicly available. The processes by which mass tort settlements are reached,

138. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1978) (arguing that making a moral decision, such as which of two children shall receive the final dose of a drug to cure some illness, on the basis of a coin flip would fail to show equal concern); Simons, *supra* note 123, at 720–21 & n.97 (discussing Dworkin's theory of equal concern); *see also* Greenawalt, *Prescriptive Equality*, *supra* note 123, at 1273 (arguing that the principle of equality "may express deep-rooted feelings, not easily dispelled, to which decisionmakers appropriately are responsive").

139. For example, Jerry Mashaw has focused on procedure as an affirmation of individuality and respect for persons through participation. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888 (1981) ("[I]t is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons."). Although Mashaw focuses on equality of opportunity as part of dignity, *id.* at 902–03, outcome equality is also a salient component of dignity.

140. *See* Rubenstein, *supra* note 2, at 1893 ("Litigants will lose faith in adjudication as a means of dispute resolution if outcomes appear to be random, or worse, if they appear to be biased."). For discussions of legal legitimacy more generally, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) and Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 407–18.

141. *Compare* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624–26 (2008) (lamenting unpredictability in punitive damages awards), *and* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998) (describing variations in punitive damages awards despite juror agreement on reprehensibility), *with* Theodore Eisenberg et al., *Variability in Punitive Damages: Empirically Assessing* Exxon Shipping Co. v. Baker, 166 J. INSTITUTIONAL & THEORETICAL ECON. 11–13 (2010) (criticizing the Supreme Court's reliance on summary statistics of variability and demonstrating that size of punitive damages awards increases in a linear fashion with the size of compensatory damages awards in log-transformed dollars).

142. *See* Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 772–73 (2008) (discussing the relationship between court transparency and national security after 9/11).

including sampling, public trials, and the creation of matrices for the allocation of damage awards, are a step in this direction.[143] As discussed further in Part III, they do not go far enough.

So far, this analysis has only addressed the issue of outcome equality as a function of final determinations. But timing is also a critical component of equality in adjudication. The order in which courts hear cases is central to procedural justice. Delays can have negative effects on both parties. As a prominent theorist explains, "Delay may have two different effects on a decision: it may undermine accuracy in the sense that it increases the risk of error, and it may undermine the practical utility of judgments for the purpose of redressing rights."[144] As time passes, events recede into the distance; witnesses forget, disappear, or pass away. The passage of time compounds the injury for plaintiffs awaiting compensation. It also makes pursuing cases more difficult for lawyers working on a contingency fee basis, who must fund the litigation going forward.[145]

For defendants, the effect of delay is mixed. On the one hand, defendants in mass tort cases may suffer as investors wonder what the effects of large-scale litigation will be on the company. On the other hand, delay often favors defendants who benefit from any difficulties plaintiffs may have in proving a case years after the fact. Defendants also benefit from putting off payment of damages, should they be found liable. Finally, in some cases, the passage of time permits changes in scientific thinking to coalesce, clarifying the causation inquiry. If the scientific studies vindicate the defendants' position, new evidence can end the litigation.[146]

Timing and fairness in adjudication are in tension with one another. The Federal Rules of Civil Procedure optimistically require that the rules be "administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[147] But often these considerations must be traded off against each other. One can easily imagine a very inexpensive summary proceeding that would not pay any attention to individual issues. Such a regime would be unjust not only because it limits participant autonomy, but also because it does not even attempt to give plaintiffs what they are entitled to under the substantive law. Similarly, with enough resources, it is possible to hold an individual trial in every case. Under

143. *See supra* subpart I(D) (describing the role of damages scheduling in increasing transparency of the civil justice system).

144. A.A.S. Zuckerman, *Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353, 360 (1994).

145. *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 90–91 (2010) (describing how contingency fees boost plaintiffs' bargaining power at the expense of transferring the risk of litigation to their attorneys).

146. *See, e.g.*, *In re* Breast Implant Cases, 942 F. Supp. 958, 961 (E.D.N.Y. & S.D.N.Y. 1996) (finding scientific evidence inadequate to prove that breast implants caused systemic injuries alleged by plaintiffs).

147. FED. R. CIV. P. 1.

current conditions (or any realistic improvement upon them), an insistence on individual trials would mean long delays. Our system has resolved the tension between justice and speed by strengthening the procedures available for settling cases in the pretrial phase and giving judges additional discretion to resolve cases through pretrial or settlement conferences,[148] dismissals at the complaint stage,[149] summary judgment,[150] judgment as a matter of law,[151] and orders for a new trial.[152] The tension between speed and fair outcomes is resolved in each case by the operation of these procedural rules on the ground—in other words, through judicial discretion. This is why focusing on the procedural tools available to district judges and the way they use those tools is critical to understanding how the right to outcome equality can be operationalized.

In sum, the principle of outcome equality requires that similar litigants ought to receive the same outcomes and provides a basis for giving reasons for differential treatment. Reasonable adherence to outcome equality demonstrates equal respect and concern for litigants. Furthermore, outcome equality should be understood both in terms of comparing *how much* litigants receive and *when* their cases are resolved. The next subpart will evaluate the doctrinal support for the right to outcome equality both in the procedural law and as a constitutional right.

B. *Doctrinal Enforcement of Outcome Equality*

Having considered the aspirational principle of outcome equality, we turn to an investigation of the extent to which the subconstitutional rules of the procedural law and the constitutional provisions of equal protection and due process support a right to outcome equality. This analysis demonstrates that judicial interpretations of the procedural laws and constitutional protections offer only limited recognition of outcome equality.

1. The Procedural Law.—Outcome equality is expressed in our civil litigation system through a variety of procedural doctrines that attempt to instill the discipline of consistency across cases.[153] For example, preclusion doctrines prevent the inconsistent outcomes that may result from relitigation of the same case or the same issue. Remittitur disciplines outcomes by allowing judges to reduce outlier verdicts. Both of these doctrines limit litigants' day in court in favor of equality and consistency. A variety of other doctrines, such as joinder and representative litigation, also encourage

148. FED. R. CIV. P. 16.
149. FED. R. CIV. P. 12(b).
150. FED. R. CIV. P. 56.
151. FED. R. CIV. P. 50.
152. FED. R. CIV. P. 59.
153. *See* Rubenstein, *supra* note 2, at 1884–92 (discussing the expression of different types of equality in the rules of civil procedure).

comparison and equalization across cases by allowing cases raising the same issues to be decided in a single proceeding.

Claim preclusion forbids the relitigation of the same claim between the same litigants.[154] Issue preclusion or collateral estoppel forbids relitigation of the same issue in a subsequent case.[155] The doctrine of nonmutual collateral estoppel permits a litigant to prevent his opponent from litigating an issue that the opponent litigated in a previous suit.[156] Finally, the doctrine of law of the case dictates that once an issue has been decided, it may not be relitigated at a later stage in the same lawsuit.[157] These doctrines are meant to ensure that case outcomes are consistent.

But preclusion doctrine is too narrowly focused to do much work in promoting equal outcomes across cases. Claim preclusion only applies to claims arising out of the same transaction or occurrence.[158] Issue preclusion (collateral estoppel) applies only to the same issue being relitigated by the same party and cannot be used against a new party who never had the opportunity to litigate the issue in the first place.[159] To illustrate, consider the classic bus accident hypothetical: There is a bus accident in which fifty passengers are injured and all fifty sue.[160] In the first suit, the defendant bus company prevails; the court finds the bus company was not negligent. The bus company cannot use that judgment against the second plaintiff because that plaintiff was not a party to the first suit and did not have an opportunity to litigate the question.[161] Now imagine that in a third suit the plaintiff prevails on the negligence issue. Can the fourth plaintiff use the findings of negligence in the third plaintiff's suit against the defendant? After all, the defendant was a party to and fully litigated the third suit. The answer is that a court will not permit the fourth plaintiff to use the findings of the third suit against the defendant, although formally speaking the court has the discretion to do so. The Supreme Court has warned that plaintiffs who could easily have joined the previous action (as the fourth plaintiff in this example could

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154. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4406, at 138–40 (2d ed. 2002).

155. *Id.*

156. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (upholding the doctrine of nonmutual collateral estoppel); 18 WRIGHT, MILLER & COOPER, *supra* note 154, § 4416, at 393 & n.17 (noting that *Parklane Hosiery* confirmed that collateral estoppel can be used by a plaintiff as an offensive tool in a second action when that plaintiff was not a party to the first action).

157. 18B WRIGHT, MILLER & COOPER, *supra* note 154, § 4478, at 637–41.

158. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (defining the term *claim* for purposes of claim preclusion).

159. *See Parklane*, 439 U.S. at 326–27 (noting the historic requirement of mutuality of parties for use of collateral estoppel and that the Supreme Court's decision in Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971), abandoned this requirement only with respect to plaintiffs seeking to relitigate issues they had lost in a previous case).

160. *See id.* at 330 n.14 (citing Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 304 (1957)) (discussing Professor Currie's similar hypothetical involving a railroad car).

161. *See supra* note 159 and accompanying text.

have) should not be permitted to "adopt a 'wait and see' attitude" in the hope of a favorable outcome in the first suit and later benefit from offensive nonmutual collateral estoppel knowing that they need not face the consequences of an adverse ruling.[162] The Court has also cautioned that the use of offensive nonmutual collateral estoppel is unfair to the defendant "if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."[163]

How broadly or narrowly courts define the issues at stake in a particular litigation will also determine whether one outcome supersedes future litigation. The problem of issue definition in preclusion doctrine raises a fundamental difficulty for comparative valuation of injuries and for the right to outcome equality more generally: What makes like cases alike? Even if a court were to preclude subsequent litigation and thus prevent inconsistent outcomes in one case, there is no guarantee that a particular outcome is consistent with the value assigned to the underlying injury in comparable cases. Because the concept of value in tort law is comparative, we can determine value only by reference to a portfolio of similar cases. The tort system is still searching for an acceptable method of determining what makes cases similar for purposes of assigning value, and this is one reason injury valuation is contested.

The doctrine of remittitur is another way the procedural law enforces the principle of equality. Remittitur permits the court to reduce jury verdicts that it believes are unreasonably high by allowing the plaintiff to choose between a new trial and a reduced award.[164] The court is supposed to arrive at that reduced award by looking at the outcomes of comparable cases decided by juries.[165] This type of truncation is similar to what statisticians do with outlier data points. Statisticians can recode the outlier datum or drop it altogether on the theory that it represents some kind of mistake.[166] But the existence of the outlier may be an important clue to failures in the model being used.[167] In fact, an outlier may indicate that the model is flawed. In the remittitur context, omitting the outlier becomes a problem when the outlier is not an aberration but represents the direction in which valuation is

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162. *Parklane*, 439 U.S. at 330.

163. *Id.*

164. *See supra* note 5 and accompanying text (describing the standard for remittitur in federal court).

165. *See* Dimick v. Schiedt, 293 U.S. 474, 486–87 (1935) (recognizing that remittitur withstands Seventh Amendment attack but rejecting additur as unconstitutional); Joseph B. Kadane, *Calculating Remittiturs*, 8 LAW PROBABILITY & RISK 125, 125–26 (2009) (describing a method used by one district court judge in analyzing comparable cases).

166. David J. Sheskin, *Outlier*, *in* 1 ENCYCLOPEDIA OF RESEARCH DESIGN 979–81 (Neil J. Salkind ed., 2010) (discussing outlier data and courses to take in statistical analysis when the outlier is not considered an error).

167. *See* NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE 251 (2007) (arguing that, for the Gaussian model, it is better to understand when the model cannot apply than to try to adapt the model to "non-bell curve" situations).

moving.[168] For example, the value assigned to a particular kind of injury may increase over time. If that is the case, realignment through remittitur will systematically prevent appropriate increases in damages awards. If remittiturs are not granted systematically, which is likely in a decentralized litigation system such as our own, changes in case value may increase the difficulty of assigning value in future cases because this practice increases unpredictability. Furthermore, remittitur favors lower valuations of injury. Because remittitur is constitutional but additur is not, in the federal courts (and at least some state courts), remittitur is a one-way ratchet.[169] The doctrine lowers awards that are extraordinarily high but never raises awards that are too low. In the latter case, the judge's only option is to grant a new trial.

A final set of procedural rules that contribute to equality of outcomes is the rules governing party joinder and representative litigation. The Federal Rules of Civil Procedure provide a very liberal regime for party joinder: anyone can be joined in a lawsuit so long as a party alleges any "question of law or fact common to all" the joined parties.[170] The Rules also provide for class actions, which allow individuals who share common "questions of law or fact" to band together in a lawsuit collectively represented by a class representative.[171] Only if the class is certified can the class members benefit from the lawsuit jointly (and be bound by its results).[172] Where individuals are joined together in a suit, a reference class is created; they can be compared to one another and the outcomes in each of their cases aligned.[173] In some limited cases, the federal court may even enjoin competing actions affecting a single stake against which multiple plaintiffs have claims.[174] Finally, the multidistrict litigation statute and the rule governing consolidation of actions permit the court system to combine actions raising common issues of law or fact.[175]

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168. There is a debate about the significance of and reasons for an apparent increase in the size of jury verdicts. *See* Vidmar, *supra* note 67, at 877–78 (describing and criticizing studies showing inflation of jury awards since the 1980s).

169. *See Dimick*, 293 U.S. at 486–87 (upholding remittitur but rejecting additur as unconstitutional). *But see* Jacobson v. Manfredi, 679 P.2d 251, 255 (Nev. 1984) (upholding additur in a products liability case).

170. FED. R. CIV. P. 20(a)(1)(B) (governing joinder of plaintiffs); FED. R. CIV. P. 20(a)(2)(B) (governing joinder of defendants).

171. FED. R. CIV. P. 23(a) (outlining prerequisites for certifying class actions).

172. *See* Smith v. Bayer Corp., 131 S. Ct. 2368, 2379–80 (2011) (stating that a member of a class that is not certified is not a party to the prior litigation and cannot be precluded).

173. *See* Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081, 2083–84 (2009) (discussing problems faced in determining the parameters of a reference class and proposing a solution).

174. *See* RICHARD D. FREER, CIVIL PROCEDURE § 13.2, at 703 (2d ed. 2009) ("[T]he federal court overseeing an interpleader case may 'enter its order restraining [the claimants] from instituting or prosecuting any proceeding in any State or United States court affecting the [stake].'" (second and third alterations in original) (quoting 28 U.S.C. § 2361 (2006))).

175. 28 U.S.C. § 1407 (governing multidistrict litigation and permitting a panel of judges in such situations to transfer actions raising common issues of fact to a single district for pretrial

At the same time, the rules for required joinder and interpleader demonstrate the procedural law's tolerance of inconsistent outcomes. The fact that a series of suits may lead to inconsistent adjudications is not sufficient to require parties to be joined under Rule 19.[176] Similarly, the interpleader rule permits persons to be joined as defendants only when their claims "may expose a plaintiff to double or multiple liability."[177] Interpleader is generally used to address the problem of competing claims to property so that the interpleader plaintiff will not be subject to inconsistent obligations. Thus, for example, persons who may have a claim to an insurance policy when the amount of that policy is less than the tortfeasor's exposure can be brought into the same lawsuit under the doctrine of interpleader and related statutes.[178] Although interpleader has been used to enforce equality between litigants who have claims against a limited fund, it has not been used to address inconsistent adjudication of tort cases.

In sum, procedural doctrines such as remittitur, joinder, class actions, and interpleader enforce a modicum of equality between litigants.

2. *The Constitutional Dimension.*—Both the Equal Protection Clause and the Due Process Clauses of the United States Constitution could be the basis for a constitutional requirement of outcome equality in litigation. Currently the law provides only a thin justification for such a requirement.[179]

The Equal Protection Clause imposes some limited requirements of equal treatment toward litigants. It requires that the government, including the courts, treat all similarly situated persons alike.[180] At the same time, lawmakers may recognize relevant differences between individuals.[181] It is familiar enough that equal protection doctrine singles out certain classifications for strict scrutiny. Laws that classify individuals based on race, ethnicity, national origin, alienage, and religion must be justified by a compelling state interest,[182] and laws that classify individuals based on gender are

proceedings); FED. R. CIV. P. 42(a) (describing consolidation of actions involving common questions of law or fact).

176. *See* FED. R. CIV. P. 19(b) (outlining an exception to compulsory joinder: even if a party is "required" under section (a)(1), if that party cannot feasibly be joined and the criteria in section (b) weigh in favor of allowing the lawsuit to continue, the action can proceed without that required party).

177. FED. R. CIV. P. 22(a)(1).

178. *See* 28 U.S.C. § 1335(a)(1) (stating that district courts have jurisdiction in the nature of interpleader if "[t]wo or more adverse claimants . . . are claiming or may claim to be entitled to such money or property").

179. *See* Rubenstein, *supra* note 2, at 1896–97 (demonstrating that "constitutional equal protection doctrine has not directly contributed to ensuring adjudicative outcome equality").

180. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

181. *See* Tigner v. Texas, 310 U.S. 141, 147 (1940) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").

182. *Cleburne*, 473 U.S. at 440 (citing Graham v. Richardson, 403 U.S. 365 (1971) and McLaughlin v. Florida, 379 U.S. 184, 192 (1964)); Nelson Tebbe & Deborah A. Widiss, *Equal*

subject to intermediate scrutiny.[183] Decisions based on other classifications, such as age, looks, height, or wealth, for example, are presumed to be valid and subject only to rational-basis review, absent some subconstitutional protection.[184] The same rationale applies to the Judicial Branch and to the decisions of other persons deemed government actors, such as attorneys exercising peremptory challenges in civil litigation.[185]

The Supreme Court struck down race- and gender-based peremptory challenges in civil cases.[186] The Court reasoned that such challenges violate the equal protection rights of jurors, who may be denied every citizen's right to participate in the judicial system based on a discriminatory peremptory challenge.[187] Furthermore, the Court explained that "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process, and places the fairness of [the] proceeding in doubt."[188] In other contexts, courts have also found that taking race into account can violate the equal protection rights of litigants. For example, in *McMillan v. City of New York*,[189] the United States District Court for the Eastern District of New York held that assessing damages based on statistical evidence of race as a predictor of life expectancy violated the plaintiff's right to equal protection.[190]

To the extent that adjudicators, including juries, take an impermissible classification such as race or gender into account when determining damages, this is an equal protection violation. But this rule is very difficult to police because the jury makes its determination in a "black box." With very few

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Access and the Right to Marry, 158 U. PA. L. REV. 1375, 1407 & n.141 (2010) ("Religion has been included in the list of suspect classifications, albeit in dicta." (citing City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam))).

183. *See Cleburne*, 473 U.S. at 441 ("A gender classification fails unless it is substantially related to a sufficiently important governmental interest." (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982), and Craig v. Boren, 429 U.S. 190 (1976))).

184. *Id.* at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174–75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); and *Dukes*, 427 U.S. 297); *see also* 42 U.S.C. §§ 6101–6107 (2006) (prohibiting discrimination in employment on the basis of age in programs receiving federal aid).

185. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (holding that peremptory challenges based on race violate the equal protection rights of jurors); *see also* Shelley v. Kraemer, 334 U.S. 1, 15 (1948) (articulating the principle that the actions of judicial officers within their state capacities are state actions within the meaning of the Fourteenth Amendment).

186. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994); *Edmonson*, 500 U.S. at 616, 630.

187. *Edmonson*, 500 U.S. at 618–19 (citing Powers v. Ohio, 499 U.S. 400, 407–09 (1991)).

188. *Id.* at 630 (citations omitted) (quoting *Powers*, 499 U.S. at 411) (internal quotation marks omitted). The Court went on to explain that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Id.* (citing Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)); *see also* Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 67 (2003) (describing the judicial function of norm elaboration in the context of equality).

189. 253 F.R.D. 247 (E.D.N.Y. 2008).

190. *Id.* at 255 ("Equal protection in this context demands that the claimant not be subjected to a disadvantageous life expectancy estimate solely on the basis of a 'racial' classification.").

exceptions, juror testimony about deliberations, including racially charged remarks made by other jurors, cannot be introduced to impeach a verdict.[191] Moreover, statistical evidence of differential treatment of protected classes in the court system will not give rise to an equal protection claim.[192] Only in cases such as *McMillan*, where the question before the court concerned the introduction of statistical evidence taking race into account, is an equal protection ruling possible. Even then, the range of classes the Equal Protection Clause protects is narrow and excludes myriad other considerations that may result in litigants being treated inequitably. Thus, jurors may favor attractive plaintiffs consistent with equal protection doctrine, even when beauty is not a legitimate basis for injury valuation under the law.[193] In some cases, such favoritism results in outcomes that are incorrect applications of the law to the facts and are inequitable.

Equal treatment of similarly situated litigants could also be understood to fall under the rubric of procedural due process. Due process has been understood to be a liberty-based right of individuals in contradistinction to the equality rights of groups. Procedural due process, therefore, has largely been understood to require a determination of how much process is due to a given individual, rather than as a comparison between similarly situated litigants.[194] But liberty and equality claims are intertwined.[195] The

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191. *See* FED. R. EVID. 606 (declaring that "a juror may not testify about any statement made or incident that occurred during the jury's deliberations" during an inquiry into the validity of a verdict); United States v. Benally, 546 F.3d 1230, 1231, 1241 (10th Cir. 2008) (holding inadmissible juror testimony regarding racist remarks about Native Americans during jury deliberations).

192. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (holding that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'" and that the defendant therefore was required to prove that the "decisionmakers in *his* case acted with discriminatory purpose" (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967))); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278–79 (1979) (holding that a showing of disparate impact on a protected group is insufficient to give rise to an equal protection violation absent a showing of discriminatory purpose, in other words, that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group" (internal quotation marks omitted)).

193. Sometimes beauty may be a legitimate basis, such as in cases where jurors are valuing a disfiguring injury. *See supra* notes 49–50 and accompanying text (discussing juror valuation of disfigurement).

194. The procedural due process cases have largely been about how to determine how much process is due in a given case. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 339, 349 (1976) (describing the hearing required for termination of social security disability benefits).

195. Yoshino, *supra* note 8, at 748–49 (explaining that the Supreme Court's move from group-based equal protection claims to individual-rights claims "reflects what academic commentary has long apprehended—that constitutional equality and liberty claims are often intertwined"); *see also* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002) (describing how the representation-reinforcement and deliberative-democracy theories of judicial review "conscript a basic equality as a means toward another end—liberty" and declaring that "[e]quality and liberty are not as different as their histories in the case law have made them out to appear"); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000) (observing that once similarly situated people begin to see themselves as a minority group, they transition from due process arguments to equal protection arguments to

interrelationship of liberty and equality is evident in cases involving the right to sexual or reproductive freedom or the right to equal access to the courts for purposes of divorce.[196] But the Supreme Court has also considered equal treatment as a procedural due process right of defendants in punitive damages cases,[197] in criminal cases,[198] and in considering the jurisdictional reach of the courts.[199]

The Supreme Court has addressed the due process concerns triggered by the variation in jury awards, specifically in its punitive damages jurisprudence. In *Exxon Shipping Co. v. Baker*,[200] for example, the Court justified the requirement that punitive damages be consistent across cases on the basis that defendants need to know what conduct will give rise to liability.[201] The Court explained that "when the bad man's counterparts turn

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advance their individual rights); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 380–81, 385–86 (1985) (describing how the Court in Roe v. Wade, 410 U.S. 179 (1973), chose to address abortion limitations under a fundamental-rights approach rather than using an approach based on sex equality); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 106 (2007) (describing the Court's shift from unequal treatment to liberty of contract as a justification for striking down business regulations); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008) (arguing that constitutional protections of dignity in substantive due process cases and equal protection cases "vindicate, often concurrently, the value of life, the value of liberty, and the value of equality"); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004) (describing the Court's due process case law as a "narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix").

196. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); Boddie v. Connecticut, 401 U.S. 371, 388–89 (1971) (Brennan, J., concurring) ("Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether.").

197. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2625–26 (2008) (stating that "[c]ourts of law are concerned with fairness as consistency" and describing inconsistency and unpredictability of punitive damages awards as a due process violation); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996) (observing that a reviewing court determining whether a punitive damages award is a grossly excessive violation of due process should compare the punitive damages award to civil or criminal penalties for comparable conduct).

198. *See* Koon v. United States, 518 U.S. 81, 113 (1996) (noting that reducing "unjustified disparities" in criminal sentencing is necessary to achieve "the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice").

199. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process Clause, by ensuring the 'orderly administration of the laws,' . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945))).

200. 128 S. Ct. 2605 (2008).

201. *See id.* at 2627 (concluding that a penalty should be reasonably predictable in its severity so that one "can look ahead with some ability to know what the stakes are in choosing [a] course of

up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage."[202] *Exxon* evokes a principle of equal risk distribution among defendants.

Outside of the punitive damages context, however, the doctrinal structure permitting judges to enforce some level of consistency in jury verdicts has been considered only a long-held rule of common law, not a constitutionally imposed due process requirement.[203] The constitutionality of rules allowing judges to reconsider jury verdicts has therefore traditionally been analyzed under the Seventh Amendment individual right to a jury trial rather than as a problem of inequality or arbitrary treatment.[204] Furthermore, our judicial system has consistently tolerated variations in jury verdicts. The standard that permits judges to overturn verdicts only when no reasonable jury could find for that party,[205] for example, does relatively little to enforce equality of outcomes among litigants.

In sum, there is a basis in the existing doctrine and the language of the Equal Protection and Due Process Clauses for establishing a right to outcome equality in adjudication. That right has even been recognized by the Supreme Court.[206] But it has not been consistently imposed, and there is substantial countervailing law and practice. The likelihood that a robust right to outcome equality will emerge from the Supreme Court is low at present. As described in the introduction, the Court has favored liberty over equality in adjudication in many recent opinions. Nevertheless, with the existing tools available to them, district court judges have pioneered innovative procedures that promote outcome equality. If these procedures were more rigorous, they would do an even better job of supporting outcome equality across litigants. Over time, the importance of outcome equality may even trickle up to the Supreme Court.

III. Outcome Equality in Mass Tort Cases

Equality remains an important foundational principle of our civil litigation system, even if the endorsement from the procedural law and

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action"); *see also Gore*, 517 U.S. at 585 (stating that a defendant has an "entitlement to fair notice of the demands that the several States impose on the conduct of its business").

202. *Baker*, 128 S. Ct. at 2627.

203. *See* Dimick v. Schiedt, 293 U.S. 474, 488 (1935) (Stone, J., dissenting) (describing the power of the judge to set aside a jury verdict as inadequate or excessive as a "rule[] of the common law which [has] received complete acceptance for centuries").

204. U.S. CONST. amend. VII; *see also* Galloway v. United States, 319 U.S. 372, 389 (1943) (holding motions for directed verdict constitutional); *Dimick*, 293 U.S. at 486–87 (holding additur unconstitutional).

205. FED. R. CIV. P. 50.

206. *See Baker*, 128 S. Ct. at 2627 (noting that the unpredictable nature of punitive awards "is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another").

constitutional provisions is limited. The resilience of this principle is most evident on the ground, where judges are using their discretion to adopt equality-promoting procedures. This part considers what judges have already done to promote outcome equality in mass torts and analyzes what could be done better.

A. The Emergence of Equality: Informal Sampling

Recently, judges overseeing large numbers of tort cases collected in a single forum under the auspices of the multidistrict litigation statute and similar procedural devices have started using sampling techniques such as nonbinding bellwether trials for "informational" purposes.[207] This process of court-engineered sampling is akin to what lawyers ordinarily do when they compare similar cases to determine what damages award is appropriate, but it is a somewhat more transparent and systematic approach. Because it requires a comparison between cases, it is more equality promoting than "ordinary" individual litigation.

In the late 1990s, a few trial courts experimented with binding statistical-adjudication procedures. In *Hilao v. Estate of Marcos*,[208] a federal court used statistical methods to adjudicate a class action brought on behalf of persons who suffered human rights abuses under the regime of Ferdinand Marcos in the Philippines.[209] A special master conducted on-site depositions in the Philippines, and based on those, he recommended a recovery schedule to a jury, which then adopted his recommendations (for the most part).[210] The Ninth Circuit upheld this procedure.[211] Around the same time, a U.S. district court judge in Texas tried 160 asbestos cases and was prepared to use those verdicts to extrapolate to the remainder of asbestos cases consolidated before him.[212] The Fifth Circuit quashed his efforts, holding that the extrapolation of the results of the sample verdicts violated the defendants' due process right and the Seventh Amendment.[213] No trial court has followed in the footsteps of these innovators, and the appellate courts continue to express hostility to mandatory statistical adjudication of this type.

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207. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008); *see also* Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006) ("[E]ven without preclusive effect, [bellwether trials] offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated.").

208. 103 F.3d 767 (9th Cir. 1996), *disapproved of in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

209. *Id.* at 782.

210. *Id.* at 782–84.

211. *Id.* at 787.

212. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 666 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

213. *Cimino*, 151 F.3d at 319.

Sampling has resurfaced in the last five years as an informal method for encouraging aggregate settlements rather than as a binding method for resolving cases in the class action context. This sampling methodology uses informational bellwether trials.[214] This informal method has been used in both state and federal forums. The most often cited example is the Vioxx litigation, but there are many others.[215] Sampling was used to encourage settlement in *In re September 11th Litigation* (September 11th Litigation).[216] A sampling process was instituted in the related WTC Disaster Site Litigation.[217] Sampling has been proposed in the litigation over formaldehyde-laden FEMA trailers,[218] in the litigation arising out of the presence of methyl tertiary butyl ether in the water supply,[219] and in the Fosamax litigation.[220] Sampling was also proposed in the gender discrimination class action against Wal-Mart to solve the problem that the case required individual trials and was therefore not manageable as a class action, although this plan was rejected by the Supreme Court.[221]

The WTC Disaster Site Litigation presents a particularly intriguing approach to statistical adjudication.[222] Approximately 9,090 plaintiffs filed lawsuits against more than 200 defendants, alleging injuries arising out of their exposure to harmful chemicals in the aftermath of the tragedy of

214. *See* Fallon et al., *supra* note 207, at 2332 ("The ultimate purpose of holding bellwether trials . . . was not to resolve the thousands of related cases pending . . . but instead to provide meaningful information and experience to everyone involved in the litigations.").

215. *See, e.g.*, *id.* (noting the use of bellwether trials in *In re* Propulsid Products Liability Litigation, MDL No. 1355, 2000 WL 35621417 (J.P.M.L. Aug. 7, 2000)).

216. *See* Opinion Supporting Order to Sever Issues of Damages and Liability in Selected Cases, and to Schedule Trial of Issues of Damages at 5, *In re* Sept. 11th Litig., No. 21 MC 97 (AKH) (S.D.N.Y. July 5, 2007), *available at* http://www.nysd.uscourts.gov/docs/rulings/21MC97_opinion_070507.pdf (scheduling six representative cases for trial on the issue of damages with the intention that the jury verdicts would have applicability for other pending cases).

217. *See* Order Amending Case Management Order No. 8, *supra* note 19, at 1–3 (dividing the WTC Disaster Site Litigation cases into five groups and selecting sample cases from each group based on severity, random selection, and the court's discretion).

218. *See* Pretrial Order No. 28, at 1, *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., MDL No. 07-1873 (E.D. La. Feb. 10, 2009), *available at* http://www.laed.uscourts.gov/FEMA07md1873/Orders/order1096.pdf (ordering the parties to submit "potential bellwether trial plaintiffs").

219. *See* Opinion and Order at 1–2, 26, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., No. 00 MDL 1898 (SAS) (S.D.N.Y. Oct. 19, 2009), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2000cv01898/4606/2866/ (limiting the court's holding regarding punitive damages to "the facts presented at this bellwether trial").

220. *See* Order at 1, *In re* Fosamax Prods. Liab. Litig., No. 06 MD 1789 (JFK) (S.D.N.Y. June 29, 2011), *available at* https://d83vcbxs8ojhp.cloudfront.net/pdf/Trial%20Selection%20Order.pdf (noting that the court had previously ordered the parties to "select two cases for trial as bellwethers").

221. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1191–93 (9th Cir. 2007), *rev'd*, 131 S. Ct. 2541, 2561 (2011).

222. *See* Order Amending Case Management Order No. 8, *supra* note 19, at 1–3 (describing the sampling process implemented by the court).

September 11, 2001.[223] The plaintiffs include New York City employees, such as firefighters and police officers, as well as civilian volunteers and others.[224] Judge Alvin Hellerstein appointed two special masters—both law professors—to set up a sampling procedure to encourage settlement.[225] They developed a method for allocating the plaintiffs into groups. Sample cases from each group would go forward as bellwether trials.

Under the experts' plan, plaintiffs were required to fill out questionnaires regarding types of diseases they suffered and the severity of their injuries.[226] The information was entered into a database.[227] The groups were then organized based on type of illness and severity of the alleged harm.[228] Out of the first group of 2,000 cases, the special masters collected 200 of those alleging the most severe injuries, 25 additional cases of other diseases that had not been included in the severity chart, and 400 cases chosen at random.[229] Of these, the judge picked two cases, the defense lawyers picked two cases, and the plaintiffs' lawyers picked two cases, for a total of six cases set to proceed through pretrial and trial.[230] Judge Hellerstein explained that this "allows the parties to get a good sense of the strengths and weaknesses of all the cases" and presumably would lead to settlement.[231] The judge later increased the number of bellwether trials to twelve,[232] but before any cases were tried, an aggregate settlement was reached.[233]

Judge Hellerstein's approach to the WTC Disaster Site Litigation is typical of court-engineered sampling, which proceeds more or less as follows: Among a large set of similar cases, the judge slates several for

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223. Opinion Discussing Methodology for Discovery and Trials of Sample Cases at 6, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 19, 2009), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2021mc00100/58533/1138/0.pdf.

224. *In re* World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 173 (2d Cir. 2008).

225. The special masters are two very prominent torts professors: James Henderson of Cornell Law School and Aaron Twerski of Brooklyn Law School. Opinion Discussing Methodology for Discovery and Trials of Sample Cases, *supra* note 223, at 7 & n.3.

226. *Id.* at 8.

227. *Id.* at 7–8.

228. *Id.* at 10.

229. Order Amending Case Management Order No. 8, *supra* note 19, at 1–2.

230. Opinion Discussing Methodology for Discovery and Trials of Sample Cases, *supra* note 223, at 11.

231. Mark Hamblett, *Plan Is Implemented to Resolve Suits in WTC Cleanup*, N.Y. L.J., Feb. 25, 2009, at 1.

232. Mireya Navarro, *Settlement Plan Drafted for Sept. 11 Lawsuits*, N.Y. TIMES, Feb. 5, 2010, *available at* http://www.nytimes.com/2010/02/05/nyregion/05zero.html; Alexandra D. Lahav, *Twelve Instead of Six? Developments in the WTC Disaster Site Litigation*, MASS TORT LITIG. BLOG (Feb. 19, 2010), http://lawprofessors.typepad.com/mass_tort_litigation/2010/02/twelve-instead-of-six-developments-in-the-wtc-disaster-site-litigation-.html.

233. A.G. Sulzberger & Mireya Navarro, *Accord on Bigger Settlement for Ill 9/11 Workers*, N.Y. TIMES, June 11, 2010, *available at* http://www.nytimes.com/2010/06/11/nyregion/11zero.html.

pretrial practice and trial.[234] Lawyers litigate these sample cases through discovery and summary judgment, pretrial motions, and even trial.[235] When these selected cases have settled or reached judgment, lawyers use the experience culled from them to settle all the other cases in the group because the lawyers have developed a sense of the value of similar cases from the process of litigating the sample cases.[236]

Aggregate litigation presents opportunities to develop more rigorous sampling methodologies, bellwether trials among them. Unlike the settlement of the stand-alone case, courts can verify that the reference class is appropriate, that the sample is chosen randomly, and that it is sufficiently large to yield reliable results. The ordinary methods of case valuation do not require—and are virtually never based on—anything approaching a rigorous methodology. As a result, the ordinary trial process does not account for the always-present potential that a settlement deviates considerably from the average value the group of similar cases would have been assigned if all the cases were to proceed to trial. It is very difficult to sample in individual tort cases, but mass tort cases provide opportunities for developing a more rigorous method for assigning damages because they are so often joined together in one forum. At the same time, the informal methods that judges use in these cases are not sufficiently rigorous to achieve outcome equality. The remainder of this part considers the benefits of sampling and how to improve upon current practices.

B. How Trial by Formula Promotes Outcome Equality

1. Extrapolation.—Cases raising the same questions of fact and law are inevitably linked to one another. In a mass tort litigation, for example, many clients are represented by relatively small groups of lawyers. Many cases settle, and the amount of any individual settlement is determined by reference to the outcomes in parallel adjudications and settlements. In other words, lawyers determine outcomes on a comparative basis. Any individual's award is dependent on how other cases are resolved. Sometimes the dependent relationship between individual cases is made explicit, as in the requirement in the settlement agreements in the WTC Disaster Site Litigation and the Vioxx case that a large percentage of the plaintiffs accept the settlement in order for the settlement to go forward.[237]

Although one settlement affects the price of another, individual cases also differ from one another in relevant ways. Some individuals suffer more

234. Fallon et al., *supra* note 207, at 2342–43.

235. Lahav, *Bellwether Trials*, *supra* note 118, at 577.

236. *See* Fallon et al., *supra* note 207, at 2338 ("[B]ellwether trials can precipitate and inform settlement negotiations . . . .").

237. *See supra* notes 222–33 and accompanying text (describing the WTC Disaster Site Litigation and settlement); *supra* notes 108–21 and accompanying text (describing the Vioxx settlement).

because their injuries are of greater severity or because injuries of similar (or even lesser) severity have caused more damage to them and their family. The contingencies of social life and luck affect the extent to which an individual is harmed. Renowned special master Kenneth Feinberg struggled with this issue in administering the September 11th Victim Compensation Fund. Numerous people perished in the terrorist attack of September 11th and Feinberg was charged with compensating families and individuals who had opted out of the tort system and agreed to have their compensation determined by the fund.[238] Some were very rich and others very poor, but all experienced terrible losses. In his book about the experience, Feinberg concluded that he would have preferred to give identical amounts to all claimants than to have to quantify the value of human life in the aftermath of such a disaster, especially when those valuations reflect existing economic inequality.[239]

Since correcting preexisting inequality is not part of the doctrine of damages in tort law, the litigation process may compound some of these inequalities. Recognizing this, we ought to consider not only what procedural devices produce equality between litigants, but also to what extent the law enables or limits an adjudicator's ability to take into account these contingencies in the process of assigning damages amounts to individual cases. In considering the effect of sampling and extrapolation on litigants, it is important to keep in mind the normative ideal of procedure: to make sure that plaintiffs receive what they are entitled to under the substantive law. With respect to the assignment of damages, that entitlement is not dictated by precise legal standards and has a strong cultural and contextual element.[240]

The easiest method for achieving outcome equality among litigants is to average the outcomes of sample cases or settlements across the entire population of plaintiffs. This is the method that has been discussed in the scholarship, in part because more refined methods of extrapolation are more expensive.[241] In determining damages schedules for mass tort settlements, lawyers do not use a pure averaging regime across all plaintiffs. Instead, they appear to take into account a number of factors, as demonstrated by the Vioxx calculator, which includes variables such as type of injury, severity of injury, length of ingestion of the drug, the claimant's physical characteristics, etc.[242] Because this is what lawyers are doing on the ground—with judges' help—this section will assume that sampling methodology will take into

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238. KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 21–26 (2005).

239. *Id.* at 182–83.

240. *See supra* subparts I(B)–(C).

241. *See* Bone, *supra* note 25, at 584–86 (noting that courts could perform a linear regression over a sample instead of using a sample average but explaining that increasing the accuracy of any such regression compels adding more variables into the model, requiring more measurements and increasing costs).

242. *Vioxx Settlement Calculator*, *supra* note 120.

account some objective factors such as those that were taken into account in the Vioxx settlement.

Imagine a sample of cases is tried and half the plaintiffs are awarded $100 and the other half awarded $50. The average award for this group of plaintiffs is $75. If all the plaintiffs are assigned an award of $75, the plaintiffs who either did receive or would have received $100 are subsidizing those that did or would have received $50, because the extrapolation process awards them $25 less than they would have been awarded at trial. In their article defending sampling, Michael Saks and Peter Blanck argued that this outcome is justifiable compared with the baseline of individual trials because the result of any individual trial is only one possible result out of many.[243] Saks and Blanck explained that "[e]very verdict is itself merely a sample from the large population of potential verdicts."[244] Assume for our simple hypothetical that if a single plaintiff's case was tried a number of times and these results were averaged, the average award would be $75. This is more accurate than a verdict of either $100 or $50, because the first overcompensates and the second undercompensates the plaintiff.[245] The best estimate of the "true" award is the average.[246] The argument is that because the population is similar to one another in all relevant ways, the average of a sample of cases will yield the same "true" award as the averaging of a series of trials of the same case under similar conditions.

One problem with this argument, as Saks and Blanck themselves recognized, is that populations of plaintiffs are not homogenous in the real world.[247] Verdicts that fall far outside the population mean of the distribution may represent real differences among plaintiffs. An extrapolation process based on averaging erases these differences even though they are legally relevant, thus violating the normative principle underlying the procedural law: that plaintiffs should receive the measure of damages they are entitled to under the substantive law. A simple hypothetical illustrates the point: A group of people experienced damage to their hands. Most of the group is made up of white-collar workers, but among them is a concert pianist. Assume that the damages experienced by the concert pianist—who has lost her livelihood as the result of the hand injury—are far greater than those experienced by one of the white-collar workers. If being a concert pianist is not a variable that can be considered in the averaging process, then the

243. *See* Saks & Blanck, *supra* note 23, at 833 (arguing that a damages award in an individual tort case is just as much an estimate—and a more inaccurate one at that—of actual damages as a sample average).

244. *Id.*

245. *Id.* at 834.

246. *Id.*

247. *Id.* at 837, 845; *see also* Bone, *supra* note 25, at 573 ("Because factual issues vary among class members and cases are not homogenous with respect to damages, sample plaintiffs do not represent those not sampled in the same way that plaintiffs in a small-claimant class represent absentees.").

presence of the concert pianist will distort that process. One kind of distortion will occur if there is no concert pianist among the cases sampled for trial. In that case, the extrapolation process will award the pianist an amount far lower than she is entitled to. A second type of distortion will occur if a concert pianist is included in the sample. Her presence will increase the average award for white-collar workers who ought not receive an increased award.

The problem of the concert pianist would be easily resolvable if the procedure used for sampling can take her presence into account. For example, the court could survey the population of plaintiffs to determine whether there is a concert pianist among them. Presumably, being a concert pianist is an objectively verifiable fact, and the sampling process can take the presence of a concert pianist or two in the population into account in the construction of the model. That is what makes this example an easy one. But what about other variables that are not so easy to take into account in the extrapolation process, either because it is too costly to survey the population of plaintiffs or because these variables are not objectively verifiable and therefore difficult to take into account in a statistical model? For example, certain preexisting conditions may lower jury verdicts either because they cause reduced life expectancy or because jurors have a tendency to be less sympathetic to the underlying condition. There are ways to resolve the more complex problems raised by real-world sampling in litigation,[248] but before considering them, it is worthwhile to step back and face the basic question raised by sampling: What is the basis for assigning damages in a tort case?

The arguments about sampling in tort cases presented so far are based on an underlying assumption that pervades the scholarship and the negative precedent on sampling: there is an accurate measure of damages (the "true" measure), and the job of the tort system is to approximate it.[249] Whether that accurate measure is a single number or a narrow range, the assumption is more or less the same: there is an objectively verifiable number external to the tort system against which the amount of damages awarded by the jury can be measured. But what if that assumption is erroneous? Part I of this Article attempted to demonstrate that even if such an objective measure of damages were possible from a God's eye point of view, it is not available to mere mortals.[250] Instead, uncertainty pervades tort law.

Consider the case of the \$50 and \$100 damage awards. If there is an observable and legally justifiable reason why some cases fell into the \$100 category and others into the \$50 category, then the adjudicator must find a

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248. *See* Joseph B. Kadane, *Probability Sampling in Litigation*, 17 CONN. INS. L.J. (forthcoming 2011) (manuscript at 3–6) (on file with author) (providing examples of random-sampling techniques used in litigation).

249. *See, e.g.*, Bone, *supra* note 25, at 577 (discussing the possibility that accuracy in damages awards constitutes a "range" but also stating that "the more competent the jury, the closer its verdict will be to the correct amount").

250. *See supra* subpart I(A).

way to distinguish between these two types of cases. But suppose everyone suffered the same severity of injury. In that case, they all suffered a $75 harm. If the difference in the two outcomes represents variability for reasons that we cannot measure or for reasons that we think are morally irrelevant, such as plaintiffs' physical attractiveness or race,[251] then redistributing the difference between the two outcomes among the plaintiffs is the fairest approach. This redistribution benefits the least well-off (a $75 plaintiff who was awarded $50) at the expense of the best off (a $75 plaintiff who was awarded $100).

When no legally defensible reason dictates outcomes, the primary objection to the process of averaging falls away because averaging does not redistribute awards from the most harmed to the least harmed. Instead, this system distributes awards equally among those who are (more or less) equally harmed. The key dispute is whether it is systemically acceptable to treat equally plaintiffs who are (more or less) equally harmed, rather than requiring that only identical plaintiffs be treated the same. Since no person is identical to any other, a system that requires equal treatment only of identical litigants will provide equal treatment to nobody. Sampling requires an acceptance that the values assigned in tort cases can be extrapolated across populations of similarly situated individuals because those values are assigned (and contingent) rather than approximations of some inherent value. This observation restates the basic tension between liberty and equality.

To accept this argument means accepting two additional assumptions. First, variation in awards is not always justifiable. Awards may vary because of the parties' race or gender, the quality of their lawyer, or other extralegal factors. Studies show that at least some variation between verdicts in similar cases is not related to the application of the substantive law but stems from other factors—such as the plaintiffs' race—so that similarly situated black plaintiffs receive lower verdicts than white plaintiffs.[252] Second, uncertainty pervades the tort system. This phenomenon is widely recognized. For example, as prominent tort scholars Kenneth Abraham and Glen Robinson explain,

> [I]t can hardly be denied that there is randomness in outcomes and that this randomness is in substantial degree a function of insisting that each claim be valued in isolation from any other. Any such randomness must be seen as a flaw in the system that undermines the system's accuracy and fairness.[253]

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251. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 465–66 (1998) (describing racial and gender disparities in tort damage awards and settlements); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99, 136 (2005) (same).

252. *See* Wriggins, *supra* note 251, at 136 (citing one study that found that black plaintiffs received awards that were 74% of what white plaintiffs received for comparable injuries).

253. Abraham & Robinson, *supra* note 26, at 147.

While studies of jury verdicts have found that there is a correlation between severity of injury and size of award, they have also found that jury verdicts vary for reasons that we do not understand.[254] If the variation is not warranted by the facts of the individual case but instead is a result of extralegal factors or noise, then it is not justified. Statistical analysis can help start a conversation about what factors ought to be relevant and to what extent verdicts or settlements are influenced by variables that ought to be irrelevant.

Extrapolation by averaging is further justified because it benefits the plaintiffs that are most harmed under the current regime by making certain that unjustifiably low awards are equalized with the unjustifiably higher awards of similarly situated plaintiffs. In the previous example, the plaintiffs that are most harmed are those whose damages ought to have been assigned a value closer to $100 but for unknown reasons receive only $50. Sampling and extrapolation reduces the risk that a plaintiff will be assigned an outlier award that is lower than the awards of comparably situated plaintiffs. This same plaintiff gives up the chance to receive a higher award than similarly situated plaintiffs by becoming part of the extrapolation process. This loss of a chance to obtain an award at the high end of the range is not unfair. Fairness requires that like cases be treated alike, that differences among similarly situated persons be justified, and that individuals receive what they are entitled to under the substantive law. It does not entitle plaintiffs to participate in a lottery for the highest possible damages award. Limiting unjustifiably high and low awards is a requirement for treating cases equally.

In sum, a sample picked randomly from the correct reference class will yield fair results, so long as the extrapolation process is able to take into account objectively verifiable variables and does not systematically devalue certain categories of claims for socially undesirable and legally impermissible reasons. While sampling cannot correct underlying social inequality—because this is not an aim of the substantive law—it can be a part of a procedural system in which plaintiffs obtain what they are entitled to under the substantive law.

This analysis leaves open some important concerns that will be addressed later in this part. First, it is predictable that plaintiffs who have a chance at higher value awards due to extralegal factors will opt out of a sampling process that uses averaging if they are allowed to, causing it to collapse. Second, what about subjective variables that are important to the law, such as the plaintiff's experience of emotional distress? That is, how is the adjudicator to deal with uncertainty in structuring the statistical model? Third and finally, how can an adjudicator structure a sampling regime to avoid bias? These issues will be addressed below.

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254. *See supra* subpart I(B) (describing studies of variance in jury verdicts).

Before turning to these concerns, however, two additional benefits of sampling will be discussed. First, a sampling regime can be used not only to determine case values but also to determine the order in which cases will be heard. This permits adjudicators to order dockets to maximize equality among litigants. Second, sampling promotes transparency, which is an important value in its own right. Transparency also promotes equality by permitting comparison between similarly situated litigants. The tort system ordinarily obscures such comparisons.

2. *Fairness in Timing and Case Management.*—As noted in the earlier discussion of the arguments in favor of equality, the timing of case resolution is a crucial component of fairness among litigants.[255] Delay in a hearing causes two problems. First, it may reduce accuracy because of the passage of time. Second, it imposes an additional burden on the plaintiff with a valid claim waiting for compensation. Sampling allows the judge to ameliorate these twin problems of delay. First, by getting some cases underway, evidence is brought forward while it is fresher in witnesses' minds. Second, by favoring the most damaged plaintiffs in the order of cases tried or resolved, it limits the most egregious effects caused by the wait for adjudication.

Arguably, the decision to resolve cases on a first come, first served basis—as our system currently does—is fair in much the same way a lottery is fair. Each litigant, no matter their importance outside the judicial system, the subject matter of their case, or the extent of their injury, will be heard in turn.[256] To the extent that the timing of filing can be very roughly correlated to the timing of the injury, it makes sense to allow those injured first to be heard first.[257] This approach (very roughly) solves the problem of unfair timing by moving each individual's case forward in the order that they were injured. Thus, all injuries are treated equally in a formal sense. First come,

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255. *See supra* notes 144–52 and accompanying text; *see also* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 621–22 (2011) ("Assuming all plaintiffs have similar cases (as in a mass tort) and that they file at different times because of chance events, . . . arguably there is good reason to treat all of them equally.").

256. As a formal matter, jumping the line requires a showing of irreparable injury or imminent harm. A temporary restraining order, for example, may be granted without notice to the other party upon a showing of "immediate and irreparable injury," and if such an order is issued a preliminary injunction hearing must take precedence over other matters. *See* FED. R. CIV. P. 65(b)(1) (authorizing temporary restraining orders without notice); FED. R. CIV. P. 65(b)(3) (setting the timing for a preliminary injunction hearing following grant of a temporary restraining order); Winter v. NRDC, 129 S. Ct. 365, 374 (2008) (observing that the four-part test for granting a preliminary injunction includes consideration of the likelihood of the movant suffering irreparable harm in the absence of the injunction). As a practical matter, judicial docket control adds some discretion into the order in which cases are heard.

257. First come, first served would be a fair approach in cases where the timing of manifestation of injury correlates to harm (that is, the most injured file first). It is less fair in cases where the weaker cases are filed first. But "we do not usually associate lotteries with adjudication." Bone, *supra* note 25, at 621.

first served does not take special account of those who suffer most by waiting, either because of evidentiary problems caused by delay or because the cost of waiting is higher for them than for other litigants.

For the most harmed, the civil justice system allocates the timing of litigation poorly. This problem is aggravated in cases where individuals suffer injuries in and around the same time period. In that case, there does not seem to be a good justification for privileging the savviest litigants or the fastest filers when other individuals, who are not as quick or savvy but have been harmed to the same or to a greater extent, languish. Instead, the court should approach such litigation as if all cases were filed at once.

Once deciding to treat all cases in a mass tort as simultaneously filed, the judge faces the question of what other criteria ought to be used to determine priority. Courts ought to order the cases in a way that most comports with the ideal of litigant equality and with the principle that social institutions such as the courts should be used for the common benefit. One option is to choose the cases to be heard first on a random basis—by a lottery. This would give everyone an equal opportunity to be heard in a timely manner. Such a random selection would compound the harm to those who are not selected by lottery but were severely damaged, because it would delay their compensation.[258] A lottery, therefore, would be a detriment to the least advantaged plaintiffs. It would be better either to pick the most harmed cases first or to sample from each tier and litigate the sample cases simultaneously.

There are serious difficulties with the most-harmed-first approach, however. First, it is difficult to determine which plaintiff is the most harmed. Is it the one entitled to the highest award in monetary terms under the substantive law or the one who perhaps is entitled to a lesser award but enters the legal system with the greatest need for his award? This question returns us to the problem of social luck, which goes largely unaddressed by the tort system. There is an opportunity for judges to take such considerations into account in case management because they are discretionary, for the most part. But if we set aside this problem for a moment, there is no justification for treating those with less severe harms more favorably than those with more severe harms. Doing so increases the inequality already suffered by the severely harmed. Accordingly, a court is justified in choosing the most severe cases to be heard first, with the court's challenge being how to define the meaning of "most harmed."

A second challenge to the most-harmed-first approach is that it appears to conflict with the principle of randomization. If the most harmed are disproportionately selected for trial, then the sample is by definition not random. The reason there is no conflict, however, is that severity of harm ought to be one of the parameters of the appropriate reference class. A

258. The most harmed plaintiffs who were in fact selected to go first would benefit under such a regime. Only the most harmed plaintiffs not selected to go first would have their suffering compounded by delay.

rigorous sampling process would not average the results of sample trials of substantially harmed individuals with those of individuals who were only minimally harmed. Instead, the population of similarly harmed individuals would constitute a reference class, and the sample would be randomly chosen from that group. To use the earlier example of hand injuries, the court would survey the litigants to determine which ones were concert pianists and sample from that group first. The results of that sample would be extrapolated to all the concert pianists. Then the court would randomly sample from the population with lesser harms—the white-collar workers—and the results from those trials would be extrapolated to the other white-collar workers.

The most-harmed-first approach was adopted by Judge Hellerstein in the WTC Disaster Site Litigation. Instead of hearing cases on a first come, first served basis, he singled out the most harmed plaintiffs and sampled from that group.[259] This required substantial data collection, which is necessary in any event in order to determine the appropriate reference classes for sampling. In the WTC Disaster Site Litigation, this data came largely from plaintiffs themselves (and their attorneys).[260] Self-reporting creates some possibility for sloppy, mistaken, or even fraudulent reporting, and the court must design incentives to prevent this behavior as well as systems for monitoring lawyers. The design of such systems is beyond the scope of this Article, but it is important to recognize that successful policing of misrepresentation is an important part of fair statistical-adjudication procedures.[261]

3. *Transparency.*—A statistical-adjudication procedure will lead to greater transparency of outcomes to the public and litigants for several reasons. First, to the extent that sampling leads to trials, the process and the results of those trials will be publicly available. Second, court rulings with respect to docket management and sampling procedures will be published or available at the courthouse. Already most decisions in high-profile multidistrict litigation may be accessed free of charge on court websites, although transcripts of hearings and expert reports are ordinarily not available online.

Third, because judges, special masters, or experts must articulate the reasons for pursuing a particular sampling regime, choosing reference classes, and determining relevant variables, the reasoning behind these decisions will be available to litigants (at a minimum) and ought to be available to the public as well. As mentioned earlier, the Vioxx settlement claims administrator created an online calculator that shows how a plaintiff with the relevant characteristics will be compensated under the settlement regime.[262]

259. Order Amending Case Management Order No. 8, *supra* note 19, at 2–3.

260. *See supra* note 226 and accompanying text.

261. *See, e.g.*, S. Todd Brown, *Specious Claims and Global Settlements*, U. MEM. L. REV. (forthcoming 2012) (manuscript at 4–20), *available at* http://ssrn.com/abstract=1783792 (comparing three mass tort case studies and analyzing the effect that a high volume of claims has on a court's and a defendant's ability to identify and dispose of specious claims).

262. *See supra* note 120.

The settlement in the WTC Disaster Site Litigation is also publicly available, although there is no calculator for damages as of yet, and the judge initially expressed concern that the valuation process for individuals was not sufficiently transparent for litigants to make informed decisions about whether joining the settlement would be beneficial for them.[263] In that case, the judge even held a fairness hearing, although there is no legal mandate to hold one in aggregate litigation.[264]

Because judges must justify sampling regimes, sampling brings to the forefront and makes transparent usually unarticulated assumptions about what does and what ought to matter in evaluating compensation in tort cases. Although lawyers and judges may have an informal sense of these assumptions, they are rarely, if ever, publicized, and the informal senses may well be wrong, even though the participants are experts.[265] Sampling therefore leads to greater rigor in methodology, creates accountability through publicity, and encourages the type of openness and dialogue that ought to be the hallmark of a civil justice system in a democracy. It enforces the type of reason giving for differential treatment that is required by the right to outcome equality.

C. *The Challenges of Sampling*

Achieving outcome equality through sampling and similar Trial by Formula procedures is not easy. This subpart considers the flaws in sampling processes utilized by district court judges to achieve outcome equality. Sampling in litigation is challenging for four reasons: (1) the opt-out problem, (2) risk of sample bias, (3) uncertainty, and (4) cost. First, if plaintiffs believe that an averaging regime will systematically lower the highest value awards, most will opt out, making any sampling regime impossible to implement. Second, the design of any statistical experiment requires an unbiased sample, a requirement that has not been met by the informational sampling procedures courts currently use. Third, variation in the results of adjudication is sometimes difficult to explain and creates impediments to the construction of a fair extrapolation process. Finally, a rigorous sampling

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263. *See* Mireya Navarro, *Federal Judge Orders More Talks on 9/11 Deal*, N.Y. TIMES, Mar. 20, 2010, *available at* http://www.nytimes.com/2010/03/20/nyregion/20zero.html ("Judge Hellerstein also said that the terms of the settlement were too complicated for the plaintiffs to be able to reach an 'intelligent decision' on whether to accept it.").

264. Mireya Navarro, *U.S. District Court Approves Ground Zero Health Settlement*, N.Y. TIMES, June 24, 2010, *available at* http://www.nytimes.com/2010/06/24/nyregion/24zero.html; *see also In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491–92 (E.D.N.Y. 2006) (coining the term "quasi-class action" to describe the application of class action protections to aggregate litigation).

265. *See* William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical–Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 298–99 (1996) (demonstrating that expert opinions are not better (and are often worse) than very crude statistical predictions). Thanks to Peter Siegelman for this point.

regime is also likely to be more costly than the informal, lawyer-driven sampling regime currently in use. This subpart will discuss each of these problems in turn and demonstrate that they do not pose serious impediments to the success of a sampling regime and to the realization of litigants' rights to outcome equality.

1. The Opt-Out Problem.—Where there is substantial variation among plaintiffs, an averaging regime will redistribute damages from plaintiffs with the cases assigned the highest value (the $100 plaintiffs in our prior example) to those assigned the lowest value (the $50 plaintiffs). Under averaging, plaintiffs who might have received $100 will now receive only $75, and plaintiffs who might have received $50 will now receive an extra $25. If a system such as this grants plaintiffs the autonomy to exit, one would predict that the pool would suffer from adverse selection.[266] The plaintiffs with the greatest anticipated awards will opt out of the procedure and leave only the plaintiffs with the lowest value claims to participate. This is because those with greater anticipated awards will predict that they will be systematically undercompensated in the averaging process. Each plaintiff can anticipate that other plaintiffs with higher awards will not participate, causing the average compensation to be reduced until finally only plaintiffs with claims not otherwise worth litigating will be left in the procedure. Enabling plaintiffs to opt out of a sampling procedure will result in its unraveling.

David Rosenberg has proposed mandatory class actions as a solution to the unraveling problem.[267] This solution is sound in theory, but in practice it is unlikely to succeed—at least as a court-driven procedural innovation—because it runs against the tide of the Supreme Court's individualist jurisprudence, which has consistently limited mandatory class actions.[268] Legislative change would be required to implement it.

An insight from the economic analysis of law, confirmed by the practice of aggregate settlement on the ground, indicates that sampling procedures may successfully retain plaintiffs even where no mandatory class can be certified. Adverse selection in the litigation context depends on the plaintiffs knowing more about their claims than the court knows.[269] Where plaintiffs

266. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 492–94 (1970) (describing the concept of adverse selection in the context of the insurance market, where "as the price level rises the people who insure themselves [are] those who are increasingly certain that they will need the insurance[,] . . . with the result that no insurance sales may take place at any price"). For a comprehensive and critical discussion of the concept, see generally Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004).

267. Rosenberg, *Mandatory-Litigation Class Action*, *supra* note 22, at 833.

268. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557–61 (2011) (decertifying a mandatory injunctive class action); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999) (decertifying a mandatory limited fund class action).

269. *Cf.* Alma Cohen & Peter Siegelman, *Testing for Adverse Selection in Insurance Markets* 18–23 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 651, 2009),

are not able to outguess the court or jury with respect to their award, they will not be able to engage in adverse selection. The current popularity of informal sampling procedures to spur settlement despite inconsistent verdicts is good evidence that plaintiffs (and their lawyers) do not know more about the probable outcome of their cases than the court does. For example, the verdicts in the Vioxx cases that were tried to juries varied substantially. Some cases resulted in $50 million verdicts, others in no liability.[270] Even cases decided in the same forum under the same legal regime were split. Of the five cases tried in New Jersey state court, two were defense verdicts and three resulted in multimillion-dollar verdicts for plaintiffs.[271] There was some reasonable means of distinguishing these cases, as evidenced by the fact that in the settlement the lawyers were able to come up with a schedule for assigning damages.[272] Nevertheless, it does not seem that either side was able to predict outcomes. Even if lawyers were equipped to predict jury verdicts reliably, judges retain the power to reduce awards through motions for judgment as a matter of law, remittitur, and judgment on appeal.

A mass exodus of plaintiffs from a sampling procedure indicates that the plaintiffs can predict that they are likely to obtain a greater award by pursuing a lawsuit on their own than the extrapolation process would award them. To the extent that this prediction is based on ascertainable variables, these variables should be included in the model, obviating the need for plaintiffs to opt out. If their prediction is based on over-optimism or risk-seeking behavior, there is little to be done other than educating plaintiffs.

In a sampling procedure, the plaintiff gives up the chance to receive an outlier award in exchange for the guarantee of an average payment that is paid out more quickly than waiting in line. That this exchange is beneficial for plaintiffs is demonstrated by plaintiffs' near universal acceptance of the Vioxx and WTC Disaster Site Litigation settlements.[273] If the variability of the distribution in the group of plaintiffs is not too great, sampling will equalize awards among similarly situated persons and prevent some individuals from receiving lower awards than they should for extralegal or unjustifiable reasons. For these reasons, both risk-neutral and risk-averse plaintiffs ought to prefer a sampling regime to individual litigation even though that regime averages verdicts.

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available at http://ssrn.com/abstract=1513354 (describing cases where individuals are not able to outguess insurance companies so that they cannot engage in optimizing behavior that characterizes adverse selection).

270. *See* Lahav, *Recovering Social Value*, *supra* note 118, at 2394 & nn.106–07 (collecting Vioxx verdicts); *see also* Alexandra D. Lahav, *Vioxx Verdicts*, MASS TORT LITIG. BLOG (Oct. 29, 2009), http://lawprofessors.typepad.com/mass_tort_litigation/2009/10/vioxx-verdicts-.html (same).

271. Lahav, *Recovering Social Value*, *supra* note 118, at 2394 & nn.106–07.

272. *See Vioxx Settlement Calculator*, *supra* note 120 (providing a series of factors used to approximate each claimant's share of the settlement).

273. *See supra* notes 222–33 and accompanying text (describing the WTC Disaster Site Litigation and settlement); *supra* notes 108–21 and accompanying text (describing the Vioxx settlement).

2. *Sample Bias.*—The most important issue in sampling—whether done on an anecdotal basis by an individual lawyer negotiating a settlement on behalf of a client or engineered by a court in the context of aggregate litigation—is whether the sample is skewed. One must always suspect that any nonrandom method of picking sample cases will be skewed and therefore will be an inaccurate estimate of the population average. Second, even if the sample is an accurate estimate, verdicts may vary for reasons that cannot be explained. In such a case, the question becomes, what is the significance of the variations? Are they pure noise, or is there some variable present for which we need to account?

Sample bias is a substantial problem in the current system. Consider for a moment how the ordinary lawyer is likely to obtain data for determining the "going rate" of settlement. The lawyer may be familiar with values in a set of comparable cases that went to trial because the verdict is publicly available, or that the lawyer settled or had access to prior settlement data through informal channels. Thus, the lawyer will either be able to use public records or friends and colleagues to obtain a dataset.

Trial verdicts are particularly likely to provide unreliable samples for comparison. There are two reasons for this. First, cases that go to trial are aberrations.[274] A case is likely to reach trial when the parties are very far apart in evaluating the case.[275] As a corollary, any case where the result is predictable by both sides is very unlikely to reach trial. After all, if the parties feel comfortable in their ability to predict the outcome, they are much better off settling and avoiding the transaction costs of an expensive trial. Second, parties decide whether to go to trial. Repeat players can therefore systematically skew the sample of publicly available verdicts in order to shape an end result that is most favorable for them. Defendants have an easier time doing this because they can offer settlements to plaintiffs they believe have strong cases and let weaker cases go to trial.[276]

As an example of the selection bias in trials, consider the case of *In re Rhone-Poulenc Rorer Inc.*[277] In that case, a group of hemophiliacs who were infected with AIDS through use of tainted blood products brought a class

274. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925–26 (2000) (highlighting the increasing rarity of trials).

275. *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 370–71 (1986) (noting that narrowing the divergence between parties' perceived probabilities of the outcome at trial will make settlement more likely). Much has been written on the theory of settlement in the field of law and economics. For a somewhat dated but very useful review of the literature, see generally Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989).

276. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 101–02 (1974) (discussing, among other advantages, repeat players' ability to settle cases where they expect unfavorable rule outcomes and adjudicate those that they regard as likely to produce favorable rules).

277. 51 F.3d 1293 (7th Cir. 1995).

action against the manufacturers of those products.[278] In an opinion written by Judge Richard Posner, the Seventh Circuit held that the case could not proceed as a class action, reasoning (among other things) that the class action would exert such extreme pressure on the defendant that it would be forced to settle.[279] In support of the claim that such pressure was unwarranted, Judge Posner relied on the fact that twelve of the thirteen cases that had gone to trial resulted in defense verdicts.[280] The opinion did not note how it came to be that these particular thirteen cases went to trial. It is possible, for example, that the defendant settled all or most trial-ready cases prior to trial and only permitted those cases it was likely to win to go forward. If that were the case, any conclusions drawn from this sample of thirteen blood-products cases would have been biased in favor of the defendant.

For those watching the litigation from afar, it is quite difficult to tell why some cases reached trial and others settled, leaving ample possibility for sample bias. This means that conclusions based on trial outcomes without more information are likely to lead to indefensible results. By *indefensible*, I mean results that are not justifiable by reference to outcomes in similar cases that never reached trial because of the machinations of one side or the other.

Random selection is critical to obtaining a useful sample. Convenience samples based on the lawyer's personal experience or the experiences of colleagues suffer from potential bias because they are not randomly selected. If the lawyer can conduct rigorous qualitative research, namely by collecting a broader set of cases on which to base his or her evaluation and using them to develop a fine-grained theory of which variables in that sample are relevant to case outcomes, there is a greater chance that this evaluation will accurately reflect the going rate of settlement. Even so, qualitative methodology requires recognition of its own limitations, such as the potential of sample bias and the difficulty of finding correct points of comparison. It is most beneficially used in conjunction with quantitative methods that can verify findings. Similarly, even when qualitative methods are rigorous, some type of quantitative analysis is still useful.

In any event, there is no evidence that lawyers use any type of rigorous qualitative study in determining settlement amounts. If such rigorous methods are used anywhere, it is likely in the insurance context, where companies collect data on settlements or perhaps where well-funded lawyers are repeat players. And even in the case of lawyers who are repeat players, it seems likely they would be satisfied with convenience sampling given that there is no incentive to use more rigorous methods.[281]

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278. *Id.* at 1294.

279. *Id.* at 1299.

280. *Id.* at 1299–300.

281. *See* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1297 (2003) (explaining that the concept of the "availability heuristic" causes people to rely on accessible, illustrative examples rather than genuine consideration of actual

3. *Uncertainty.*—The second most important issue in sampling is unexplained variability of the distribution of results. One of the key differences between the type of anecdotal methodology based on convenience sampling that lawyers use in the ordinary course of litigation and a court-engineered sampling methodology is the potential for the latter method to give an explicit account of variability. In situations where case outcomes are very heterogeneous, assigning case values is possible if we believe that the reasons for variation are "noise" rather than the effect of legally relevant variables that ought to have been taken into account. This assignment needs to be justified, however, and an extrapolation process requires that judges do so.

One solution to the variability problem is to set the parameters of the reference class more rigorously.[282] If the court is sampling from a reference class of cases that are similar to one another with respect to the key variables, then the result of sampling should be sufficiently homogeneous to be useful in valuing other cases in the reference class. That is, we can extrapolate the results of the sample to the rest of the reference class if all the cases are reasonably similar. But in order to decide the parameters of the appropriate reference class, the court will need to identify the variables that are relevant to case outcomes. In other words, determining the parameters of the reference class requires taking a normative position regarding which variables are important. Furthermore, these variables must be not only relevant but objectively verifiable.[283] Variables that are not objectively verifiable—such as a person's mental state—require time-consuming, individualized hearings in order to be identified in individuals. For this reason, innovative procedures that seek to extrapolate from a sample to a larger population of plaintiffs are less useful where subjective variables are crucial to determining outcomes.

Comparing the case at hand to a convenience sample may create the illusion that we know its value with certainty. In convincing clients to settle, lawyers are likely to be too sure that the client's case is comparable to other cases they have in mind, even when those cases evidence a selection bias. By contrast, a transparent, rigorous sampling method engineered by the court is less likely to suffer from such failures. Inherent in the task of developing a sampling methodology for aggregate litigation ought to be a process for taking a hard look at the problems of sample bias and the significance of

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probabilities); *cf.* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 230 (1973) (observing that individuals perceive an event as more probable if a similar event has recently occurred).

282. *See* Cheng, *supra* note 173, at 2095–97 (contending that, in legal contexts, using model-selection criteria to define the reference class will help to alleviate traditional reference-class problems).

283. *See* Lahav, *Bellwether Trials*, *supra* note 118, at 606 (noting that parties will attempt to manipulate the variables used to define a reference class unless there exists some "objective means" to define parameters that bound the group).

unexplained variability of distribution. A rigorous methodology must recognize that the model will not be perfectly determinative. The question for the participants in the statistical-adjudication procedure (and the court system more generally) is how much variance is too much? When does variance become normatively unappealing? My argument here is that unexplained variation due to noise is not normatively acceptable because it is inconsistent with the right to outcome equality.

To the extent that decision makers utilize good sampling methodology, aggregate litigation may in fact provide better individualized justice than "individualized" settlements based on convenience sampling. Both in the individual case and the aggregate case, plaintiffs receive settlements based on comparable cases. The more rigorous the methodology used to determine which cases are comparable, the closer the outcome of any individual case to the average damages assigned in a series of trials of similar cases. This average is the most defensible method of assigning a damages award.

Since our system monetizes injury in tort cases by comparison to outcomes in similar cases, especially in settlement, the key to a reliable valuation will be the quality of the sample used. At its best, a systematic, rigorous approach to sampling produces results that can be analyzed to assign a defensible value to a group of mass tort cases before the court. A rigorous approach to sampling avoids some of the biases and concomitant inequality in the assignment of damages that plague the convenience-sampling method.

4. *Cost.*—Cost has largely been the focus of the traditional debate about mass torts, which pits the individual right to participation against efficient resolution of cases. Understanding the positive effect of statistical adjudication on outcome equality adds a new dimension to this debate.

First, perhaps the right to equal treatment in litigation trumps cost considerations, even if it is determined that rigorous sampling is intolerably expensive as compared to the current pro-settlement regime. As examined in Part II, there is some basis in existing doctrine for recognizing a right to equal treatment in litigation, including equality of outcomes. A system that was extremely cost-effective would not be valid if it discriminated against certain protected classes, for example. A robust equality right, therefore, might trump cost considerations, just as the right to liberty or to a day in court has in the Supreme Court's current jurisprudence.

How costly would a rigorous approach to sampling be? As described more thoroughly in the next section, a rigorous sampling experiment will require a survey of the plaintiffs to be sampled, calculations to determine the appropriate sample size, and a number of bellwether trials—likely greater than the four to fifteen trials that courts have experimented with in their past attempts at informational sampling. Experts will be needed to determine what type of statistical experiment is needed in order to assign reasonable values to plaintiffs' cases. Trying any case is expensive and trying multiple cases will be even more so, although some economies of scale may be

achieved. Data collection and analysis will cost something, both in the initial survey and after the bellwether cases are tried. It is difficult to determine this cost in the abstract; setting a dollar value on the cost of a procedure requires a fine-grained knowledge of the type of work to be done in a particular case, such as the number of relevant variables to be taken into account, the variability within the plaintiff population, and the level of reliability that will be deemed acceptable.[284] Data collection and analysis will be less costly in some cases than in others. It makes little sense, therefore, to consider the question of cost as an empirical, noncomparative matter divorced from a real-world example.

The question of cost, in the end, is fundamentally comparative. Every procedure costs something, so the question is, what is the baseline to which sampling is being compared?[285] Due process doctrine also makes cost a relative matter. Under the *Mathews v. Eldridge*[286] test, the risk of error is to be balanced against the cost of alternative procedures.[287] Therefore, determining whether a rigorous sampling procedure meets the requirements of due process comes down to a comparison. The choice of baseline cost to which sampling is compared is a normative one. Accordingly, cost is not an independent argument against or in favor of sampling, but instead one that rides on the back of larger beliefs.[288]

For purposes of evaluating expense, should we compare innovative procedures to the normative baseline of current practice, which largely consists of settlements, or to the normative baseline of the "day in court" ideal? Either choice must be justified. Moreover, this choice is part of a larger debate about the private and public role of the tort system, the privatization of adjudication, and the decline of the civil trial.[289] Compared to the baseline of the day-in-court ideal, sampling represents a real cost savings

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284. *See* Kadane, *supra* note 248 (manuscript at 3–6) (describing cases in which different sampling methods were used).

285. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) ("Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.").

286. 424 U.S. 319 (1976).

287. *Id.* at 335 (noting that a due process analysis requires "consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest").

288. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976) (criticizing the Supreme Court's analysis in *Mathews* as focusing too much on "questions of technique rather than questions of value" and thereby being "unresponsive to the full range of concerns embodied in the due process clause").

289. *See, e.g.*, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 626–27 (2005) (arguing in favor of a constitutional right to some kind of tort system); Resnik, *supra* note 28, at 549–51 (discussing privatization of the court system through increased use of arbitration).

because it means trying fewer cases, and trials are very expensive. Choosing the day-in-court ideal as the baseline entails a normative view of the litigation system as a public good. Trials are democracy-promoting events and sampling is a way to encourage them.[290] On the other hand, choosing the extant regime of aggregate settlement as a cost baseline makes sampling seem very expensive. The current approaches to informational sampling sometimes involve trying no cases at all, and the bellwether trial plans put forth by judges generally include very few trials.[291] Compared to these practices, a rigorous sampling system would require many more trials and, therefore, would be more expensive. Finally, an analysis of cost must also consider whether the cost calculus takes into account costs to litigants only or to the judicial system[292] and whether the calculus will take into account some of the benefits of litigation, including information forcing.

Accordingly, even if the equality right is defined as a weaker right, it ought to be included in the due process calculus. Among the interests that ought to be included in the *Mathews* calculus, if it is applied in this context, is the government or court's interest in the equal treatment of persons before the law and in giving reasoned justifications for differential treatment of similarly situated persons.

D. *Requirements of a Rigorous Sampling Methodology*

What are the requirements of a rigorous sampling technique? A reliable sample requires that the selection process be free from bias and that the sample be sufficiently large to produce reliable results given the variance of outcomes within the group.

Making sure that the sample is not biased is best achieved by collecting a random sample. Randomization has not generally been the practice in court-engineered sampling, but it should be. Courts seem to prefer a sample constructed by permitting defendants' and plaintiffs' attorneys to each choose an equal number of cases, with perhaps a few additional cases thrown in by the court.[293] This method gives the parties the illusion of control. It has the merit of signaling the nature of the bias inherent in the sample. We can predict that the defendants' attorneys will try to pick their best cases—that is, cases that will minimize recovery—whereas the plaintiffs' attorneys are likely to pick the cases that maximize recovery. This knowledge can help

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290. *See* Lahav, *Bellwether Trials*, *supra* note 118, at 594 (noting that bellwether trials promote democratic decision making).

291. For example, in the WTC Disaster Site Litigation only six trials (out of the first group of 2,000 cases) were originally planned. *See supra* note 230 and accompanying text (discussing the trial plan).

292. *See generally* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (discussing the failure of parties on both sides to take into account the social costs of litigation).

293. *See* Fallon et al., *supra* note 207, at 2349 (explaining that selection by attorneys is the best option when the pool for bellwether cases is being filled).

us determine how much we ought to discount the verdicts in the cases selected by the parties. Nevertheless, litigant-driven sampling encourages the selection of outlier cases and is not likely to produce a dataset that provides reliable information about the distribution of the larger set of cases.[294] If that distribution is already known and it is possible to situate the biased sample cases within that distribution, the limits of this method may be surmountable. But that is impossible without some preliminary procedure, such as a survey using random sampling, to determine the characteristics of the larger population. In any event, if a larger study has been done, there is no need to follow it with biased sampling that cannot reveal information the court and litigants need to settle cases fairly.

A second requirement is that the sample be sufficiently large to provide reliable results. The size of the population of cases being measured does not dictate the size of the sample. Instead, the size of the sample will depend on the *variability* of the group.[295] In the mass tort context, the special master ought to determine what observable and relevant criteria exist that can place individuals within acceptably homogenous subgroups and then sample from each of those subgroups. The samples need not be large. The more homogeneous the group, the smaller the necessary sample. Because tort cases present numerous potentially relevant variables, and because cases can differ from one another considerably (in relevant and irrelevant ways), courts need a good estimate of the variations within the group in order to determine what the size of the sample ought to be.

A preliminary estimate of the subgroupings within a mass tort may be obtained through the collection of data from the parties. For example, in the WTC Disaster Site Litigation, Judge Hellerstein ordered the parties to complete questionnaires to determine the variability within the group.[296] The judge determined the size of the sample to be tried prior to the litigants actually completing the questionnaires.[297] It seems he did this largely because the timing of completing the questionnaires would have held off sample trials for too long, delaying justice for individuals and leaving defendants in limbo. But this approach can result in too rough an estimate of damages.

In a rigorous sampling method, in contradistinction to the current informal practice, the variability in the population will determine the size of the sample. It is not possible to determine the appropriate sample size without first obtaining a sense of that variability. If the group is relatively homogeneous, then a small sample will be enough. But if there is substantial

294. *Id.*

295. *See* DAVID FREEDMAN ET AL., STATISTICS 371 (3d ed. 1998) ("[T]he likely size of the chance error in sample percentages depends mainly on the absolute size of the sample, and hardly at all on the size of the population").

296. *See* Order Amending Case Management Order No. 8, *supra* note 19, at 1–2 (ordering parties to gather and turn in plaintiffs' responses to questionnaires).

297. *Id.* at 2.

variation within the group, the sample size will need to be larger. To know the margins of variation, courts need to obtain information about the population to be sampled through surveys such as that used in the WTC Disaster Site Litigation or past experience.

So why do courts try a sample that is likely too small? First, the court might move a few cases toward trial on the theory that the momentum will result in settlements. The object of the procedure in that case is not to construct the most reliable procedure to assign damages but to construct a procedure that will promote settlement. The momentum approach seems to have been adopted in the September 11th Litigation. In that case, the judge slated cases for trial explicitly in order to encourage settlement, on the theory that even a single verdict would bring the settlement offers on both sides closer together.[298] No case has been tried, but a number were settled as they approached trial.[299]

Second, as cases proceed through pretrial litigation—discovery, summary judgment, and motions in limine—lawyers narrow their claims and develop a keener sense of the story that they will be able to tell at trial. These developments might be called the "soft benefits" of sampling. The questions presented in a given case are framed more precisely, and often, some of the claims initially included in the complaint fall away. Furthermore, summary judgment decisions, especially those on questions of law where individual variables are not likely to matter, dispose of issues that are similar in the larger population of cases. Even if such decisions are not preclusive as a formal matter, they serve as an indicator of what is likely to occur in the other cases presenting similar issues consolidated before the same judge. When the court decides such dispositive or key issues, lawyers use them to develop a finer sense of the possibilities in other cases. But the reliability of these predictions is not the same for all issues facing litigants. The closer the decided issue is to a question of law applicable across cases, the more likely it is that the judge's decision will have an impact on other cases in the reference class.

Permitting a small sample of cases to go forward on a limited basis, even if the results cannot be reliably extrapolated across cases, can be very useful in case coordination and issue refinement. Nevertheless, courts must recognize the limits of an approach that does not use a reliable sample. If the results of a very limited convenience sample are used to determine outcomes in a broad range of cases without attention to the variables that differentiate

298. *See* Opinion Supporting Order to Sever Issues of Damages and Liability in Selected Cases, and to Schedule Trial of Issues of Damages at 5, *In re* Sept. 11th Litig., No. 21 MC 97 (AKH) (S.D.N.Y. July 5, 2007), *available at* http://www.nysd.uscourts.gov/docs/rulings/21MC97_opinion_070507.pdf (explaining that cases were chosen for trials of damages to hasten their resolution as well as the resolution of other cases).

299. *See* Order at 1–2, *In re* Sept. 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Sept. 17, 2007), *available at* http://www.nysd.uscourts.gov/docs/rulings/21MC97_order_091707.pdf (ordering fourteen cases closed due to settlement).

those cases, the result will not reflect a reasonable assignment of damages based on comparable cases. Such a process would violate the right to outcome equality and be unfair to the litigants.

Even if the larger population is meticulously studied and grouped into more homogenous categories based on observable and relevant criteria, there will still be some noise. This noise will be caused by variables that are not observable although legally relevant or that are not legally relevant but nevertheless alter the outcome in a given case. Furthermore, there may be variables that are observable and relevant but are so rarely present that it is difficult to take them into account through sampling.

To illustrate, return for a moment to the hypothetical group of individuals suffering hand injuries. Recall that most of them are white-collar workers but one is a concert pianist. Everyone involved in the litigation may agree that the concert pianist should receive greater compensation than a lawyer for the same hand injury. But she presents a significant problem for the sampling procedure. It is hard to predict the presence of the concert pianist within the group. If the concert pianist is within the sample, then her presence will skew the results and the rest of the group will be overcompensated. But if the fact that she is a concert pianist is not taken into account for her individual case, then she will be undercompensated. The court will need to realize that the presence of a pianist is a relevant factor that should be included in the model. In the alternative, the concert pianist may choose to opt out of the procedure in advance. But she will only do so if she can predict the makeup of the rest of the group, that is, if she can identify herself as an outlier.[300] If the costs of determining variables such as the presence of outliers are very great, this presents a problem for implementing a sampling procedure in the real world. The success of scheduling of injury valuation in mass settlements to date indicates that outliers will not pose an insurmountable barrier.

Rigorous sampling forces litigants and the court to face the issue of variance in the distribution of damages awards. It requires courts and litigants to think systematically about both the generic case of the white-collar worker and the outlier case of the concert pianist. Courts must either justify treating the concert pianist the same as a white-collar worker or create a procedure to fairly distinguish her case. Such systematic consideration is the first step to a fair and transparent resolution of large-scale litigation. It is also a requirement for realizing the right to outcome equality in litigation. The alternative is not likely to be the vindication of liberty through an accurate determination of each case through individualized litigation. Instead, the result will be the even rougher justice of convenience sampling.

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300. *See supra* note 269 and accompanying text (discussing how adverse selection will only be a problem if the litigant knows more than the judge about likely outcomes).

The trend toward informal sampling as a method for encouraging settlement brings the traditional method of case valuation—comparison—out of the shadows. Sampling illustrates, counterintuitively, that justice administered at the wholesale level may be less rough than that at the individual level precisely because random sampling is better than convenience sampling. Statistical techniques like sampling also allow participants in the civil justice system to quantify risk. In ordinary litigation, there is also a risk of error and the presence of uncertainty, but it goes unarticulated and too often is ignored. The result is unexplained variation and inequitable outcomes. Sampling offers an opportunity to realize the right to outcome equality in litigation and to justify outcomes both to participants in the tort system and its critics.

IV. Conclusion

This Article has endeavored to defend the principle of outcome equality as a counterpoint to the Supreme Court's overemphasis on liberty and individualism in litigation.[301] The principle of outcome equality is at work in judicial attempts to use sampling to determine both the order in which cases proceed and the manner in which they are resolved. Although it seems that equality in civil litigation is in retreat at the moment, on closer inspection, the fact that district court judges continue to pursue outcome equality through informal statistical adjudication indicates a strong possibility for the balance to shift in its favor.

Other procedural revolutions have initially emerged at the district court level. For example, district courts were applying a pleading standard requiring more than "notice pleading" before the Supreme Court's recent pleading cases tightened that standard.[302] Although many perceived *Bell Atlantic Corp. v. Twombly*[303] and *Ashcroft v. Iqbal*[304] as revolutionary, a close study of district court opinions revealed that the revolution had been brewing for some time.[305] One can only speculate as to why the district courts have pursued outcome equality when the emphasis at the appellate level has been so consistently tilted towards liberty. Perhaps the district courts, seeing a larger set of cases and being closer to outcomes, are better able to appreciate the negative consequences of inequality wrought by inconsistency in adjudication.

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301. *See supra* notes 10–18 and accompanying text.

302. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (describing how the rhetoric of notice pleading did not match the reality of what the lower federal courts were doing on motions to dismiss).

303. 550 U.S. 544 (2007).

304. 129 S. Ct. 1937 (2009).

305. Fairman, *supra* note 302, at 1011–59 (describing pleading practices in the federal courts with respect to a number of substantive areas).

Trial by Formula has the potential to resolve many other problems that plague modern litigation. For example, commentators have repeatedly lamented patterns of baseless claiming in mass tort litigation.[306] Sampling offers a way of addressing the phenomenon of fraudulent claims and creating incentives to curb them.[307] But as this Article has endeavored to show, sampling is more than an innovative and efficient procedure for resolving litigation and realizing the aims of the substantive law. Rigorous statistical methods can realize one of the fundamental ideals of the legal system that has been wrongfully ignored: the right to equal treatment before the law. By improving their statistical methods, district courts can restore the needed balance between the right to liberty and the right to equality. Perhaps in time the balance will shift in the Supreme Court as well.

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306. *See, e.g.*, Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1228 (2008) (arguing that litigation screenings have led to a large number of specious, perhaps even fraudulent, claims in asbestos, silica, silicone-breast-implant, fen-phen, and welding-fume mass tort litigation).

307. In the *Diet Drugs Litigation*, for example, it was determined that some lawyers were submitting claims to the settlement administrator using falsified results. *See In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 226 F.R.D. 498, 505–07 (E.D. Pa. 2005). The court's initial solution, ultimately scuttled by the defendant, was to sample claims. *See id.* at 507 (noting that the court imposed a 100% auditing rate on claims after concerns of illegitimate claims arose). For a discussion of this case at greater length, see Lahav, *supra* note 28, at 406–16.

Fidelity to Community: A Defense of Community Lawyering

LAWYERS AND FIDELITY TO LAW. By W. Bradley Wendel. Princeton, New Jersey: Princeton University Press, 2010. 286 pages. $35.00.

Reviewed by Anthony V. Alfieri*

"Many of the lawyers . . . really looked skeptical at community action."[1]

Introduction

In July 2011, Miami-Dade County Mayor Carlos Gimenez, faced with a $400 million budget gap, proposed to close thirteen libraries across Greater Miami, including the Virrick Park Library in Coconut Grove Village West (the West Grove),[2] an impoverished Afro-Caribbean-American community[3] served by the University of Miami School of Law's Historic Black Church Program.[4] Now in its fourth year, the Historic Black Church Program

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1. Interview by Zona Hostetler with Gary Bellow, Professor, Harvard Law Sch., in Cambridge, Mass. (Mar. 17, 1999).

2. Matthew Haggman & Martha Brannigan, *Proposal to Shutter Miami-Dade Libraries Draws Fire*, MIAMI HERALD (July 14, 2011), http://www.miamiherald.com/2011/07/14/v-fullstory/2314852/proposal-to-shutter-miami-dade.html.

3. *See* Arva Moore Parks, *History of Coconut Grove*, *in* REIMAGINING WEST COCONUT GROVE 20, 20–23 (Samina Quraeshi ed., 2005) (documenting the history of the West Grove).

4. Founded in 2008, the Historic Black Church Program arose out of a student-driven community-outreach initiative combining the historic preservation of churches, the conservation of neighborhood cultural and social resources (libraries, parks, and schools), and the open, expanded access to legal rights education and provider-referral services. Building upon the legal–political practices of the civil rights and poor people's movements of the late twentieth century, the initiative emphasizes organizing faith-based coalitions and mobilizing local nonprofit groups in cooperation with public agencies (prosecutor and public defender offices as well as police and fire departments) and in partnership with private entities (banks, small businesses, and real estate developers) to assist communities beset by concentrated inner-city poverty. A confluence of socioeconomic factors—public-sector neglect, private-sector disinvestment, and nonprofit-sector abandonment—have

provides multidisciplinary resources in education, law, and social services to underserved, predominantly low-income residents of the West Grove through partnerships with the Coconut Grove Ministerial Alliance, a consortium of historic black churches and other local nonprofit entities, service providers, and schools for the purposes of grassroots community organization and legal rights mobilization.[5] Publicly, Miami-Dade County officials asserted that the libraries slated for closing "were picked on two criteria: use and geography."[6] Nevertheless, because the closings disproportionately impacted low-income communities of color adversely, the selection process raised serious questions and widespread suspicions of class bias and racial animus.[7]

Like many county library systems across the nation struggling to educate already large and growing low-income populations,[8] Miami-Dade County libraries "serve not only as a resource to borrow books and participate in literacy programs, but provide much-needed Internet service."[9]

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rendered inner-city communities across the nation highly susceptible to continuing and oftentimes permanent impoverishment. The Historic Black Church Program seeks to combat that impoverishment through community education, nonprofit institution building, and civic participation. The case study presented here stemmed from events occurring during the summer of 2011, in which the Historic Black Church Program served in a limited advisory role primarily in its capacity as a member of the Coconut Grove Ministerial Alliance, a consortium of Historic Black Churches. *Historic Black Church Program*, CENTER FOR ETHICS & PUB. SERVICE (University of Miami School of Law, Coral Gables, Florida), Fall 2010 & Spring 2011, at 1, 5.

5. On the Historic Black Church Program, see Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1090–92 (2009); Anthony V. Alfieri, *Integrating Into a Burning House: Race- and Identity-Conscious Visions in* Brown*'s Inner City*, 84 S. CAL. L. REV. 541, 592–601 (2011) (book review) [hereinafter Alfieri, *Integrating Into a Burning House*]; Anthony V. Alfieri, *Post-racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 927–28 (2010) [hereinafter Alfieri, *Post-racialism*]; CTR. FOR ETHICS & PUB. SERV., UNIV. OF MIAMI SCH. OF LAW, HISTORIC BLACK CHURCH PROGRAM: 2011–2012 PROJECTS (2011) (on file with author) [hereinafter HISTORIC BLACK CHURCH PROGRAM: 2011–2012 PROJECTS]; and CTR. FOR ETHICS & PUB. SERV., UNIV. OF MIAMI SCH. OF LAW, STRATEGIC PLAN (2011) (on file with author). The Program operates jointly with the University of Miami's College of Arts and Sciences and Schools of Architecture, Communication, and Education to supply faculty and student opportunities for civic engagement, service learning, and community-based research.

6. Haggman & Brannigan, *supra* note 2. County officials commented: "Some [libraries] are proposed to be closed because of light traffic, while others are targeted because another library is nearby." *Id.*

7. *See* Luisa Yanez, *Miami-Dade Mayor Carlos Gimenez Holds First Virtual Town Hall Meeting*, MIAMI HERALD (July 14, 2011), http://www.miamiherald.com/2011/07/14/2315006/miami-dade-mayor-holds-first-virtual.html (documenting the mayor's receipt of a complaint suggesting that the libraries selected to be closed were largely those in "black or poor neighborhoods"); *see also* Matthew Haggman & Martha Brannigan, *Miami-Dade Commission Supports Mayor's Proposed Tax Plan, but Spares County Libraries*, MIAMI HERALD (July 19, 2011), http://www.miamiherald.com/2011/07/19/v-fullstory/2321502/miami-dade-commission-supports.html (noting that the mayor's budget proposal was modified due to the concerns over closing libraries that were "particularly vital to lower-income groups").

8. Miami-Dade County officials report that "the Miami-Dade Public Library System is the eighth largest public library system in the country with 48 branches in neighborhoods throughout the county." *Capital Plan—Building Beyond Books*, MIAMI-DADE PUB. LIBR. SYS., http://www.mdpls.org/info/capital_dev/watchus_grow.asp.

9. Haggman & Brannigan, *supra* note 2.

Although described as "a very modest facility in terms of space," the Virrick Park Library reportedly offers "a thriving educational experience for a substantial number of both youngsters and adults."[10] As a result, both West Grove community advocates and elected officials protested the mayor's proposed closing of the Virrick Park Library, declaring that "the cost of the library is minimal compared to the value it provides the community."[11]

Within days of the mayor's announcement, West Grove church ministers and community leaders began to circulate e-mails opposing the Virrick Park Library closing and calling for political action to block it. To help map and gauge various strategic options, the Historic Black Church Program began to assess a range of legal–political tactics, including possible recommendations of limited direct-service representation, county-wide impact litigation, and legislative law reform. Direct-service representation required the recruitment of pro bono counsel (e.g., legal-services organizations and for-profit law firms), the solicitation of injured plaintiff parties (e.g., West Grove families and children), the formulation of plausible causes of action (e.g., civil rights disparate-impact claims and state constitutional right-to-education claims), and the fashioning of appropriate relief (e.g., declaratory and injunctive remedies, the latter requiring an impracticable evidentiary showing of irreparable injury and the probability of success on the merits). More daunting, impact or test-case litigation demanded the cooperation of multiple co-counsel and complex calculations of party standing and class certification. Law reform, by comparison, entailed private and public lobbying of key decision makers in the mayor's office and at the county commission.

In addition, the Historic Black Church Program explored possible nonlegal alternatives, such as private fund-raising to replace the projected library budget shortfall and the physical relocation of the Virrick Park Library to a neighborhood church or school. Furthermore, the Program contemplated a media campaign (e.g., editorials and letters), public protest (e.g., a march, rally, or sit-in), and political pressure (e.g., reporting selected public officials to regulatory agencies for the purposes of investigating ongoing unethical or unlawful conduct in unrelated matters),[12] all to persuade local municipal and county officials to help mobilize public opposition to the proposed closing.[13]

10. Jackie Bueno Sousa, *Library Anecdote Doesn't Tell Whole Story*, MIAMI HERALD (July 26, 2011), http://www.miamiherald.com/2011/07/26/2331540/library-anecdote-doesnt-tell-whole.html (quoting Miami-Dade County Commissioner Xavier Suarez).

11. *Id.*

12. Plainly, the instrumental reporting of public officials for unethical or unlawful conduct to regulatory agencies in unrelated matters for the purpose of gaining leverage in bargaining over community resources presents issues of both ordinary morality and substantive justice.

13. It is important to note that neither the faculty nor the students of the Historic Black Church Program ultimately recommended any of the legal–political actions under review here, though such actions assemble the common core of options frequently available to community lawyers.

Taken together, this conventional and sometimes controversial array of legal–political strategies and tactics will sound familiar to community lawyers. The notion of "community lawyering" is by now well entrenched in the literature of the legal profession.[14] Wide-ranging in scope, that literature spans civil rights and poverty-law studies,[15] clinical education and skills-training courses,[16] and the empirical work of interdisciplinary scholars.[17] Indeed, histories of the American civil rights and poor-people's movements highlight the role of community lawyers in legal advocacy and political organizing.[18] Likewise, developments in law school curricular design and campus–community outreach point to the integration of community-lawyering models into legal education more generally.[19] Similarly, the

14. By community lawyering, I mean neighborhood-based representation on behalf of underserved individuals, groups, and organizations in the form of direct-service, impact, or test-case litigation, legislative law reform, transactional counseling, and legal–political organizing.

15. On community lawyering in civil rights and poverty law, see generally Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715 (2010); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007); and Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3 (2007).

16. On community lawyering in clinical education and skills training, see generally Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do with Them?*, 34 FORDHAM URB. L.J. 1269 (2007); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333 (2009); and Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008).

17. For empirical and interdisciplinary scholarship on community lawyering and legal services, see Laurie A. Morin, *Legal Services Attorneys as Partners in Community Economic Development: Creating Wealth for Poor Communities Through Cooperative Economics*, 5 U. D.C. L. REV. 125 (2000) and Jeanne Charn & Jeffrey Selbin, The Clinic Lab Office 3–13 (2010) (unpublished manuscript) (on file with author). *See also* D. James Greiner & Cassandra W. Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. (forthcoming 2012), available at http://ssrn.com/abstract=1708664 (assessing the impact of poverty-law outreach, intake, client selection, and service delivery); Anthony Alfieri et al., Reply to Greiner and Pattanayak (Jan. 2012) (unpublished manuscript) (on file with author).

18. On the intersection of legal advocacy and political organizing in community lawyering, see generally Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) and Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000–2001).

19. On curricular models of community and related public-interest lawyering in legal education, see generally Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391 (2007); Louis S. Rulli, *Too Long Neglected: Expanding Curricular Support for Public Interest Lawyering*, 55 CLEV. ST. L. REV. 547 (2007); Gregory L. Volz et al., *Higher Education and Community Lawyering: Common Ground, Consensus, and Collaboration for Economic Justice*, 2002 WIS. L. REV. 505; and W. Lawson Konvalinka, Book Note, *More Than a Poor Lawyer: A Study in Poverty Law*, 89 TEXAS L. REV. 449 (2010).

writings of law-and-society scholars underscore the significance of community or "cause" lawyering here and abroad.[20]

This Review will offer an ethical defense of community lawyering against the backdrop of W. Bradley Wendel's important new book, *Lawyers and Fidelity to Law*.[21] Building upon his prior distinguished work on legal ethics[22] and the contemporary writings of moral and political philosophers,[23] *Lawyers and Fidelity to Law* advances a theory of legal ethics positing "fidelity to law" as the central obligation of lawyers at work in liberal-democratic societies.[24] Wendel's moral and political arguments for a fidelity-to-law conception propound political legitimacy as a normative benchmark for lawyer decision making.[25] Moreover, his arguments ground the duties of lawyers in "democratic law making and the rule of law," thus situating the ethical and indeed normative value of lawyering in the "domain of politics" rather than in ordinary morality or social justice.[26] By defending a theory of legal ethics that places fidelity to law instead of client or community interests at the core of lawyers' obligations, Wendel seeks to rehabilitate the idea of legitimacy as a normative ideal for lawyers and to channel lawyers into a formal, procedural system of advocacy and counseling largely independent of substantive-justice objectives.[27] Wendel's transformation of the evaluative framework of legal ethics from the concerns of ordinary morality and substantive justice to the considerations of political legitimacy and process-oriented legality, I will argue, exposes community lawyers to new terms of normative criticism and erodes the justification of their crucial work in American law and society.

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20. On community-lawyering strands in cause lawyering, see John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927 (1999); Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 302–36 (Austin Sarat & Stuart S. Scheingold eds., 2006); and Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575 (2006).

21. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010). For helpful discussion of the ethics of community lawyering, see generally Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000).

22. *See generally* W. Bradley Wendel, *Lawyers as Quasi-public Actors*, 45 ALTA. L. REV. 83 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); W. Bradley Wendel, *Legal Ethics as "Political Moralism" or the Morality of Politics*, 93 CORNELL L. REV. 1413 (2008); W. Bradley Wendel, *Razian Authority and Its Implications for Legal Ethics*, 13 LEGAL ETHICS 191 (2010); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

23. *See* JOHN RAWLS, POLITICAL LIBERALISM, at xxxvi (2005) (exploring ideas of "justice as fairness" and the "political conception of justice"); JOSEPH RAZ, *The Claims of Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28, 28–33 (2d ed. 2009) (remarking on the law's requirement of adherence to legal rules even when there are compelling reasons for deviating from those rules).

24. WENDEL, *supra* note 21, at 7–9.

25. *Id.* at 2, 11, 15, 47–48, 55, 89–92, 98–99, 130.

26. *Id.* at 2.

27. *Id.* at 2, 4, 23, 42, 157, 215 n.19.

The Review proceeds in three parts. Part I describes Wendel's "fidelity to law" conception and its normative, positive-law underpinnings. Part II examines the meaning of and justification for community lawyering within Wendel's ethical framework. Part III sketches an outsider ethic of disobedience and resistance as an alternative guidepost for community lawyers.

I. Fidelity to Law as a Normative Defense of Positive Lawyering

"[T]he biggest problem . . . was that the lawyers would resist actually working directly with community organizers and community action people . . . ."[28]

Wendel's "fidelity-to-law" conception of ethical lawyering rests on the claim of political legitimacy. He defines political legitimacy as a property or quality of "political arrangements" acquired through the deserved "respect and allegiance of citizens," an allegiance that survives citizen quarrels and unjust laws.[29] On this definition, political legitimacy constitutes a normative precept animating the relationship and mediating the tension "between state power and citizens."[30] By bootstrapping the duties of lawyers to considerations of "democratic law-making and the rule of law," Wendel relocates the ethical value of lawyering from the fields of ordinary morality and substantive justice to "the domain of politics."[31] Thus configured, the value of lawyering derives from fidelity to the law, not the pursuit of client, nonclient, or broader community interests.[32]

Under Wendel's fidelity-to-law conception, law earns cultural and social "respect because of its capacity to underwrite a distinction between raw power and lawful power," or more bluntly, to sever or separate force from legality.[33] That capacity, he explains, "enables a particular kind of reason-giving" or considered judgment to be employed "independent[ly] of power or preferences."[34] Through public deliberation and the exercise of

28. Interview by Zona Hostetler with Gary Bellow, *supra* note 1.

29. WENDEL, *supra* note 21, at 2.

30. *Id.*

31. *Id.*

32. *Id.* at 2, 26, 44, 49–50, 67, 71, 87, 89, 122–23, 168, 175, 178, 184, 191, 210; *see also id.* at 80 (explaining that the law does not permit lawyers to seek out every possible lawful advantage for their clients); *id.* at 84 (describing how lawyers may attempt to change the law through good-faith arguments only).

33. *Id.* at 2; *see also id.* at 3 (defining the concept of legality in terms of the "difference between the law and what someone—a citizen, judge, or lawyer—thinks ought to be done about something, as a matter of policy, morality, prudence, or common sense"); *id.* at 119 (distinguishing individual from institutional decision making); *id.* at 202 ("The claim of legality is, in essence, the avowal of having evaluated a scheme of legal entitlements and constraints from the perspective of one who regards them as creating reasons for action as such.").

34. *Id.* at 2; *see also id.* at 14 (describing how participants in a legal system act as if the law is not radically indeterminate and noting how legal reasoning results in an objective range of reasonable interpretations); *id.* at 61 (explaining that the law must be regarded as intrinsically reason giving in order to make a distinction between a legal right or permission and lawbreaking);

reasoned judgment, he adds, represented and unrepresented citizens may lay claim to legal entitlements in an orderly, regularized fashion within society.[35] Unlike preferences and interests or desires, according to Wendel, legal entitlements are "conferred by the society as a whole" both fairly, in the manner of process, and collectively, in the nature of political community.[36] For Wendel, "the legitimacy of laws enacted through fair procedures" gives rise to the political legitimacy of entitlements that citizens "accept" for moral rather than economic or political reasons.[37] In this way, legitimacy requires no appeal to higher law claims such as ordinary morality, individual and collective justice, or the public interest.[38]

Notwithstanding his axioms of legal entitlement and political legitimacy—and his enigmatic confidence in the natural moral reasoning conferred by citizenship—Wendel admits that the popular discourse of American law and culture contains "a significant strand of approval of law-breaking," especially when harnessed to the ends of justice.[39] From popular culture, in fact, he discerns a common appreciation for the instrumental value of law for citizens and their desires yet a lack of respect for the inherent value of law for society and its needs.[40] However valorized in culture and society, the law, Wendel acknowledges, "does not end debate in moral terms

id. at 130 (discussing how even if one grants that the legal system needs political legitimacy, lawyers' roles are not limited to facilitating the access of individuals to legal meaning making); *id.* at 160–61 (distinguishing agent-neutral reasons from agent-relative reasons, which are not morally mandatory).

35. *Id.* at 2; *see also id.* at 6 (claiming there is value in lawyers' work within a system that maintains legitimate procedures and establishes a stable basis for coexistence and cooperation); *id.* at 8 (remarking that a lawyer's ability to help a client in a legal manner is limited by the client's legal entitlements); *id.* at 123 (explaining that there is room for dissent even in a well-ordered society where dissenters respect and obey fair and just institutions).

36. *Id.* at 2; *see also id.* at 197 (suggesting that official authority is ultimately derived from a community's practices); *id.* at 265 n.62 (mentioning that the goal directedness of any practice is a noncircular source of obligations internal to the practice). On legal authority, legislation, and consent, see JEREMY WALDRON, THE DIGNITY OF LEGISLATION 124–66 (1999).

37. WENDEL, *supra* note 21, at 2; *see also id.* at 62 (labeling as "good citizens" those who take the law as a source of reasons for action instead of merely as a source of negative consequences). Wendel's privileging of moral conviction over economic or political interest goes largely unexplained.

38. *Id.* at 2, 9–10, 29, 56, 120, 210.

39. *Id.* at 3 (noting popular images of "heroic" lawyers marked by their willingness "to bend the rules in pursuit of substantive justice"). *See generally* William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001) (profiling three prominent portrayals of lawyers and discussing popular culture's exaltation of their legal transgressions in pursuit of basic moral values).

40. *See* WENDEL, *supra* note 21, at 2 (citing the ability of citizens to gain power through appeal to legal entitlements); *id.* at 3 (repeating the attitudes of some clients that the law should be followed only if it helps accomplish their goals); *id.* at 82 (describing some lawyers' view that their role is to press their clients' interests "right up to the boundaries of the law"); *id.* at 114–15 (remarking on the popular conception of the law as "an irritant, rather than something that deserves allegiance").

about a matter."[41] Debate, he allows, may encompass "public criticism, protests, civil disobedience, and other acts designed to change the law" for moral and political reasons.[42] Nonetheless, he insists, "lawyers are charged with an obligation to treat the law with respect," ideally in a democratic spirit of civic obedience to positive law.[43]

For purposes of political theory, Wendel assumes that the law, under "a reasonably well-functioning democratic political order," symbolizes "a collective achievement by people who share an interest in living alongside one another in conditions of relative peace and stability."[44] On this democratic view, law furnishes "procedures that enable citizens to resolve disagreements that otherwise would remain intractable, making it impossible to work together on common projects."[45] In calling upon lawyers to respect the law, Wendel urges the resolution of societal conflicts and controversies "through public, reasonably accessible procedures that enable citizens to reach a provisional settlement"—put simply, "to enable cooperative action in response to some collective need."[46]

Extending out from this public stance, Wendel assembles twin political purposes for ethical lawyering. From the outset, he seeks to rejuvenate the idea of legitimacy as a normative touchstone for lawyers. Throughout, he also strives to channel lawyers within a positive-law system crafted "to supersede disagreements over what substantive justice requires."[47] For

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41. *Id.* at 3; *see also id.* at 107 (recognizing that the existence of moral pluralism may conflict with the legal norms established in society); *id.* at 115–16 (asserting that the law legitimates certain actions in a pluralistic society).

42. *Id.* at 3.

43. *Id.*; *see also* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 424 (2004) (contending that "lawyers have an obligation to respect the law and maintain its capacity to serve as a framework for coordinated action").

44. WENDEL, *supra* note 21, at 4; *see also id.* at 2 (asserting that law enables civil interaction by performing an equalizing function); *id.* at 91 (stating that law is essential to the political order of a society, allowing people to coexist peacefully).

45. *Id.* at 4; *see also id.* at 89 (asserting that laws are societally instituted procedures for resolving disagreements that establish the framework for cooperation); *id.* at 96–98 (exploring the types of disagreements that make law necessary and arguing that law facilitates the existence of societies with a diversity of viewpoints).

46. *Id.* at 4 (citing the settlement function as a "larger-scale phenomenon" that "supersedes diffuse disagreement over normative issues by replacing the contested individual moral and political beliefs of citizens with a shared social position"); *see also id.* at 99 (noting that "members of society might reasonably opt for the use of procedural mechanisms to transcend the disagreements that divide them, and to establish a framework for coordinated action").

47. *Id.* at 4; *see also id.* at 10 (arguing that to "regard professional duties . . . as aiming directly at justice or other moral notions such as efficiency or autonomy, would essentially vitiate the capacity of the legal system to supersede disagreements about these values"); *id.* at 26 ("The main argument in this book is that in the majority of cases, a fully worked-out moral analysis of what a lawyer ought to do will conclude that the lawyer has an obligation of fidelity to the law that precludes reasoning on the basis of ordinary non-institutional moral values."); *id.* at 54 (asserting that "one of the most important functions of the law is to supersede uncertainty and disagreement and provide a resolution of competing claims of right, so that citizens can coexist and work together on mutually beneficial projects").

Wendel, "shifting the evaluative frame of reference from ordinary morality and justice to considerations of political legitimacy" alters "the terms of the normative criticism of lawyers."[48]

Consider in this light the case of community lawyers here in Miami and elsewhere. Typically engaged in a wide range of civil rights and antipoverty work, community-based lawyers frequently challenge state-sanctioned patterns and practices of class bias or racial animus embodied in discrimination and disparate treatment—repeated patterns and practices increasingly insulated doctrinally from federal and state court attack. Wendel's revised evaluative framework pushes normative criticism of such lawyer-engineered challenges away from considerations of morality and justice—precisely those considerations essential to the condemnation of racial discrimination and economic inequality. Instead, his framework tilts normative criticism of such lawyer challenges toward considerations of rights-based entitlement, political legitimacy, and procedural legality, and hence toward the acceptance of discrimination and disparate treatment as good-faith attempts by democratic lawmakers to balance competing social interests in the allocation of scarce resources,[49] here in Miami with respect to neighborhood libraries. This normative reassessment transforms the criticism of community lawyers who advise clients, particularly clients and communities of color, on the permissibility of strategic resistance to state-sanctioned patterns or practices of racial discrimination and racially disparate treatment from the accusation that their conduct reflects complicity in the moral wrong of contempt for nonclient, majority-political entitlements to the charge that their conduct actually tarnishes them as "abusers of the law."[50]

On Wendel's normative valence, the charge of lawyer abuse of the law arises from the morally deduced obligation "to respect the institutions, procedures, and professional roles that constitute the legal system."[51] In order to demonstrate that the law and the legal system are worthy of popular respect,[52] Wendel draws upon the "political normative considerations relating

48. *Id.* at 4; *see also id.* at 87–89 ("[C]onsiderations associated with the value of legality and the rule of law provide reasons for lawyers to act with fidelity to law, rather than acting on the basis of the moral and nonmoral considerations that would otherwise apply in the absence of the lawyer–client relationship.").

49. *See id.* at 4 ("The effect of shifting the evaluative frame of reference from ordinary morality and justice to considerations of political legitimacy is to change the terms of the normative criticism of lawyers."); *id.* at 86 (asserting that "the legal entitlements of clients, not client interests, fix the boundaries of lawyers' duty of loyalty to their clients"); *id.* at 122 ("[T]he fundamental obligation of the lawyer's role is fidelity to the law itself. The law supersedes moral disagreement and provides a basis, however thin, for social cooperation and solidarity."); *id.* at 177 (pronouncing that the "obligation of fidelity to law must be understood in context, with some lawyers having greater latitude than others to assert less well-supported legal positions on behalf of clients").

50. *Id.* at 5; *see also id.* at 86 (summarizing a "Principle of Neutrality" in which the boundaries of a lawyer's duty of loyalty are fixed by clients' legal entitlements rather than ordinary morality).

51. *Id.* at 5.

52. *Id.*

to the ethics of citizenship in a liberal democracy."[53] Employing John Rawls and his notion of the "burdens of judgment," Wendel construes the ethics of citizenship in terms of pluralism and disagreement.[54] His embrace of ethical pluralism stems from the recognition of diverse interests, capacities, and ends in a liberal democracy and the inexorable likelihood of value conflicts.[55] Out of commitments to a democratic society and value pluralism, Wendel endorses "fair terms of cooperation" in law, culture, and society in spite of the familiar presence of "deep and intractable disagreements at the level of comprehensive moral doctrines."[56] Cooperative fairness, expressed in positive lawmaking and law-applying procedures—for example, in the drafting and implementation of legislative budget-making authority—in this sense fosters legitimacy.[57] To Wendel, "governance through fair democratic procedures is something worth respecting" in law, politics, culture, and society.[58] Accordingly, he observes, lawyers, even community lawyers, "do something valuable by working within a system that maintains legitimate procedures for establishing a stable basis for coexistence and cooperation."[59]

The liberal backdrop of democratic governance, fair procedure, and political legitimacy informs the core moral content of Wendel's vision of legal ethics, a vision closely aligned with the standard conception of ethics dominant within the Anglo-American legal profession.[60] To a substantial

53. *Id.*; *see also id.* at 115 (positing a moral obligation to obey even unjust laws provided that such laws "do[] not exceed some limit of injustice").

54. *Id.* at 5; *see also id.* at 55 (rejecting the argument that society's need for law arises from the inherent selfishness and inadequacy of its members); *id.* at 92 (locating Rawls's "burdens of judgment" in the context of nonideal ethics (citing RAWLS, *supra* note 23, at 55–58 (1993))). By the burdens of judgment, Wendel means "the indeterminacy in practice of our evaluative concepts, due to empirical uncertainty and moral pluralism." *Id.* at 5.

55. *Cf.* RAWLS, *supra* note 23, at 56–57 (positing that the sources of reasonable disagreement—the burdens of judgment—derive from differences in people's total experiences, the ways in which they assess and weigh moral considerations, and the ways in which they assess and evaluate conflicting and complex evidence that bears on their judgments); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 396–402 (2005) (contending that the sources of moral pluralism can be categorized and explained as arising from "epistemological difficulty," "value pluralism," or the differences in people's "cultural identit[ies] and experience[s]").

56. WENDEL, *supra* note 21, at 5.

57. *See id.* at 5–6 (arguing that citizens in a democracy must agree on certain, tolerably fair lawmaking procedures); *id.* at 99 (discussing perceived imperfections in the legislative process); *id.* at 101–02 (arguing that congressional-lawmaking procedures are fundamentally legitimate despite some perceived imperfections).

58. *Id.* at 6; *see also id.* at 88 (suggesting that respect for the law is warranted where the procedures for making, interpreting, and applying laws are legitimate).

59. *Id.* at 6; *see also id.* at 86–105 (arguing that the capacity of the legal system to treat citizens equally through the application of legitimate and fair procedures for making and applying law vindicates the rule of law, even where some outcomes work injustice, because fair procedure enables citizens to resolve disagreement cooperatively).

60. *See id.* at 5 (insisting that the book will argue that the legal system is worthy of respect by virtue of its "rel[iance] on political normative considerations relating to the ethics of citizenship in a liberal democracy"); *id.* at 28–30 (discussing the standard conception of legal ethics).

extent, Wendel defends the standard conception, albeit in modified form. His conceptual adjustment culls from three principles: two guide lawyer actions, and a third shapes the normative evaluation of such actions.[61] The first—the Principle of Partisanship—calls for the lawyer "to advance the interests of her client within the bounds of the law,"[62] while the second—the Principle of Neutrality—excuses the lawyer from consideration of either "the morality of the client's cause" or "the morality of particular actions taken to advance the client's cause," presuming "both are lawful."[63] The third—the Principle of Nonaccountability—follows from lawyer adherence to and institutional observance of the first two principles, thus permitting Wendel to conclude that "neither third-party observers nor the lawyer herself should regard the lawyer as a wrongdoer," at least "in moral terms."[64]

In contrast to the overriding instrumental logic of the traditional standard conception, Wendel argues that "lawyers should act to protect the legal *entitlements* of clients" and not simply pursue their private interests or public preferences.[65] For Wendel, the law empowers lawyers to act for clients through the attorney–client relationship and "sets limitations on the lawful use of those powers."[66] By showing that "the legal system deserves the allegiance of citizens," he contends, "lawyers will be seen to play a justified role in society" and therefore will accrue, and perhaps regain, ethical value as a profession.[67]

II. Fidelity to Law as a Normative Criticism of Community Lawyering

"I wasn't sure that this model of a policy-oriented, direct action-oriented, community action connected legal services program could really work."[68]

Wendel's fidelity-to-law conception of legal ethics presents a serious, normative criticism of community lawyering. In defending a theory of legal ethics in which fidelity to law shapes the professional responsibilities of lawyers, Wendel both recasts and reinforces the basic premise of role-differentiated morality. Bound up in "the claim that occupying a social role

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61. *See id.* at 6 ("The Standard Conception consists of two principles that guide the actions of lawyers, and a third principle that is supposed to inform the normative evaluation of the actions of lawyers."); *id.* at 28 (discussing the three principles that constitute the Dominant View).

62. *Id.* at 6; *see also id.* at 29–30 (enumerating the three principles that constitute the Dominant View).

63. *Id.* at 6.

64. *Id.*; *see also id.* at 29–31 ("The Principle of Nonaccountability means that, as long as the lawyer acts within the law, her actions may not be evaluated in ordinary moral terms.").

65. *Id.* at 6; *see also id.* at 31 (arguing that "the legal entitlements of clients, not client interests, should be paramount for lawyers").

66. *Id.* at 6.

67. *Id.* at 7; *see also id.* at 6 n.* (remarking that "since fidelity to law, not client interests, is a principal difference between this view and the standard conception, the position here might be referred to as the fidelity to law conception, the entitlement view, or something similar").

68. Interview by Zona Hostetler with Gary Bellow, *supra* note 1.

provides an institutional excuse for what would otherwise be wrongdoing," the notion of role-differentiated morality, he points out, departs from the more universally compelling concept of ordinary morality.[69] For many community lawyers, for example, the commands of ordinary morality pilot their work, often in street-level collaboration with neighborhood residents and groups. Despite this divergence and the personal and professional sway of ordinary morality, for Wendel, "roles do real normative work by excluding consideration of reasons that someone outside the role would have to take into account."[70] This role-specific, outsider-norm exclusion narrows Wendel's evaluative frame of reference to certain institutional roles and practices that, when applied to community lawyers, act to constrain their work across multiple, varied contexts. Those roles and practices, he concedes, demand moral justification at a higher, systematic level of generality beyond routine case-by-case application in localized settings.[71] To that end, he ties the lawyer's role to a set of values embodied by the character of citizenship in a pluralistic society where the day-to-day "lives of individuals are comprehensively regulated by political institutions."[72] This tie, however, fails to bind individuals disenfranchised by mainstream political institutions and denied the full rights and privileges of citizenship, as illustrated by the history of the West Grove.

Respect for the values of citizenship in a pluralistic society molds Wendel's understanding of lawyers when clients or circumstances summon them to act in their professional capacity as advocates, advisors, and counselors. On this understanding, lawyers play out "a small but significant part" in maintaining, and indeed preserving, the mainstay institutions of a pluralistic society—namely courts, legislatures, and administrative or regulatory agencies.[73] By attending to these institutions and keeping them in "good working order,"[74] Wendel contends, the lawyering role garners "significant moral weight."[75] That weight, along with its underlying norms

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69. WENDEL, *supra* note 21, at 7; *see also id.* at 20 (explaining the distinction between ordinary and role-differentiated morality); *id.* at 31 (introducing the conflict between the standard conception and ordinary morality).

70. *Id.* at 7; *see also id.* at 20 (linking this role-based morality to the creation of genuine duties related to a larger system of general morality); *id.* at 23 (suggesting that ordinary morality justifies the larger structure of which role-differentiated morality is a part).

71. *Id.* at 7, 27, 122.

72. *Id.* at 7; *see also id.* at 90–91 (arguing that a system is just if it adequately enables citizens with different moral viewpoints to participate equally in democratic institutions); *id.* at 116 (suggesting that lawyers best serve the value of legality if they act not on what they perceive to be required by morality but rather to facilitate settlement of normative disagreements).

73. *Id.* at 7.

74. *Id.* at 7; *see also id.* at 64 (describing lawyers who shirk their responsibility to keep the system in "good working order" as "Holmesian bad men"); *id.* at 84 (condemning lawyers who act as "saboteurs or guerilla warriors" by failing to respect "existing positive law").

75. *Id.* at 7; *see also id.* at 62 (differentiating between "good" and "bad" citizens based on factors that motivate compliance with, and regard for, the law).

of fairness and legality, draws upon "a freestanding morality of public life."[76] In this respect, he reasons, lawyers resemble *political officials* more than ordinary moral agents.[77] Such resemblance affords Wendel an opportunity to erect a new regime of interwoven public and lawyer ethics rooted in citizen respect for the law and the value of legality.[78]

Unlike Wendel's civic-minded, "political" lawyers, community lawyers encounter a profoundly diminished "morality of public life" in their work. Public life in impoverished communities like the West Grove reveals decades of economic abandonment and political neglect. Devastated by concentrated poverty, public life for low-income households in Miami and elsewhere lacks the basic institutional features of a "working" society, such as accessible and functional employment markets, public schools, social services, and mass transportation. In these increasingly desperate and despairing circumstances, community lawyers struggle under Wendel's formalist injunction to construct their role primarily out of the citizenship norms of respect for law and legality.

Yet, from this starting point, Wendel returns to the Principle of Partisanship, asserting that the law simultaneously imposes "limits on permissible advocacy" and "constitutes the lawyer's role."[79] For Wendel, the constitutive function of law and legal entitlements materially works to empower lawyers to act on behalf of clients.[80] Legal entitlements, he emphasizes, express "claims of right, as distinct from assertions of interest,"[81] a distinction historically contingent on political power, cultural dominance, and socioeconomic hierarchy. Wendel makes no mention of these pivotal contingencies, an oversight that ignores the historical absence and diminution of the legal entitlements of segregated communities like the West Grove. The distinctive quality of legal entitlements, he contends, redirects the standard conception of a lawyer's professional duties from the

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76. *Id.* at 7; *see also id.* at 23 (contending that "[o]ne of the principal arguments in this book is that legal ethics is part of a freestanding political morality"); *id.* at 26 (clarifying that "freestanding values," while not "unrelated to ordinary morality," are largely dependent on the "institutional context"); *id.* at 33–36 (analyzing Stephen Pepper's "first-class citizenship" model and concurring with David Luban's criticism of that model); *id.* at 156–57 (clarifying that people can remain "moral agents" while "grounded in freestanding political considerations" including "the inherent dignity and equality of all citizens, and the ideal of legitimacy").

77. *Id.* at 7.

78. *Id.* at 8, 10, 18, 48–49, 85, 87, 92, 117, 131.

79. *Id.* at 8.

80. *See id.* (pointing out that a client's "extra-legal interests . . . do not convey authority upon an agent to act in a distinctively legal manner on behalf of the client"); *see also id.* at 6 (previewing the notion that the law "empowers lawyers to do anything at all for clients"); *id.* at 52 (explaining that the client's legal entitlements serve as the basis of the lawyer's power to act on behalf of the client); *id.* at 129 (providing examples of lawyers' use of clients' procedural entitlements to challenge the existing distribution of entitlements).

81. *Id.* at 8; *see also id.* at 54 (concluding that lawyers are prohibited from adopting unreasonable interpretations of clients' legal entitlements "simply because it would be advantageous to their clients if they did so").

zealous protection of a client's lawful interests to the protection of a client's legal entitlements.[82]

In addition to this redirection, Wendel's entitlements view of the standard conception requires that lawyers not only recognize but also affirm the law as legitimate.[83] To Wendel, this recognition acknowledges that the law should be and in fact stands "worthy of being taken seriously."[84] It also acknowledges that the law should be "interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client's goals."[85] That dual recognition propels Wendel's claim "that lawyers must advise clients on the basis of genuine legal entitlements and assert or rely upon only those entitlements in litigation or transactional representation that are sufficiently well grounded."[86]

The claim of genuine legal entitlements changes the basis for ethical criticism of community lawyering from the standpoint of ordinary morality or injustice to infidelity to law.[87] Infidelity of this kind links legal ethics and lawyers' professional obligations to "respect for the law and the legal system."[88] Elevating respect for the law and the legal system to a normative plane treats law as a social achievement by its very nature "worthy of the loyalty of citizens and lawyers."[89] No doubt most community lawyers endorse this treatment, according the law formal respect and granting the legal system institutional loyalty. Most also applaud the social achievement of the law in establishing legal entitlements and safeguarding legal protections,

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82. *Id.* at 8, 115–17, 123–55.

83. *Id.* at 8, 167–68.

84. *Id.* at 8; *see also id.* at 40 (observing that clients are entitled to the type of protection from their lawyers that a friend may provide, "which is to have the interests of an individual taken seriously, as against the claims of the wider collectivity").

85. *Id.* at 8. *But see id.* at 85 (acknowledging that "there may be cases in which legal injustice cannot be interpreted away" and providing as an example the legal principle of "separate but equal" as it existed in the early twentieth century).

86. *Id.* at 8. Wendel's dual recognition also concedes the frequent difficulty in differentiating "between a loophole or malfunction, on the one hand, and a genuine legal entitlement on the other." *Id.*; *see also id.* at 115 (comparing the refusal to justify positions on the basis of legal entitlements to the "express[ion] of bare desires, like a toddler throwing a tantrum"); *id.* at 123 (defending the notion that "the ethics of lawyering is constituted principally by the political obligation of respect for the law, not ordinary moral considerations").

87. *See id.* at 7–8 (calling attention to the conceptual wrong turn in legal ethics in utilizing the toolkit of ordinary ethics to address the problems of lawyers and suggesting instead that lawyers strive to ensure their reliance on legal entitlements in litigation or transactional work, a reliance sufficiently well-grounded in the law); *id.* at 123 (advocating for a theory of legal ethics that "ha[s] something to say about when the obligation of fidelity to law runs out in the face of substantive injustice"); *id.* at 128 (explaining that a lawyer's refusal to assist a borrower in asserting a legal entitlement would be "to deprive a client of that very thing for which the role of lawyer is constituted").

88. *Id.* at 9; *see id.* at 123 (grounding the ethics of lawyering based on respect for the law, as opposed to "ordinary moral considerations"); *id.* at 132 (arguing that lawyers are ethically prohibited from employing extralegal means to combat injustice).

89. *Id.* at 9; *see also id.* at 158 (arguing that actors in the political realm "display allegiance to a conception of moral responsibility with procedural justice at the foundation").

including "the capacity of official institutions to recognize rights in favor of disempowered citizens against the powerful."[90] To that extent, they join Wendel in affirming the law as legitimate and worthy of serious, good-faith interpretation. Their interpretative horizon, however, goes beyond the settled ground of legal entitlements, genuine or not. Of necessity, daily combat against inner-city poverty and racial inequality requires the creative enlargement of conventional lawyer roles and functions as well as the expansion of constitutional, statutory, and common law entitlements. Considerations of morality and justice fuel the augmentation of legal role, function, and entitlement.

Wendel connects the social function of law to the "reasoned settlement of empirical uncertainty and normative controversy."[91] Consistent with this function, Wendel remarks, law provides "a basis for cooperative activity"[92] in accordance with the changing "circumstances of politics."[93] Borrowed from Jeremy Waldron, the notion of the circumstances of politics implies not only a shared societal interest in building a tolerant forum for group cooperative action,[94] but also a dispute-resolution procedure open to competing positions and respectful of participants, each consistent with a commitment to negotiation, settlement, and stability.[95] Echoing Rawls, Wendel explains that procedures tailored to dispute resolution and tied to a "threshold standard of fairness permit people to reach a reasoned settlement of what would otherwise be intractable disagreement."[96] Such fairness procedures render law legitimate to the extent that the law "responds

90. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEXAS L. REV. 727, 737 n.43 (2012) ("I will admit to worrying that treating the law instrumentally will result in a long-term impairment of its capacity to underwrite demands for respect by the powerless.").

91. WENDEL, *supra* note 21, at 9; *see also id.* at 210 (contending that adherence to the law is preferable to asking lawyers to be loyal to sometimes-inconsistent ideas about the public interest).

92. *Id.* at 9.

93. *Id.* (citing JEREMY WALDRON, LAW AND DISAGREEMENT 86, 101 (1999)).

94. *Id.* at 9–10; *see also id.* at 18–19 (claiming that legal ethics entails the application of a political normative system that is informed in part by the capacity of law to enable cooperation); *id.* at 36 (noting that legality is important because it enables societal coordination and stability); *id.* at 54, 93, 98 (describing law as a way to stabilize and coordinate the interests of citizens in light of both substantive moral disagreements and mundane disagreements).

95. *See id.* at 9 ("Procedures that meet a threshold standard of fairness permit people to reach a reasoned settlement of what would otherwise be intractable disagreement."); *id.* at 116 ("In a pluralistic society, the law provides a framework for coordinated action in the face of disagreement."); *id.* at 129 (describing the law as creating a framework of moderate stability and indicating ways lawyers can challenge settlement).

96. *Id.* at 9; *see also id.* at 88 ("Rawls believes that reasonable citizens may subscribe to a diversity of reasonable comprehensive doctrines, but from within those comprehensive doctrines they may be able to endorse a political justification for a fair scheme of cooperation."); *id.* at 92–96 (explaining that fair procedures are needed to resolve disagreements between citizens that disagree about matters of morality or justice).

adequately to the needs of citizens in the circumstances of politics."[97] To his credit, Wendel confesses that a gap sometimes separates legitimacy and authority, noting that however legitimate their hold, "laws can be unjust."[98]

Community lawyers work under conditions of socioeconomic dysfunction and legal–political conflict similarly marked by empirical uncertainty and normative controversy. Shaped by hierarchy, those conditions impede the cooperation and negotiation of politics, in part because of disagreement over the allocation of scarce resources—in this instance, county library funds—and in part because of inequalities of class and race. Wendel's fairness procedures, to the extent relevant and reliable, neither address nor dismantle the conditions of hierarchy that undermine the legitimacy of law and the legal system for marginalized groups. Laws and legal systems that fail to respond adequately to the economic and social needs of citizens, and hence preserve and reproduce socioeconomic hierarchy, claim authority without legitimacy.

Still, Wendel grants the legal system a broad and deep capacity to supersede public disagreements about cultural and social values.[99] By design, he contends, the law operates "to create a more or less autonomous domain of reasons, rooted in the community's procedures for resolving conflict and settling on a common course of action."[100] Embedded and discharged within this domain, the obligations of lawyers flow from and carry out what Wendel calls the "artificial reason of law" without the necessity, benefit, or cost of ordinary moral reasons and substantive-justice considerations.[101] This artificial reason, he maintains, pervades the institutional roles and practices of the legal system to mold "social solidarity and mutual respect."[102] The value of that contribution to society and legality and the associated "moral worth" of the law renders the lawyer's role morally respectable.[103]

Wendel discovers both moral respectability and social utility in the role of the lawyer, particularly when that role facilitates "the functioning of a complex institutional arrangement that makes stability, coexistence, and

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97. *Id.* at 9; *see also id.* at 98–113 (arguing that a political system must meet a minimum, imperfect standard in terms of providing access to the political process in order to be considered legitimate).

98. *Id.* at 9 (defining *authority* in terms of "the justified claim to create obligations"); *see also id.* at 115 (arguing that there is an obligation to follow unjust laws); *id.* at 119 (noting that institutions such as prosecutors' offices can reach unjust results).

99. *Id.* at 9, 123.

100. *Id.* at 10; *see also id.* at 96, 112, 123 (stating that law provides a framework for reaching decisions when there is disagreement about moral judgments).

101. *Id.* at 10.

102. *Id.* at 10; *see also id.* at 101 (emphasizing that normative debate could be endless without this function of the law); *id.* at 246 n.113 (referencing "the connection between legality and mutual respect").

103. *Id.* at 10; *see also id.* at 49–50, 85 (declaring that a client's entitlements are a moral imperative per se, independent of ordinary moral considerations).

cooperation possible in a pluralistic society."[104] To realize the social good of legality, Wendel urges lawyers to imagine the legal system and their clients' legal entitlements as reason-giving factors that effectively "override considerations that would otherwise apply to persons not acting in the same professional capacity."[105] This override proviso bars community lawyers from consideration of "ordinary moral considerations when deciding how to act on behalf of a client."[106] Rooted in a deep-seated respect for law, the proviso endures even when the law itself—here a local, legislatively mandated budget cutback—appears motivated by racial animus or intended to exacerbate racial inequality.[107]

To be sure, Wendel concedes that lawyers should be "free to challenge unjust, wasteful, or stupid laws" under the standard procedures enacted to secure legal change, whether in the form of "civil-rights lawsuits, impact litigation, class actions, constitutional tort claims, lobbying," or "other vehicles."[108] Crucial to this concession is a distinction "between using legal procedures to challenge unjust laws and subverting them."[109] For Wendel, the obligation of fidelity to law ethically constrains lawyers to act narrowly to defend only the legal entitlements of clients.[110] Narrowing the space available for the exercise of ordinary moral discretion in advocacy or counseling, he admits, deprives lawyers of the freedom to serve clients as "friends or wise counselors."[111] Within that confined professional space,

104. *Id.* at 10; *see also id.* at 98 (claiming that in the context of disagreement, the value of the law is in its treatment of disagreeing parties as equals).

105. *Id.* at 10.

106. *See id.* at 10 (warning that a citizen's or lawyer's right to "refuse to obey" law "would open a whole new arena of disagreement, this time over whether procedures were sufficiently representative, transparent, accessible to all citizens, and so on"); *see also id.* at 158 (describing "a moral justification for what seems like an exclusion of morality from professional life"); *id.* at 167–68 (citing reasons as to why the lawyer–client relationship should be structured by the ideal of fidelity to law and not to clients).

107. *See id.* at 203–04 (arguing that even where the requirements of antidiscrimination law are ambiguous, lawyers maintain fidelity to the law rather than enable their clients to contest its substantive meaning); *see also id.* at 10–11 (claiming that the lawyer's role should not be understood in ordinary moral terms and affirming the principle of legality as itself a social good); *id.* at 88–89 (stating that duties of lawyers must be oriented toward respect for the law itself even if a lawyer believes that a particular law is unjust); *id.* at 107 (emphasizing the importance of lawyers obeying and respecting the law).

108. *Id.* at 11; *see also id.* at 84 (emphasizing the importance for lawyers to work within the law when challenging oppression); *id.* at 123 (acknowledging that just legal systems can and do enact unjust laws that require challenge); *id.* at 129 (noting that "lawyers are encouraged by professional tradition to . . . challenge injustice"). Wendel declares: "Using the legal system to challenge unjust laws is one of the most noble things that lawyers do." *Id.* at 11.

109. *Id.* at 11; *see also id.* at 118 (giving an example of a lawyer who subverted the government's case in a murder trial); *id.* at 132 (advocating that lawyers should use legal means to oppose injustice).

110. *Id.* at 10–11; *see also id.* at 122–43 (describing the implications of legal entitlements for the practice of law).

111. *Id.* at 10–11 (mentioning that lawyers "contingently may be friends or counselors in addition to serving as expert legal advisors," though pointing out that "those additional roles are

lawyers function as self-described quasi-political actors to assert and to protect their clients' legal entitlements and corresponding "political and legal values" against the well-known "coercive force of the state."[112]

Wendel's commitment to the political value of legality and his recognition of the importance of institutionally prescribed roles create dissonance for community lawyers when the law and the legal system require morally disagreeable, albeit politically justified, actions such as compliance with the mayor's unjust directive to close the Virrick Park Library.[113] That dissonance, Wendel speculates without support, may actually enhance the level of lawyer deliberation in parsing the consequences of harmful action to clients and nonclients.[114] Even when, as here, those consequences and their underlying motivations appear race-infected and therefore unjust, Wendel's ethical imperative of political morality persists in place.[115]

Applied to the West Grove, Wendel's political-morality imperative practically precludes representation of neighborhood residents in opposition to the Virrick Park Library closing because their constitutional and statutory *interests* in education, literacy, and equal protection lack the force of legal *entitlements.* Read fairly, the current context of federal and state law, however indeterminate, fails to give rise to an appropriate range of reasonable interpretations sufficient to support any facial or as-applied challenge in this instance, despite the latitude granted by the adversary system.[116] Contrary to Wendel's contentions, the purported craft of participating in the making and evaluating of legal arguments derived from the internal point of view of lawyering[117]—here, for example, displayed in inventing implausible forms of declaratory and injunctive relief—produces neither reflective equilibrium nor ethical coherence for community advocates struggling to

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optional from the standpoint of the political justification of the lawyer's role"); *see also id.* at 34–35 (exploring lawyer–client personal and political relationships).

112. *Id.* at 11; *see also id.* at 34–37 (assessing the role of client autonomy within the legal system and concluding that lawyers have an ethical duty to justify their actions based on the legal entitlements of clients and not the interests or preferences of either clients or lawyers).

113. *See id.* at 11 (distinguishing between political and social morality and the scope of obligations required by each); *id.* at 18 (same); *see also id.* at 49–50 (contending that lawyers are obligated to prioritize political morality and its commitment to the value of legality); *id.* at 85 (concluding that "lawyers should act with reference to their clients' legal entitlements, not ordinary moral considerations").

114. *Id.* at 12.

115. *Id.* at 12, 85–105.

116. *See id.* at 13, 206 (acknowledging that in some cases, but not all, statutory law is subject to multiple interpretations).

117. *Id.* at 15 (asserting that there are "better and worse ways to go about interpreting and applying the law"); *see also id.* at 177 (arguing that "[e]thical lawyering is often a matter of knowing what may be done, given legal ambiguity or uncertainty"); *id.* at 198–200 (contending that "it is essential that a theory of legal ethics take account of the way the content of the law may be contestable" and emphasizing the role of judges and lawyers in ensuring that this is the case).

reconcile the claimed legality of the Virrick Park Library closing and the professional responsibilities of moral agency and justice promotion.[118]

III. Community Lawyering and the Ethic of Disobedience and Resistance

"So I was involved in the protest activity."[119]

For civil rights and poverty lawyers working in impoverished communities like the West Grove, engrafting Wendel's internal point of view of ethical lawyering and its accompanying fidelity-to-law obligation in the context of the Virrick Park Library dispute reveals not legality and legitimacy but racialized power, repressive order, and authoritarian impulse.[120] Neither ethical coherence nor reflective equilibrium can guide lawyers when circumstances, as here, suggest racial bias and invidious discrimination at the hands of the dominant social order.[121] Rather, such circumstances evoke Bill Simon's call for a turn to justice[122] and social solidarity.[123] Both claims of racial injustice and claims of countermajoritarian solidarity cause turmoil in the law. Indeed, the task for community lawyers is to "unsettle law," and their efforts to do so should be applauded rather than viewed as a "threat."[124] As Kate Kruse observes, "[T]he continual ebb and flow of normative controversy can be viewed as an incident of, rather than an impediment to, a free and just society."[125] Instead of hewing to a "rigid and wooden"[126] vision of

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118. *Id.* at 16, 87, 206–07.

119. Interview by Zona Hostetler with Gary Bellow, *supra* note 1.

120. William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEXAS L. REV. 709, 710 (2012) (book review). Simon remarks:

> By gesturing toward positivism and by surrendering to less reflective authoritarian impulses, Wendel's argument underestimates the extent to which social order depends on informal as well as formal norms and adopts a utopian attitude toward constituted power. The book persistently treats as analytical propositions what are in fact empirical assertions for which Wendel has no evidence.

Id.

121. *See id.* ("[A] central theme Wendel shares with some other recent theorists of legal ethics is that concerns for justice must be subordinated to the needs of social order.").

122. *Id.* at 721 ("Lawyers should focus on the direct consequences of their actions and should try to vindicate justice in the particular case . . . ."); *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, at xvii, xxii–xxiii (1988) (proposing that "lawyers are uniquely situated to . . . make the law more just" and "urging a professional ethic" by which lawyers engage in "moral activism" by "self-consciously promot[ing] unrepresented interests"); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 17 (2000) (maintaining that lawyers "must accept greater obligations to *pursue* justice"); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9 (1998) (defending an approach to ethical decision making that requires lawyers to "take such actions as . . . seem likely to promote justice").

123. Simon, *supra* note 120, at 722.

124. Katherine R. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, 90 TEXAS L. REV. 658, 658 (2012) (book review).

125. *Id.*

lawyer political morality, community lawyers should consider the "morality and practicalities"[127] of a client's or community's situation. In the already blighted situation of the West Grove, now in jeopardy of losing a vital neighborhood resource essential for public literacy, practical morality requires a democratic ethic of disobedience and resistance.[128]

In the context of low-income communities of color, democratic lawyering[129] offers race- and identity-conscious strategies of advocacy and counseling fashioned from dissenting voices traditionally outside law, legality, and legitimacy.[130] Methods of race- and identity-conscious representation, developed by the Civil Rights Movement and enlarged by critical theories of race, stand to reshape Wendel's vision of ethical lawyering. From the civil rights movement, Wendel might integrate outsider, dignity-restoring narratives and relations of empowerment to rectify the public and private humiliations of law and the legal system in Miami-Dade

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126. Stephen L. Pepper, *The Lawyer Knows More than the Law*, 90 TEXAS L. REV. 691, 706 (2012) (book review) (observing that "in Wendel's vision the overall morality and practicalities of the situation are not a necessary part of the conversation with the client").

127. *Id.*

128. *See* Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873, 878 (1998) ("Rebellious lawyering mobilizes, organizes, and empowers clients to formulate a collective response to issues poor people face. It demands cooperation and collaboration between clients, lawyers, and other lay professionals in an effort to overcome the oppression inherent in the poverty law context." (footnote omitted)); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 948 (1992) (suggesting that lawyers who represent socioeconomically and politically subordinate clients have "an obligation to empower clients that largely translates into concepts of mobilization, organization, and deprofessionalization").

129. *See* Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1386 (2009) (urging that those lawyers who work collaboratively with low-income people and people of color and their communities to push for social change should be understood as performing "democratic lawyering" because democracy is central to their aspirations, values, and methods); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 546–49 (2008) (arguing that democratic experimentalism—the dominant approach to antipoverty law over the last four decades—has had major shortcomings and should be replaced by a substantive model of antipoverty law that takes a more proactive approach to fighting poverty).

130. *See* Anthony V. Alfieri, Gideon *in White/*Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1463 (2005) (examining the work of John Hart Ely and sketching "community-centered guidelines for lawyers laboring to advance the legal, political, and economic interests of unrepresented individuals and groups"); Alfieri, *Integrating Into a Burning House*, *supra* note 5, at 601 (noting that "[n]ew directions in advocacy may come through the adoption of a flexible, race- and identity-conscious vision of community-based empowerment"); Alfieri, *Post-racialism*, *supra* note 5, at 956, 963 (proposing that in order to be effective, civil rights and poverty lawyers must understand, or *uncover*, how cultural and structural forces in low-income and minority communities interact to create collective outcomes for those living in the community, so that these lawyers can enable their clients "to engage in authentic self-elaboration, to obtain equal treatment, and to exercise the liberty of full participation in cultural and social environments"); Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 806 (2008) (arguing that effective legal change should not be measured on a case-by-case basis, but rather "by the degree to which [disadvantaged] individual clients are able to collaborate in local and national alliances to enlarge civil rights and to alleviate poverty").

County. The narratives and relations of empowerment, however complex and difficult, undergirding grassroots organization and mobilization enable lawyers to break free from traditional conceptions of the adversary role and craft function. Fundamental to that break is the incorporation of difference-based community voices and stories into the lawyering process. From critical theories of race, Wendel also might interweave the values of community participation and civic dialogue, especially between majority and minority communities. Only from dialogue will come a moral recognition of common cross-racial interests in economic justice and social solidarity, here embodied in the Virrick Park Library. In segregated communities like the West Grove, where the law and the legal system long ago failed, lawyer candor, collaboration, and race-conscious conversation best steer the normative assessment of legal–political strategies (e.g., direct-service representation, county-wide impact litigation, and legislative law reform) and the practical consideration of alternative nonlegal tactics (e.g., private fund-raising initiatives, church and school partnerships, media campaigns, public protests, and political pressure points).

Conclusion

Despite the acute conditions of poverty and racial inequality in the West Grove and in other historically segregated communities across America, Wendel admonishes lawyers, including civil rights and poverty lawyers, not to aim directly at justice and not to take account of ordinary morality in their legal–political advocacy and counseling decisions. Instead, he urges lawyers to guide their ethical decision making by the political values of democratic legitimacy and the rule of law and, moreover, to discover in the basic institutions and procedures of the legal system a natural core of morality and justice. That discovery, he contends, gives rise to a moral stance against both powerful actors and arbitrary power. From this ideal stance, according to Wendel, lawyers may justifiably engage the law and the legal system in a way that equally respects and protects all citizens independent of the corruptions of power and privilege.

For Wendel, the value of the lawyer's social role and function, and its normative significance in preserving the rule of law and in safeguarding political legitimacy, cannot be overstated. On his interior view of fidelity to law and ethical obligation, the lawyer's role and function ensures fair procedures in lawmaking and law interpreting, notwithstanding admitted procedural and substantive defects in the legitimacy of the prevailing legal system. Confronting defects in the form and content of law too vigorously, Wendel fears, threatens to reignite normative controversy, sow political disharmony, and stir social discord that is customarily and deliberately repressed by law, thereby putting individual autonomy and collective

cooperation at risk.[131] Yet, casting lawyers as quasi-public officials and binding them tightly to narrow institutional roles and craft functions marshaled in defense of client legal entitlements will not curb threats to the law rising out of minority community-based claims of ordinary morality and social justice. It will only guarantee that lawyers will once again go outside law to reclaim the spirit of disobedience and resistance found in communities like the West Grove.

131. WENDEL, *supra* note 21, at 208–11.

Fidelity to Law and the Moral Pluralism Premise

LAWYERS AND FIDELITY TO LAW. By W. Bradley Wendel. Princeton, New Jersey: Princeton University Press, 2010. 286 pages. $35.00.

Reviewed by Katherine R. Kruse*

Bradley Wendel is a pioneer on the new frontier of theoretical legal ethics. Wendel follows the lead of William Simon in breaking from the long-dominant discourse of moral theory in legal ethics and moving legal ethics toward a jurisprudence of lawyering.[1] Rather than pursuing the more traditional question of whether it is possible for good lawyers to be good persons, Wendel focuses our attention on what it means to be a good lawyer. One of the core functions of law practice is the interpretation of law. Clients seek legal advice because they want to understand what the law says and how the law constrains their choices. Because lawyers have the power to interpret and declare the law through legal advice, Wendel argues, they have a professional responsibility to interpret the law faithfully.[2] *Lawyers and Fidelity to Law* is Wendel's exploration of what it means for lawyers to fulfill this professional responsibility.

Legal ethics, Wendel once wrote, must be "'normative all the way down,' with a theory of democracy justifying a theory of the function of law, which in turn justifies a conception of the lawyer's role."[3] In *Fidelity to Law*, Wendel presents and defends such a comprehensive theory of lawyering with two interrelated arguments: a functional argument that law deserves respect because of its capacity to settle normative controversy in a morally pluralistic

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* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I would like to thank each and every contributor to this Colloquy for his or her friendship, mentorship, and intellectual companionship. You make legal ethics an exciting and rewarding field of study for me and for so many others. I owe particular thanks to Steve Pepper and Brad Wendel for comments on this Review, and to Ben Zipursky for sharing his thoughts in more than one helpful discussion about Wendel's book.

1. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 194–200 (2010). William Simon's early work was based on jurisprudential theory. *See generally* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 33–34 [hereinafter Simon, *Ideology of Advocacy*] (arguing that "to take the value of individuality seriously would require the abandonment of the Ideology of Advocacy and of legal professionalism" and that "respect for the value of law itself may require the repudiation of legal professionalism"). His break from moral theory became explicit in WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) [hereinafter SIMON, PRACTICE OF JUSTICE]. I have written more about this movement in Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493 (2011).

2. WENDEL, *supra* note 1, at 189.

3. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1176–77 (2005).

society and a normative argument that law deserves respect because democratic lawmaking processes respect the equality and dignity of citizens. This Review focuses on one of the links in the chain of Wendel's normative-all-the-way-down argument: his move from the premise of moral pluralism to his conclusion that the function of law is to settle normative controversy in society.

I question Wendel's move on both practical and theoretical grounds. Practically, it is questionable that law has the capacity to settle moral controversy—at least the deepest kind of controversy that society is unable to settle as a result of reasonable moral pluralism. And that is important, because at the deepest level of Wendel's normative-all-the-way-down argument, law's capacity to do something for us that we cannot do for ourselves is the source of the respect that we owe the law.[4] More importantly, I question whether, in a morally pluralistic society, we should *want* law to settle normative controversy. Wendel argues that we need to settle such controversies so that we can move on and organize our affairs despite our deep disagreement about values. I argue, however, that efforts to unsettle law need not be seen as a threat: the continual ebb and flow of normative controversy can be viewed as an incident of, rather than an impediment to, a free and just society.

I. Wendel's Argument from the Moral Pluralism Premise

Fidelity to Law reinterprets the traditional partisan, and morally neutral, role morality of lawyers, grounding legal ethics in both jurisprudential and political theory. True to Wendel's earlier work,[5] *Fidelity to Law* neither condones lawyers' minimal technical adherence to the law governing lawyers nor simply refers lawyers to moral values for guidance. Although in the past Wendel has argued that legal–professional values are plural,[6] he now centers his theory of legal ethics around a single overarching value: fidelity to law. Wendel reshapes lawyers' duty of partisanship around clients' *legal entitlements*—defined as "what the law, properly interpreted, actually provides" for a client[7]—rather than the zealous pursuit of a client's *legal interests*.[8] And Wendel reinterprets lawyers' traditional duty of moral

4. *See* WENDEL, *supra* note 1, at 89 ("The procedures of the legal system . . . constitute a means for living together, treating one another with respect, and cooperating toward common ends, despite moral diversity and disagreement. The values of dignity and equality therefore underwrite the claim of the legal system to have a right to the respect of citizens.").

5. *See generally* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999) (outlining an approach to the study of values in the legal profession).

6. *See id.* at 37 (stating that "a satisfying account of professional responsibility must allow for plural values"); *see also* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 116 (2000) ("[T]he foundational normative values of lawyering are substantively plural and, in many cases, incommensurable.").

7. WENDEL, *supra* note 1, at 59.

8. *Id.* at 78–79.

neutrality toward their clients' ends as respect for the authority of law even in the face of disagreement with its substantive justice.[9]

Wendel grounds legal ethics in a jurisprudence heavily influenced by H.L.A. Hart's positivism. Wendel's fidelity to law precludes gamesmanship and sharp practices that toy with the ordinary meaning of law as understood within the accepted interpretive practices of lawyers, judges, and other participants in the legal system.[10] These shared interpretive practices form what he calls the "rule[s] of recognition" within the legal profession,[11] allowing lawyers to judge some interpretations as more plausible than others.[12] Wendel also argues that fidelity to law requires lawyers to view law from an internal point of view that credits law with being "*about* something"—directed at purposes that authorize behavior as socially beneficial.[13] Law is a reason-giving domain capable of separation from morality, he argues, and lawyers exhibit fidelity to law by providing their clients with legal reasons for action.[14] As a corollary, although lawyers are free to provide moral counseling, fidelity to law precludes lawyers from inserting their moral judgments into legal representation by nullifying unjust laws covertly or by "dress[ing] up moral advice as a judgment about what the law permits."[15]

The Hartian positivism that influences Wendel's jurisprudence of lawyering is grounded even more deeply (normative all the way down) in a theory about the legitimacy of law.[16] Wendel insists that the legitimacy of law must be established on a basis that is independent of its content, defining legitimate legal systems as those that provide a basis to respect law's authority even for those who believe that the law is substantively unjust.[17] In a society characterized by reasonable moral pluralism, Wendel argues, assessments of the *substantive justice* of a law cannot provide a basis for shared judgments about the law's legitimacy because citizens will disagree about the normative criteria for measuring justice.[18] The *fairness* of the procedures by which law is enacted provides a similarly unstable basis for legitimacy, because reasonable persons in a pluralistic society will disagree about the criteria for judging procedural fairness.[19]

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9. *Id.* at 88.

10. *Id.* at 190–94.

11. *Id.* at 196–98.

12. *Id.* at 186.

13. *Id.* at 196.

14. *Id.* at 194–95.

15. *Id.* at 139.

16. *See supra* note 3 and accompanying text; *see also* Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 816 n.286 (1992) (explaining that the persuasive power of law, which stems from the "political justification" of rules, forms the crux of Hart's positivism).

17. WENDEL, *supra* note 1, at 87–88.

18. *Id.* at 88.

19. *Id.* at 102.

Although he does not separate them neatly, Wendel provides two interrelated arguments for establishing the legitimacy of law in a morally pluralistic society: a functional argument and a normative argument. Wendel's functional argument is based on the capacity of law to transform brute demands into claims of legal entitlement.[20] Law deserves respect even from those who disagree with its substantive justice, Wendel argues, because law establishes a stable framework within which citizens can coordinate their activities despite the deep, persistent, and ultimately irreconcilable normative controversy that characterizes a morally pluralistic society.[21] Borrowing from Jeremy Waldron, Wendel argues that as a morally pluralistic society we are in the "circumstances of politics," meaning that we recognize the need for a stable framework for cooperation and cannot agree on the normative basis for that framework, but we are committed to treating each other as equals and with respect.[22] Law provides a way to transcend the competing demands of underlying normative controversy and transform them into agreed-upon criteria of legality.[23] According to Wendel, this is a significant achievement: law "makes a viable and lasting community possible in the kind of society we inhabit, characterized by a diversity of religious and ethical viewpoints," because law permits us to "recognize obligations to one another, mediated through the political institutions of our society, despite substantive disagreements."[24] Because law does something for society that it cannot do for itself, Wendel argues, law has practical authority: law's settlement of normative controversy provides us with a reason to comply with law that is independent of whether the law got the resolution of the controversy right.[25]

Wendel's functional argument is underwritten by a normative argument that law is entitled to respect because the democratic lawmaking processes through which it is enacted respect the equality and dignity of citizens.[26] There are ways to settle normative controversy in society that are not normatively attractive, Wendel points out, such as installing a dictator.[27] Settlement of normative controversy through the use of force might compel compliance with law, but it would not provide citizens with a reason to respect the authority of law. There are also ways to settle a controversy that are random, like flipping a coin, or corrupt, like taking a bribe.[28] In Wendel's view, random or corrupt processes would not garner the necessary respect for the authority of law, because the settlement they would provide would not be based on a balancing of the underlying reasons. To garner

20. *Id.* at 89.
21. *Id.* at 97.
22. *Id.* at 90.
23. *Id.* at 91.
24. *Id.* at 97.
25. *Id.* at 107–13.
26. *Id.* at 89.
27. *Id.* at 98.
28. *Id.* at 111.

respect, law must be the product of processes that meet what Wendel calls the moral constraint of equality by using fair procedures that are reasonably responsive to citizen demands for participation.[29] Law gains its legitimacy, in Wendel's view, when it is decided according to processes "adequately . . . responsive to citizen demands for participation."[30]

There is a tension between Wendel's functional and normative arguments for respecting the authority of law. Without the normative argument to back it up, the functional argument devolves into nothing more than force backed by sanctions, failing to provide a basis for viewing law from Hart's "internal point of view" as an independent source of guidance for societal behavior.[31] However, if the normative argument sets too high of a standard for procedural fairness and participation, the functional capacity of law to settle normative controversy begins to unravel into second-order controversies over contested notions of fairness in society.[32] Wendel resolves the tension in favor of finality.[33] Wendel sets a relatively low threshold for fairness,[34] requiring fidelity to law as long as laws are enacted according to "tolerably fair" procedures that reflect "rough equality" among citizens.[35] To demand more, Wendel argues, would deprive law of the capacity "to settle conflict and establish a provisional basis for coordinated action."[36]

As a result of this low threshold, Wendel's functional argument ends up doing most of the work in his theory of legal ethics. The functional argument provides an independent reason to respect the authority of law: because normative controversy is really difficult to settle in a morally pluralistic society and law's capacity to transform competing normative demands into agreed-upon criteria of legality is an achievement worthy of respect. And, the functional argument plays a significant limiting role with respect to a purely normative argument that law deserves respect because (and only to the extent that) it is enacted according to a fair and inclusive lawmaking process.[37] Because citizens can be counted on to disagree about the fairness of legal process, the functional need to settle normative controversy requires that the standards of fair processes remain exceedingly lax.

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29. *Id.* at 91.

30. *Id.*

31. *See id.* at 102 (explaining that setting the bar of legitimacy—which is discussed in the normative argument—too low risks allowing an authoritative regime).

32. *Id.* at 101–02.

33. *Id.*

34. *Id.* at 102.

35. *Id.* (emphasis omitted).

36. *Id.*

37. *See id.* at 101–02 (asserting that while the normative requirement of fairness is an important aspect of legitimacy, the functional requirement of finality must predominate in order to avoid political gridlock).

II. What Follows from the Moral-Pluralism Premise?

It would be possible to take issue with Wendel on the moral-pluralism premise itself and to argue that society is much more normatively cohesive than Wendel paints it to be. As a fellow traveler in addressing the challenges of moral pluralism for legal ethics, I do not take that tack.[38] Instead, I raise two problems with Wendel's claim about what follows from the moral-pluralism premise: (1) whether, as a practical matter, law has the capacity to settle the kinds of deep, intractable moral controversies posed by the moral-pluralism premise, and (2) whether, as a theoretical matter, we should want law to play this settlement function.

A. The Moral-Pluralism Premise

The moral-pluralism premise is, at its essence, a claim that there can be, and is, a plurality of reasonable moral viewpoints in society.[39] In a morally pluralistic society, people disagree about moral judgments based on competing comprehensive conceptions of morality drawn from a variety of philosophical and religious sources, none of which can be objectively deemed "right" or "wrong" from a standpoint outside its own theoretical framework. The claim of reasonable moral pluralism is not simply that moral disagreement exists in society but that moral disagreement is reasonable and predictable. As John Rawls put it, a plurality of moral and religious views is "the natural outcome of . . . human reason under enduring free institutions" and a permanent feature of modern democratic societies.[40]

Because of its general application, law declares societal norms that apply across competing moral viewpoints and attaches sanctions to disobedience of those norms. Yet, to be effective in creating societal repose, these declarations must be accepted as legitimate. When enacted into law, societal norms become ensconced in specific language, which opens up space for technical manipulation of law's language. The sanctions attached to disobedience of law similarly open up space for citizens to skirt legal sanctions with the attitude of a classic Holmesian bad man "who cares only for the material consequences which . . . knowledge [of the law] enables him to predict."[41] Because of this interpretive and enforcement "play" within the law, any settlement of normative controversy in law will be continually

38. *See* Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 396–402 (2005) (comparing and contrasting different theories on the sources of moral pluralism but embracing moral pluralism as a whole).

39. WENDEL, *supra* note 1, at 88.

40. JOHN RAWLS, POLITICAL LIBERALISM, at xxiv (2005).

41. Oliver Wendell Holmes, Jr., Justice, Supreme Judicial Court of Mass., The Path of the Law, Address at the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 459 (1897).

undermined by interpretive games and covert disobedience by citizens whose strongly held moral beliefs run counter to law's settlement.[42]

If settlement of normative controversy is the aim and function of law, then Wendel's criterion of legitimacy—that law must be capable of deciding normative controversy in a way that satisfies those who believe that it has been decided incorrectly—is the correct standard to apply. To garner a level of respect for law's authority that rules out those kinds of maneuvers, law must do more than merely declare a victor in a societal battle of normative wills. Law must provide a reason for respect that is strong enough to trump the moral reasons to avoid law's reach that inevitably will be held by citizens who believe that the law has been wrongly decided.

B. Can Law Settle Normative Controversy in a Morally Pluralistic Society?

Wendel's description of the way law settles normative controversy can be seen as an allegory whose narrative structure casts deep and persistent normative controversy as *trouble* and law as *the hero*, rescuing society from discord.[43] In this narrative, society is unable to reason its way out of deep and intractable normative controversy but nevertheless needs to settle normative controversy so that it can move on in relative peace and harmony. To solve this problem, society submits a matter to the legal process, which transforms the dispute into settled law about which society can agree. Wendel's functional argument in a nutshell is that we should respect the law, despite our moral disagreement with its content, because law does for us something that we cannot do for ourselves: law rescues us from moral pluralism.[44]

In this subpart, I argue that Wendel's allegorical narrative about the way law settles normative controversy is not fully accurate. Although law plays a role in the complex interaction between legal and social norms that characterize both microdecisions about compliance with law in an area of normative contest and on the larger stage of law and social movements, the translation of normative controversy into legal language does not fulfill the settlement role on which Wendel's functional argument rests. If law lacks the capacity to settle deep and persistent normative controversy in society, then Wendel's functional argument for the legitimacy of law falls away. If it

42. *See* SIMON, PRACTICE OF JUSTICE, *supra* note 1, at 37–41 (identifying interpretation and enforcement as the most important problems with the "Positivist premise" of legal norms); Simon, *Ideology of Advocacy*, *supra* note 1, at 44–46 (explaining that citizens use their "procedural discretion to thwart the enforcement of the substantive rules . . . in accordance with their individual ends").

43. This is an implicit reference to the work on narrative structure by Anthony Amsterdam and Jerome Bruner. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 158–59 (2000) (describing two Supreme Court decisions on race-based controversies as "avert[ing] . . . catastrophes" and comparing the Court's role to that of the ancient Greek hero Menelaus).

44. *See* WENDEL, *supra* note 1, at 9 ("[T]he function of the law is to provide a reasoned settlement of empirical uncertainty and normative controversy, and a basis for cooperative activity . . . .").

turns out that law is a non-autonomous realm in which deep and persistent normative controversy continues to be contested even when translated into legal terms, then we have no special reason to respect the provisional settlements of positive law—legislative acts, judicial decisions, and constitutional amendments—simply because they are law.

Although I take issue with Wendel's claim that law has the capacity to settle deep and persistent normative controversy in society, I separate that from the related claim that law creates a framework that permits us to coordinate productive societal activity.[45] In my view, the latter claim—that law has the capacity to coordinate productive societal activity—paints a largely accurate picture of the function of law. Law tells us on which side of the road to drive and on what day to pay our taxes. Law provides structures for administrative regulation of the environment, workplace health and safety, transportation systems, financial markets, and many other activities where private activity affects the public good. Law provides rules for establishing property rights in everything from land to intellectual property. Law provides avenues of private redress to compensate persons who have been injured by the negligent actions of others. Law creates standards and procedures for entering and becoming a citizen of the country. In these ways and many others, law functions to order our affairs and enable us to live together in a large and complex society.

It is also accurate, in my view, to say that normative judgments are woven into the fabric of legal standards and procedures. These normative judgments can be understood to fall on a continuum from uncontroversial to hotly contested. Some normative judgments—like the very idea that property can and should be owned—are open to possible moral criticism but are so deeply embedded in our societal norms that they are rarely questioned. Other normative judgments embedded in the law—like the idea that animals can be owned as property or that the government has the right to levy taxes—enjoy generalized societal acceptance with pockets of resistance by fringe or countercultural groups.[46] Still other normative judgments—like the idea that marriage should be limited to unions between a man and a woman or (alternatively) should be extended to same-sex couples—are the subject of broad and divisive moral controversy.[47]

Where I depart from Wendel is in the central claim of his functional argument that law has the capacity to settle a hotly contested controversy

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45. *See supra* note 21 and accompanying text.

46. *See, e.g.*, IRWIN SCHIFF, THE FEDERAL MAFIA: HOW IT ILLEGALLY IMPOSES AND UNLAWFULLY COLLECTS INCOME TAXES 11 (2d ed. 1992) (arguing that paying income tax is "strictly voluntary" because a compulsory income tax would be unconstitutional); Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. ANIMAL L. 41, 58 (2008) (concluding that the American legal system should not classify animals as property because "animals are sentient creatures capable of experiencing great pain").

47. *See infra* notes 56–71 and accompanying text.

over societal norms.[48] With respect to the deeply divisive moral issues in society, it is more plausible to say that law provides a medium through which normative controversy can be (and continues to be) contested. As scholars who study law and society acknowledge, the interaction between legal and social norms is complex. At the micro level of framing and settling disputes, law often plays a peripheral role compared to more dominant social norms.[49] Although the law provides the contours within which private ordering occurs, as exemplified by Mnookin and Kornhauser's famous metaphor of dispute resolution "in the shadow of the law,"[50] these contours are indistinct,[51] and they expand or contract as law interacts with social norms in low-level-legal and extralegal decision making.[52] A similarly complex interplay of legal and social norms occurs at the macro level.[53] As scholars who study legal reform and social movements relate, law absorbs and reflects underlying normative controversy through cycles of backlash, co-optation, and bureaucratic resistance to contested legislative enactments and judicial rulings.[54] Submitting a normative controversy to the legal process can frame and transform the terms of the underlying normative controversy, and the legal process can mobilize collective action.[55] But law does not in any real sense "settle" the controversy.

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48. *See supra* note 25 and accompanying text.

49. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4 (1991) (contending that neighbors develop and enforce adaptive norms of neighborliness that trump formal legal entitlements); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 117 (1979) (arguing that "the politics of bargaining" often has a more significant influence on professional practice than legal norms).

50. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (providing a framework for considering how courtroom rules and procedures affect bargaining that occurs outside the courtroom).

51. Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 395 ("Americans bargain in the shadow of the law, but shadows are usually distortions of the object between the sun and the ground.").

52. For a summary of literature on this subject, see Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565, 565–71 (1992). Some scholars of law and society go so far as to characterize systems of private ordering as a form of law and to describe the interaction among systems of ordering as a "legal pluralism." *See, e.g.*, Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 889–90 (1988) (concluding that legal pluralism, including "sociolegal phenomena," moves away from the ideology of legal centralism and suggests attention to other forms of ordering and their interaction with state law).

53. *See generally* CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006) (describing the social movements that have been created by lawyers performing work in specific areas of concern); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (examining several attempts that have been made to use the legal system to affect social change).

54. For a summary of this literature, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

55. *See, e.g.*, Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 604 (2009) (describing the use of litigation to facilitate social change as "an imperfect but indispensable strategy").

The current moral and legal controversy over same-sex marriage in the United States illustrates the dynamic influences that evade settlement of normative controversy through law. The earliest same-sex marriage cases were litigated in the mid-1970s, when four state courts rejected legal challenges to marriage laws brought by same-sex couples.[56] Those cases were brought in the early days of the post-Stonewall-riots gay rights movement when societal attitudes condemning homosexuality had not yet been significantly unsettled,[57] and the idea that marriage was limited to unions between a man and a woman was so widely shared as to be virtually unquestionable.[58] Needless to say, the plaintiffs in those cases resoundingly lost their legal claims and, in some cases, suffered other forms of discriminatory treatment as a result of their activism.[59]

However, by the time same-sex marriage resurfaced as a legal issue in the 1990s, societal norms about homosexuality were in greater flux, and the same-sex marriage issue was met with a dizzying sequence of legal successes and failures for both pro- and anti-same-sex-marriage advocacy groups.[60] Courts in some states recognized the right to marry,[61] setting off a backlash of federal and state "defense-of-marriage" acts to legislatively prevent the

56. Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 53, at 84, 84.

57. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423–24 (1993) (observing that gay rights issues were "suppressed or ignored" before the Stonewall riots, and that even after the riots, activists struggled for over twenty years to secure "some of the same benefits regularly bestowed upon different-sex couples").

58. *Id.* at 1427–29 (asserting that early court opinions rejecting arguments in favor of a right to gay marriage relied on the ground that same-sex marriage did not fit within the societal definition of marriage).

59. John Singer, the plaintiff in a 1974 Washington state case, was fired from a federal civil-service position for his activism. Barclay & Fisher, *supra* note 56, at 89. Jay Baker, a student activist who litigated a 1971 same-sex marriage case came under scrutiny in his application to the Minnesota Bar for filing marriage documents and for being openly gay. *Id.* at 89–90.

60. *See generally* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (arguing against the thesis that same-sex-marriage litigation undercuts the ends pursued by the gay rights movement); Eskridge, *supra* note 57 (recounting the history of same-sex marriage); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006) (discussing the ambiguous results of legal efforts to effect social change regarding perceptions of homosexuality). The continually unfolding history of the gay-marriage debate is catalogued online on *Wikipedia*. Wikipedia, *Same-Sex Marriage in the United States*, http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States (last modified Nov. 7, 2011).

61. *See In re* Marriage Cases, 183 P.3d 384, 409, 453 (Cal. 2008) (holding that a family code provision stating that "only marriage between a man and a woman is valid or recognized in California" is unconstitutional); Baehr v. Lewin, 852 P.2d 44, 55, 67 (Haw. 1993) (recognizing the right to marry and holding that a law that, on its face, discriminates based on sex against the applicant–couples in the exercise of the civil right of marriage implicates the equal protection clause of the Hawaiian constitution and requires a court to apply a strict scrutiny test); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("[B]arring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

recognition of same-sex marriages from other states.[62] Anti-same-sex-marriage activists mobilized to pass legislation and constitutional amendments to limit marriage to unions between a man and a woman, sometimes accompanied by the creation of special legal status for "domestic partners,"[63] which were in turn held to violate some state constitutions.[64] Rather than settling the normative controversy over homosexuality and gay marriage, law became an arena in which the controversy over gay marriage was, and continues to be, contested.[65]

Although it is problematic to say that law has "settled" the underlying normative controversy over same-sex marriage in the United States, it is equally problematic to contend that law has played no role. As in many social movements, the legal process has shaped and arguably transformed the debate. For example, the earliest judicial cases in the 1970s "settled" the law decisively against same-sex marriage for another twenty years.[66] Yet, widening the lens to consider the role those lawsuits played within the larger gay rights social movement, the very act of litigating the cases was arguably an important "claiming" of the idea of same-sex marriage, appropriating it from Equal Rights Amendment opponents—who were presenting the idea of gay marriage as part of the parade of horribles likely to result from passing a constitutional amendment against sex discrimination[67]—and transforming the idea of same-sex marriage "from the ridiculous to the possible."[68] As the ensuing same-sex-marriage debate continues, the language of law continues to provide ways to formulate and package the issues in the debate. Around the same time the early same-sex-marriage cases were being decided, William Rehnquist analogized homosexuality to a public health concern, saying that the question of whether gay student groups should be able to organize on campus was "akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles."[69] More

62. Schacter, *supra* note 60, at 869.

63. Cummings & NeJaime, *supra* note 60, at 1250; Schacter, *supra* note 60, at 869–70.

64. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (holding that a statute banning same-sex marriage but providing for civil unions failed intermediate scrutiny under the state constitution); Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (holding a marriage statute that provides unequal rights to same-sex couples unconstitutional under the state constitution).

65. The latest big event was the passage of legislation permitting same-sex marriage in New York. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, *available at* http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.

66. *See* Eskridge, *supra* note 57, at 1427 n.17 (chronicling a number of the judicial decisions rejecting the same-sex marriage argument from 1971 to 1993). When the first modern gay-marriage case was brought in Hawaii, social-movement lawyers advised against it, thinking that the time was not yet right to mount a legal challenge. Cummings & NeJaime, *supra* note 60, at 1250.

67. Barclay & Fisher, *supra* note 56, at 86–87, 90–91.

68. *Id.* at 91.

69. Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting).

recently—and controversially—gay-marriage proponents have analogized state prohibitions on same-sex marriage to miscegenation laws, drawing on both civil rights history and the language of civil rights.[70] Equally controversially, gay-marriage opponents have analogized same-sex marriage restrictions to laws prohibiting bigamy, drawing on the history of state protection of marriage against First Amendment claims arising out of religious pluralism.[71]

Wendel recognizes the possibility of law to "transform brute demands into claims of [legal] entitlement[s]" and sees in it law's potential to settle normative controversy: by translating normative controversy into legal terms, we are able to deliberate about it as a society rather than simply "expressing bare desires, like a toddler throwing a tantrum."[72] What Wendel overlooks in this argument is that normative debate already transcends tantrum throwing and provides ways to frame disagreement with reference to reason and the public good. In a morally pluralistic society, the normative claims under dispute are not the expressions of "brute demands" but are appeals to deeply and sincerely held beliefs about the right and the good. Although translating these controversies into legal terms calls in additional resources by invoking the language of law and the precedential histories that attach to it, the deep and persistent underlying normative controversies do not suddenly become more agreeable through this transformation.

C. Should Law Settle Normative Controversy in a Morally Pluralistic Society?

In the previous subpart, I took issue with Wendel's normative-all-the-way-down argument at its deepest level, in which he grounds the lawyer's role in society in a conception of the function of law to settle normative controversy. As we climb back up the normative ladder to examine the role of lawyers in society, what is most at stake is the legitimacy of lawyers' professional activities advising and assisting clients in the "shadow of the law."[73] Wendel is sensitive to the need for openness in the political process, emphasizing that law should be seen as establishing "only a *provisional*

70. *See* Eskridge, *supra* note 57, at 1423–34 (describing the pro- and anti-gay marriage arguments based on liberal legal theory). *See generally* Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781 (discussing the parallels between civil rights history and current gay rights issues).

71. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (arguing that the constitutionality of both state laws prohibiting same-sex marriage and state laws prohibiting bigamy could be called into question based on the majority's ruling that a state law criminalizing homosexual conduct was unconstitutional). In 1879, the United States Supreme Court upheld a criminal statute prohibiting bigamy in the Territory of Utah against the religious objection of a member of the Church of Jesus Christ of Latter-Day Saints (Mormon Church) who challenged the constitutionality of the law and its application to him on First Amendment grounds. Reynolds v. United States, 98 U.S. 145, 161–67 (1879).

72. WENDEL, *supra* note 1, at 114–15.

73. *See supra* note 50 and accompanying text.

settlement" that "creates a structure or a framework of moderate stability" within which "disagreement remains possible."[74] And he endorses resistance to the existing provisional settlement that law provides through "legally established means"[75] and even through public and symbolic campaigns of lawbreaking aimed at persuading the community of the injustice of settled law.[76] What fidelity to settled law rules out is covert nullification or subversion of legal norms to meet selfish and private ends,[77] and acts of civil disobedience that "destabiliz[e] the common framework of legal entitlements," even when pursued out of a belief that the law is unjust.[78]

Others argue that the law retains an open and evolving character, not only through formal legal challenge and acts of principled civil disobedience but also through the intentional flouting of law by acquisitive and self-interested lawbreakers.[79] And we can see something approaching this in the same-sex marriage debate, where private action in contravention of settled law has been at work steadily under the radar of the formal legal challenges, as same-sex couples have gone quietly about the task of forming alternative families, using legal standards originally designed for guardianship and adoption of at-risk children.[80] The democratic legitimacy of judicial interpretations that stretch or skirt statutory language to approve second-parent adoption is questionable but can be defended by appealing to "thicker democratic values" that view enacted law as only one of the pieces in a larger and more dynamic account of democratic legitimacy.[81] These thicker democratic values would also endorse the quiet individual relief that same-sex couples have gained against settled law in uncontested trial-court adoption cases. Under this thicker view of democratic legitimacy, the quiet stretching, or (more radically) flouting, of the law to create new social forms of family or property ownership is an important way of opening up society to a plurality of life forms and choices, to which the law is then able to respond.[82]

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74. WENDEL, *supra* note 1, at 129.

75. *Id.*

76. *Id.* at 124–25.

77. *Id.* at 131–35.

78. *Id.* at 124–25.

79. *See, e.g.*, Eduardo Moisés Peñalver & Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1106 (2007) (describing settlers in the nineteenth-century American West as flouting established property laws to set up "communities governed by their own conception of just, albeit self-serving, property relations" and noting that while this was initially condemned, "the law slowly but surely adapted itself to the reality the settlers had created on the ground").

80. *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (discussing different ways courts may address the legal challenges posed by an increasing number of same-sex couples with children); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000) (discussing different courts' use of statutory interpretation to stretch existing adoption-law statutes to meet the legal challenges posed by same-sex adoptions).

81. Schacter, *supra* note 80, at 947–49.

82. Peñalver & Katyal, *supra* note 79, at 1098; Schacter, *supra* note 80, at 947–49.

Wendel's ideals for the democratic values of procedural fairness and participation are by contrast admittedly thin and focused on majoritarian legislative decision making. He accepts as legitimate any decisions made through legal processes that are "adequately (not ideally) responsive to citizen demands for participation."[83] Laws are legitimate, he argues, even if they are skewed by differentials in wealth and power[84] and reinforced by structural inequality and discrimination in education, housing, and employment;[85] even if lawmaking processes are distorted by political maneuvering that avoids "respectful consideration of competing points of view."[86] And, Wendel's theory of legitimacy requires citizens to tolerate "localized injustice" toward the targets of irrational majoritarian bias.[87] The legal process does the best it can to take "opposing viewpoints as seriously as possible," Wendel argues, but "[a]t some point the majority is entitled to say, 'we have heard enough,' and move on."[88]

Wendel accepts this thin procedural account of legitimacy because he concludes that in a morally pluralistic society, "it likely is the best we can do."[89] Insisting on too idealized of a conception of fair process, he argues, will leave "no way for a society to use the legal system to bootstrap itself out" of deep and persistent moral controversy.[90] But if the legal system is largely ineffective in bootstrapping society out of deep and persistent moral controversy, this concern falls away, opening the way for a thicker and more robust conception of procedural fairness and the legitimacy of legal process to emerge.

The loss of faith in law's capacity to settle normative controversy may seem to be a jurisprudential nightmare of society mired in ever-spiraling normative controversy without any authoritative way out of the quagmire of moral pluralism. Yet the flipside of law's failure to settle normative controversy is law's capacity to open space within the law for a plurality of moral viewpoints to thrive. This, I would argue, is not a jurisprudential nightmare, but the "Noble Dream"[91] of a flexible and responsive legal system. The idea

83. WENDEL, *supra* note 1, at 91.

84. *Id.*

85. *See id.* (arguing that laws are legitimate in America, even though "the ability of many citizens to participate in the political process is limited by . . . differentials in wealth and power . . . reinforced by structural features such as inequality in primary and secondary education" as well as persistent discrimination against women and minorities).

86. *Id.* at 100.

87. *Id.* at 103.

88. *Id.* at 101.

89. *Id.* at 91.

90. *Id.* at 102.

91. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 978 (1977) (describing the "Noble Dream" as litigants' belief that a judge will "apply to their cases existing law and not make new law for them" even if precedent and black-letter law are ambiguous). David Luban has appropriated Hart's metaphor to describe a jurisprudence of lawyering. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 131–32 (2007).

that society should aim for flexibility and openness in the face of moral pluralism rather than seek the settlement of moral controversy finds support within much of liberal political theory. When Mill, for example, writes about the need for protection against the "tyranny of the majority," he means not only the tyranny of majority opinion enacted into law, but a broader "tyranny of the prevailing opinion and feeling" and "tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways."[92] Isaiah Berlin, rejecting the idea that "a total harmony of true values is somewhere to be found,"[93] argued that the "precondition for decent societies" was to minimize the inevitable social and political collisions of a pluralistic society "by promoting and preserving an uneasy equilibrium, which is constantly threatened and in constant need of repair."[94] Societal order and stability are important values according to these political philosophers, but so are openness, flexibility, and progress.[95] And in their view, the existence of normative controversy is not nearly as troublesome as society's attempts to settle it.

In such a thicker conception, lawyers' fidelity to law need not be confined to respecting the authority of law settled according to thin procedural standards of adequate fairness. Legitimate legal process would extend beyond majoritarian lawmaking to include the complex interplay created between private compliance with (or deviance from) law and public lawmaking. Rather than being arbiters of law's legitimacy, the role of lawyers would be defined by their participation in the legal process of legitimizing or destabilizing law based on the clients' case-by-case judgments about law's legitimacy—whether law was deserving of their respect and compliance. And the professional responsibilities of lawyers would spring from their facilitative role as intermediaries between their clients and the law, requiring lawyers to make law accessible enough to assist clients in informed decision making about the legitimacy of marginal compliance or noncompliance.

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92. JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 5, 8–9 (John Gray ed., 1991).

93. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY 166, 213 (Henry Hardy ed., 2002).

94. ISAIAH BERLIN, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1, 19 (Henry Hardy ed., 1990); *see also* ISAIAH BERLIN, *The Decline of Utopian Ideas in the West*, *in* THE CROOKED TIMBER OF HUMANITY, *supra*, at 20, 47 ("[T]he best that one can do [in the face of moral pluralism] is to try to promote some kind of equilibrium, necessarily unstable, between the different aspirations of differing groups of human beings . . . .").

95. For example, Mill argued that order and progress were both necessary to good government but that order was included within progress, "not [as] an additional end to be reconciled with Progress, but a part and means of Progress itself." JOHN STUART MILL, *Considerations on Representative Government*, *in* ON LIBERTY AND OTHER ESSAYS, *supra* note 92, at 203, 223.

Conclusion

Bradley Wendel's *Lawyers and Fidelity to Law* is a remarkable step and a valuable contribution to the jurisprudence of lawyering that is emerging in the field of theoretical legal ethics. Although I disagree with him in the details of the jurisprudence of lawyering that he has developed, I do so largely within the contours of a debate that he has been instrumental in defining. Wendel's insistence that lawyers are quasi-political actors, his vision of legal ethics as normative all the way down, and his sensitivity to the challenges of moral pluralism set important parameters for the continuing debate. After *Lawyers and Fidelity to Law*, legal ethics will never be the same.

Misplaced Fidelity

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Reviewed by David Luban*

I. Introduction: Situating *Lawyers and Fidelity to Law*

The contemporary subject of theoretical legal ethics began with a handful of papers in the 1970s and early 1980s, mostly by moral philosophers troubled by the apparent dissonance between impartial morality and the one-sided partisanship of the lawyer's role.[1] The so-called standard conception of the lawyer's role, captured in the mantra of zealous advocacy, combines three elements: partisanship, neutrality, and nonaccountability.[2] Partisanship requires lawyers to pursue lawful client ends by any lawful means necessary, regardless of the morality of the ends or the damage the means might inflict on the innocent.[3] Neutrality means that lawyers must not exercise moral judgment over their clients' lawful ends or the lawful means

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1. *E.g.*, ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980); THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983) [hereinafter THE GOOD LAWYER]; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer–Client Relation*, 85 YALE L.J. 1060 (1976); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); William H. Simon, Commentary, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). Simon's article focused less on moral philosophy than on jurisprudence, and in subsequent works it became clear that Simon's own questions and answers differ significantly from those of the moral philosophers. *See* David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 879–85 (1999) (describing and analyzing the shift in Simon's position between *The Ideology of Advocacy* and his 1998 book, *The Practice of Justice: A Theory of Lawyers' Ethics*); Simon, *supra*, at 32 (establishing that the article analyzes various jurisprudential doctrines).

2. The term *standard conception* originated, I believe, in Postema, *supra* note 1, at 73. More or less simultaneously, Simon and Postema identified the three components of the standard conception. *Id.*; Simon, *supra* note 1, at 36–37. Murray L. Schwartz also identified two of the three components—partisanship and nonaccountability. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 671 (1978). In a well-known paper, Ted Schneyer denied that there is anything standard about the conception and complained that it amounted to moral philosophy's standard *mis*conception of legal ethics. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1569. I continue to think that the conception is standard. *See generally* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 393–403 (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE] (responding to Schneyer). But to avoid begging questions, I now prefer the more descriptive term *neutral partisanship* in place of *standard conception*. I will stick with Postema's label here because it is the one Wendel uses.

3. Postema, *supra* note 1, at 73.

used to pursue them.[4] And lawyers cannot be held morally accountable for acting on their clients' behalf.[5] The central question raised by the standard conception is why lawyers get a free pass from morality in a pastime that is far from victimless. As Richard Wasserstrom and Gerald Postema observed, the lawyer does her work through speech and persuasion.[6] Her moral faculties are fully engaged in a way that seems uniquely hard to square with nonaccountability.[7]

The general issue animating most of this work is the problem of role morality: how can it be that her professional role might require a lawyer to do things that would be morally forbidden to a nonlawyer? Charles Fried asked, "Can a good lawyer be a good person?"[8] And Wasserstrom wondered whether "the lawyer–client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral."[9] To the response that the adversary system requires lawyers to play a partisan role, philosophers scrutinized the "adversary system excuse" and found it wanting.[10] Others defended both the standard conception and the adversary system.[11] The critics were less concrete in identifying alternatives to what Wasserstrom called the "simplified moral world" of the standard conception.[12] Postema reconceived the lawyer's role as a "recourse role," meaning that it has built into it the recourse of breaking role when morality requires it.[13] Wasserstrom and Simon called for deprofessionalization (although Simon eventually developed a different approach).[14] My own position replaces the standard conception with a stance that I labeled "moral

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4. *Id.*

5. *Id.*

6. *Id.*

7. Postema, *supra* note 1, at 76; Wasserstrom, *supra* note 1, at 14.

8. Fried, *supra* note 1, at 1060.

9. Wasserstrom, *supra* note 1, at 1.

10. *See, e.g.*, David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER, *supra* note 1, at 83, 83–118 (coining the expression *adversary system excuse* and explaining why the excuse is insufficient); Simon, *supra* note 1, at 130–44 (decrying the adversary system excuse as inadequate); *see also* DAVID LUBAN, *The Adversary System Excuse*, *in* LEGAL ETHICS AND HUMAN DIGNITY 19, 19–64 (2007) (revising Luban's 1983 essay).

11. *See, e.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9, 12 (1975) (championing the adversary system as protective of individuals' fundamental rights and emphasizing the importance of partisanship and neutrality); STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984) (advocating for the adversary system).

12. Wasserstrom, *supra* note 1, at 2.

13. Postema, *supra* note 1, at 81–83 (attributing the recourse-role concept to MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 31–36 (1973)).

14. *See* Simon, *supra* note 1, at 130–44 (positing that personal ethics and respect for clients should guide lawyers' conduct); Wasserstrom, *supra* note 1, at 21–23 (proposing that lawyers should strive to do what is best for their clients as humans, not to simply exercise their own legal competency most effectively). Simon's later approach calls for contextual analysis and the pursuit of legal justice. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9 (1998).

activism," in which lawyers must act as they would if the adversary system excuse was unavailable to them.[15]

Obviously, these writers were not the first to question the lawyer's role in a philosophical spirit. Arguably, the critique goes back as far as Plato's *Gorgias* and *Theaetetus*,[16] and in the twentieth century, Lon Fuller raised similar questions and provided a sophisticated defense of the adversary system excuse.[17] But the burst of activity in the 1970s and 1980s revived legal ethics as a serious theoretical subject after a long hiatus.

Since the turn of the millennium, philosophical legal ethics has taken a new turn, with energetic, sophisticated writers who reject the earlier critiques of the standard conception and the focus on role morality in favor of different questions and answers. These authors include Tim Dare, Kate Kruse, Daniel Markovits, and Norman Spaulding.[18] Among the most prominent and productive of this new wave of ethics theoreticians is W. Bradley Wendel,

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15. *See* DAVID LUBAN, *Introduction*, *in* LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 10, at 1, 11–12 (declaring that lawyers cannot avoid moral accountability and, thus, should accept moral responsibility for their practice of law).

16. PLATO, GORGIAS *465c; PLATO, THEAETETUS *172e–173b.

17. *See* Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 35, 45 (Harold J. Berman ed., 1972) (arguing that an adversarial presentation of a controversy may be "the most effective means we have of combating the evils of bureaucracy"); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–62 (1958) (offering an analysis of lawyers' responsibilities within the adversary system, including those of advocate and counselor, designer of a framework of collaborative effort, and public servant). For further discussion, see David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801, 819–28 (1998).

18. *See, e.g.*, TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (2009) (providing a contemporary argument in defense of the standard conception); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 2 (2008) (arguing in part that an alternative approach to legal ethics based partly on "distinctively lawyerly virtue" can render lawyers' lives ethically appealing); Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 129–44 (2010) (proposing a model for lawyer ethics that looks beyond zealous advocacy to how partisanship can most effectively operate when working with "three-dimensional clients"); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 391–93 (2005) [hereinafter Kruse, *Challenge of Moral Pluralism*] (asserting that situations where a lawyer fundamentally morally disagrees with his client should be addressed under a moral conflict-of-interest analysis); Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 496 (2011) (suggesting that jurisprudential theories in legal ethics serve as an "attractive alternative" to moral theories); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1938–41 (2008) (criticizing moral-activist lawyers for romantic individualism); Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6–7 (2003) [hereinafter Spaulding, *Reinterpreting Professional Identity*] (arguing that the lawyer's role is founded in notions of service to the client, regardless of the client's personal, moral, or ideological inclinations, rather than identification with the client); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1377–78 (2008) (arguing that certain situations where lawyers violate human dignity and morality stem *not* from an adherence to traditional notions of professional responsibility within the adversary system, but rather from deviations from such notions).

whose many distinguished articles have culminated in the much-anticipated book that is the subject of this Colloquy.[19]

II. Pluralism and Political Morality

Writers in the new wave differ significantly from each other, but it seems to me that their writing shares two main themes, both of which figure prominently in Wendel's work. First is an abiding concern with moral pluralism—the fact that reasonable people can disagree in their moral views even about fundamental matters.[20] Moral pluralism is not simply a regrettable by-product of human difference and contentiousness. For Wendel, value is itself plural.[21]

Given the central fact of value pluralism, the new-wave writers are troubled at proposals for lawyers to, in effect, impose their own moral views on their clients by withholding services on moral grounds.[22] Viewed in this light, moral activism looks more like moral imperialism, and the lawyer who refuses to advance a client's ends on moral grounds is guilty of, at the very least, self-righteousness. But that is not all. "Legality," Wendel reminds us, "is important because it enables people to live together in a relatively peaceful stable society, despite deep and persistent disagreement about moral ideals, values, and conceptions of the good life."[23] So a lawyer who, on grounds of conscience, refuses to press a client's legal entitlements is sabotaging the very mechanism that allows us to manage value conflicts without falling into a war of all against all. The moral activist is not merely self-righteous. She is reckless and irresponsible toward a political settlement that we all need.

This takes us to the second theme that Wendel and the other new-wave writers press. They criticize moral philosophers for neglecting the political dimension of law practice—the fact that a legal system is a political institution that serves indispensable political ends.[24] Here, the argument is that framing legal ethics as a purely moral issue (the problem of role morality) fundamentally misunderstands the subject. The lawyer's obligations are political obligations, not moral ones, and the philosophical disciplines for addressing them are political philosophy and jurisprudence, not moral philosophy. As Wendel puts it, "legal ethics is part of a freestanding political

19. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

20. *See* Kruse, *Challenge of Moral Pluralism*, *supra* note 18, at 391 ("Moral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be 'right' or 'wrong' from a standpoint outside of its own theoretical framework.").

21. WENDEL, *supra* note 19, at 5, 214 n.12 (explaining that ethical values are diverse and not capable of being reduced to one "master-value" that sets forth what constitutes an ethical existence).

22. *E.g.*, Spaulding, *Reinterpreting Professional Identity*, *supra* note 18, at 51–53.

23. WENDEL, *supra* note 19, at 36.

24. *See id.* at 91 (emphasizing that laws are a product of "political institutions" and therefore are only legitimate if enacted according to "fair procedures").

morality," and he therefore doubts that "the toolkit of moral concepts that should be brought to bear on the analysis is the same toolkit used elsewhere in moral philosophy."[25]

For Wendel, the most important concept in the revised toolkit is political obligation in the form of *fidelity to law*.[26] Unlike the standard conception, Wendel believes that lawyers are morally accountable—but their accountability runs to the law, not to individuals.[27] Furthermore, unlike the standard conception, lawyers' loyalty consists in fidelity to law, not to client interests.[28] At the same time, Wendel and the other new-wave writers energetically defend lawyers' obligation to pursue the client's legal entitlements, even in the face of countervailing moral reasons not to. Wendel insists that fidelity to law would rule out a great many games that lawyers play to frustrate discovery, coach witnesses, and throw adversaries off balance.[29] So his view is not lacking in critical bite. But his overall position defends a constrained version of the traditional lawyers' self-conception against its philosophical critics.

Wendel's position has an intuitive attractiveness. It seems to occupy the Aristotelian mean between two extremes, the standard conception and its critique. Wendel and the other new-wave writers draw their argumentative resources from two unquestionably important truths: the fact of pluralism and the fact that a legal system is a political institution for managing pluralism and civilizing conflict.

The position has other attractions as well. Wendel takes very seriously the undertheorized role of lawyers as advisors on the meaning of law, an issue that he explores through the case of the lawyers who wrote the torture memos. He believes that "the lawyer's central role is to evaluate whether the client is legally entitled to pursue some objective"—in effect subordinating even the advocate's role to that of interpreters of law.[30] This is a position that I find very appealing. (My own work has moved in a similar direction.)

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25. *Id.* at 23. In this respect, Wendel agrees with Simon, who argues that problems of legal ethics are jurisprudential, not moral. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 15–18 (1998). In other respects, they disagree sharply.

26. *See* WENDEL, *supra* note 19, at 168 ("[T]he lawyer–client relationship should be structured by the ideal of fidelity to *law*—not to clients—that is, by legal and ethical ideals of fiduciary obligations.").

27. *Id.* at 12.

28. *Id.* at 2.

29. *Id.* at 191. Here, Wendel's view is not far from that of Fuller and Randall, who argued that a lawyer "plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision." Fuller & Randall, *supra* note 17, at 1161. This was written in 1958, and it is safe to say that the trial bar in the ensuing half century has completely ignored this prescription, viewing the good litigator's job precisely as muddying the headwaters of decision when doing so benefits the client. The smart money would predict that Wendel's ethical prescription that litigators refrain from lawyer games will end up in the same boat—which, I can report, is the same boat that critics of the adversary system and the ideology of advocacy have always been in.

30. WENDEL, *supra* note 19, at 56.

Fidelity to law means not only pursuing legal entitlements, but also interpreting the law faithfully, a point to which I return below. In addition, like the process theorists of the 1950s, Wendel places special emphasis on the craft values of the legal profession as an ethic designed to make the process work as it is supposed to work. This will hold obvious appeal to conscientious lawyers who believe that high-quality work is usually more ethical in every sense than sloppier work.

Finally, the book is attractive as a piece of argumentation. Wendel is philosophically sophisticated, and political philosophy securely anchors his argument, but he wears his learning lightly and avoids philosophical complexities for their own sake. He knows the law of lawyering, he engages with the scholarly literature, and he makes telling use of examples. All in all, *Lawyers and Fidelity to Law* is admirably lucid and carefully done.

However, I disagree with important aspects of the theory. Ultimately, it seems to me, Wendel puts too much faith in existing legal institutions and too much faith in procedure at the expense of substantive justice. In places, he writes as though the existing legal system is about as good as it can get. There is, I fear, complacency here as well as excess willingness to discount substantive injustice as little more than collateral damage in a basically just system. I discuss these issues in Part III.

I next examine Wendel's basic metaphor of fidelity to law. The view I shall defend is that outside the specific context of legal interpretation, law is not the kind of thing that deserves fidelity. In its primary meanings, associated with marriage, friendship, and religious faith, fidelity pertains to personal relationships, not a relationship with an abstract entity like "the law" or even an institutional arrangement like "the legal system." Furthermore, in its primary meanings, fidelity is a narrow concept, narrower than loyalty or professional or personal obligation. Properly understood, the moral obligation to respect the law—when it exists—is different from fidelity and is actually an obligation running not to the law but to fellow members of the community the law governs. It is, moreover, an obligation based on reciprocity, so that laws and legal systems marred by structural or systematic inequalities do not deserve respect to the extent Wendel thinks they do. Flawed legal systems exercise a lesser claim on us, one that can be overridden by countervailing moral concerns. This is Part IV.

In the final part, I ask where the morality went. In Wendel's view, the legal system provides second-order reasons not to ask first-order moral questions, but the questions surely do not go away. Wendel, too, is concerned about this difficulty, and he tries to address it. I conclude that his strategies either fail or move Wendel to a position that is not so far from moral activism after all.

III. The Best of All Possible Legal Systems

In conspicuous ways, Wendel's political philosophy is a return to the legal-process theory of the 1950s. Process theorists observed that every society needs an "institutional settlement"—a kind of social contract establishing the lawmaking and dispute-resolution mechanisms for the society.[31] Once the institutional settlement is in place, we must comply with it: "[D]ecisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."[32] The words are Hart and Sacks's, but they capture Wendel's argument as well.[33] The three *duly*s in this sentence hammer home the fundamental point that the institutional settlement represents society's chosen way of doing things, which threatens to unravel if people cut corners or take shortcuts. People must pursue their interests within the terms of the settlement, and lawyers are the agents of that pursuit.

For Wendel, fidelity to law means respect for law, where *respect* is a term of art meaning obedience-plus: not only obeying law, but "conducting one's affairs with due regard for the legal entitlements of others."[34] The question is why the law deserves obedience-plus, given that the law can, after all, be pretty awful.

It appears that Wendel's commitment to obedience arises from an important condition he stipulates: "The conception of legal ethics set out here is limited to lawyers practicing in a more or less just society."[35] That is because "the normative attractiveness of the lawyer's role depends on the normative attractiveness of legality."[36] The fact that the society is more or less just guarantees that acceding to the institutional settlement is not a morally outrageous thing to do.

At this point, I believe, Wendel runs into trouble. He understands perfectly well how flawed many features of the American institutional settlement are and takes pains to catalogue them: "electoral politics . . . skewed by the influence of wealthy donors"; participation limited for many by disparities in wealth; structural inequality in education; persistent discrimination; and "intrusive policing and bureaucratic indifference."[37] Although he assures us that his "point . . . is not to present an apologia for American society,"[38] Wendel sees no problem for the legitimacy of the

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31. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 3–4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

32. *Id.* at 4.

33. *See* WENDEL, *supra* note 19, at 91 ("Laws that are the product of these political institutions are legitimate if they are enacted using adequately . . . fair procedures. This is admittedly a thin basis for solidarity, but it is likely the best we can do.").

34. *Id.* at 88 n.*.

35. *Id.* at 96.

36. *Id.* at 92.

37. *Id.* at 91.

38. *Id.* at 92.

American system and excuses the procedural evils he has just catalogued as "often the byproduct of good-faith disagreements."[39] In his view, "the legitimacy of procedures is not based on optimizing fairness but on doing as well as possible,"[40] and he believes that American law "does as well as possible at treating the views of all citizens as presumptively entitled to respect."[41] Our flawed institutional settlement is "likely the best we can do."[42] Wendel quotes Churchill's aphorism that democracy is the worst form of government except for all others.[43]

I am all for not letting the best be the enemy of the good, and I agree with Wendel that legal ethics must be a theory for the nonideal world. But the concept of possibility at work in assertions that our law "do[es] as well as possible" is slippery.[44] Does he mean that no major reforms could make it better, or merely that reform is politically impossible given the process flaws he himself has catalogued? Wendel has not shown the former or even tried to. As for the latter, it is hard to see why a flawed system in which entrenched interests can block worthwhile reforms deserves undeviating obedience. If it did, then any system with an entrenched, self-reproducing power structure—Stalinist Russia, for example—would qualify as "the best we can do" and would be "do[ing] as well as possible."[45]

In places, Wendel lapses into apologetics for the status quo. Thus, at one point Wendel considers the objection that partisanship in shaping the factual record has nothing to do with value pluralism or the purposes of the legal system.[46] Why not forbid lawyers from resisting the discovery of damaging truths? Wendel's response comes close to an assertion that the existing rules are the best they can be:

> The rules of the adversary process, including rules of pleading, discovery rules, and rules governing motions practice, represent a balance among considerations of efficiency, fairness, respect for the privacy interests of litigants, and the desire to resolve disputes accurately on the merits. *Thus*, . . . permitting or requiring litigators to take a partisan stance with respect to the facts of a dispute is still justified on the grounds that the legal system has established a framework for the orderly resolution of disagreement.[47]

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39. *Id.*

40. *Id.* at 99.

41. *Id.* at 114.

42. *Id.* at 91.

43. *Id.*

44. *See id.* at 99 ("[T]he legitimacy of procedures is not based on optimizing fairness but on doing as well as possible given the need for both equal respect and finality.").

45. *See id.* at 91, 114 ("[A] procedure that does as well as possible at treating the views of all citizens as presumptively entitled to respect . . . represents the best we can do . . . to embody equality in our relations with one another . . . .").

46. *Id.* at 57–59.

47. *Id.* at 59 (emphasis added).

To which one might respond: why suppose that the balance is the right one or that the orderly framework is a sufficiently just one? Where does the "thus" come from?

In the same vein, Wendel writes that "[t]he procedures of the legal system . . . constitute a means for living together, treating one another with respect, and cooperating toward common ends, despite moral diversity and disagreement."[48] This, however, would have to be shown, not simply claimed. What would Wendel's response be to those who find grotesque injustice in the American legal system—for example, in our practices of mass incarceration and long-term solitary confinement, or in the unavailability of civil legal services for the fifth of Americans who today qualify for legal aid? Reassuring us that the law "does as well as possible" is no answer.

IV. The Concept of Fidelity

In this part, I examine the concept of fidelity, the guiding metaphor in Wendel's theory. In ordinary language, it combines elements of several related concepts, each appropriate in certain contexts but less appropriate in others. One context concerns personal relationships: fidelity in marriage, friendship, and religion (viewed as a relationship with God or the gods). I will call this *personal fidelity*. Different from personal fidelity is what I will call *interpretive fidelity*: fidelity in interpretation, translation, performance, or representation. Wendel pretty clearly works with the concept of interpretive fidelity, particularly when the lawyer takes on the role of advisor, charged with offering the client an opinion on whether the client can legally do what she wants. But Wendel also relies on a concept of obligation to the law that he calls fidelity, and I think this is a mistake unless it means obligation to persons and not to an impersonal system. Conflating the two senses is also a mistake because interpretive and personal fidelity are different.

A. Personal Fidelity

1. Marital fidelity.—The most basic ordinary-language use of the term *fidelity* is marital fidelity, and it means, quite simply, not cheating on your spouse by having sex with someone else. By extension, this usage has come to include fidelity between unmarried intimate partners; but to keep the discussion simple, let us focus solely on marriage.

Importantly, marital fidelity carries no implications of devotion to the spouse beyond nonbetrayal, and it refers quite specifically to one species of nonbetrayal, namely sexual monogamy. Marital fidelity does not require you to be a good husband or wife; it does not demand love or lovingness, or even living together: spouses who separate may still opt for fidelity. In ordinary

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48. *Id.* at 89.

language, all fidelity demands is not going to bed with anyone else—in other words, *fidelity* means little more than no infidelity, and *infidelity* means sex outside the relationship, nothing more and nothing less.

Thus in its most primordial usage, *fidelity* is a limited concept and a severely minimal virtue. It is far narrower than something we might superficially take as a synonym, namely *loyalty* or *devotion*. An example will illustrate the difference. A wife surreptitiously loots the couple's joint bank account in preparation for deserting her husband (or the other way around). That certainly counts as disloyalty to a high degree, but until the moment she has sex with someone else, she has not been unfaithful in the primary, ordinary-language sense of the word. Disloyal, yes; unfaithful, no. Infidelity is not simply lack of loyalty. It is something stronger. It is betrayal in the primordial sense of betraying one person in favor of another.

This specific sense of marital infidelity gets lost if we redescribe it as breaking one's marital vows. That euphemism loses the important implication that the unfaithful spouse has not merely violated an abstract norm, but has *gone over to a concrete rival*. The sex act between spouse and rival signifies transfer of allegiance and not merely loss of allegiance. Marital infidelity is a three-party relationship involving two spouses and a rival, not a two-party relationship involving spouses alone, and certainly not a relationship between a person and the abstract object called marital vows.

The nearest political counterpart to infidelity in this sense appears to be treason, which according to the U.S. Constitution "shall consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[49] A citizen can despise the United States, steal from the government, or even commit acts of espionage or terrorism without being a traitor. Like marital infidelity, treason means something graver and more specific than disloyalty. It means switching allegiance to an enemy. Someone who merely disobeys the law, or takes the Holmesian bad man's "what's-in-it-for-me?" attitude[50] toward the law has not betrayed anything or anyone, and has not engaged in infidelity to the law.

2. *Friendship.*—Other contexts may involve only two parties. To call someone a "faithless friend" carries no connotations that she abandons me for another friend, only that she cannot be relied upon. The faithful friend is one who visits me in the hospital, takes me out to dinner when I'm blue, goes the extra mile in helping out when I've lost my job, and does not keep score in the game of reciprocation. In this context, *fidelity* and *faith* belong side by side with a family of terms, mostly etymological cousins—*trust*, *true*, *truth*, *troth*, *betrothed*—in which trustworthiness and constancy span the whole range of behavior, not merely sexual nonbetrayal. When, in a classic legal

49. U.S. CONST. art. III, § 3.

50. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (defining the "bad man" as one "who cares only for the material consequences" of the law).

ethics article, Charles Fried coined the metaphor of "lawyer as friend," he was appealing to precisely this conception of lawyerly fidelity to clients.[51] Wendel, on the other hand, rejects a vision of lawyers' ethics founded on personal loyalty of lawyer to client, in favor of fidelity to law.[52] I take it, therefore, that this context of fidelity is not at work in Wendel's version of legal ethics—unless, as I believe, fidelity to the law is really a way of being faithful to persons.

3. *Religion.*—These observations take us to the next primary context of fidelity, namely, religion. Etymologically, *fidelity* comes from *fides*, the Latin word for *faith*,[53] and in religion it means being true to one's faith. Or more exactly, it means being true to one's God—and that is an important point because it conceives faith in its primary sense as a personal relationship between a human person and the divine person. Hewing to one's faith in the sense of orthodoxy, ritual, or belief in such abstractions as articles of faith represents a distinctively secondary sense; we are more likely to use words like *devout*, *pious*, *observant*, or *practicing* than the word *faithful* to describe this attitude toward religion.

In the Hebrew Bible, religious fidelity carries powerful overtones of sexual fidelity. The chief sin of the Children of Israel, and their chief temptation, is idolatry, the worship of other gods.[54] The Second Commandment forbids idolatry in powerful terms: "Do not have any other gods before me. You shall not make for yourself an idol. . . . [F]or I the Lord your God am a jealous God."[55] Jealous of what? Of something akin to adultery with a rival god. As Moshe Halbertal and Avishai Margalit demonstrate, the dominant understanding of idolatry in the Hebrew Bible likens it to sexual infidelity, and the prophets convey the warnings of the jealous God through powerful sexual imagery.[56] The Children of Israel must not "lust after their [foreigners'] gods";[57] if they do, God will punish Israel for its "whoredom . . . when, decked out with earrings and jewels, she would go after her lovers, forgetting me."[58] God accuses Israel of playing the harlot

51. Fried, *supra* note 1, at 1060–61.

52. *See* WENDEL, *supra* note 19, at 168 ("[T]he lawyer–client relationship should be structured by the ideal of fidelity to *law*—not to clients . . . .").

53. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 465 (11th ed. 2003).

54. *See, e.g.*, *Exodus* 32:1–30 (detailing Israel's worship of the golden calf after the exodus from Egypt and God's resulting anger); 1 *Samuel* 15:22–23 ("Has the LORD as much delight in burnt offerings and sacrifices, as in obeying the voice of the LORD? . . . For rebellion is as the sin of divination, and insubordination is as iniquity and idolatry."); *Psalm* 97:7 ("Let all those be ashamed who serve graven images . . . ; worship Him, all you gods.").

55. *Exodus* 20:3–5, appearing in slightly different words in *Deuteronomy* 5:7–9.

56. MOSHE HALBERTAL & AVISHAI MARGALIT, IDOLATRY 1, 11–20 (Naomi Goldblum trans., Harvard Univ. Press 1992) (1989). I take the biblical passages quoted below from their discussion and follow their translation.

57. *Exodus* 34:15–16.

58. *Hosea* 1:2, 14–15.

and "lavishing your favors on every passerby," like "the adulterous wife who welcomes strangers instead of her husband."[59] "On every high hill and under every verdant tree, you recline as a whore."[60] One might almost say that religious fidelity is subsumed under marital fidelity. The crucial point about religious faith conceived in this way is that it involves a relationship with a divine person, not an impersonal divinity like Aristotle's or Spinoza's.

In each of these contexts, it matters crucially that fidelity appears within a direct personal relationship, unmediated by a relationship with an impersonal or abstract entity like marital vows or articles of faith—or, I suggest, "the law."

What, then, might be the personal relationship involved in devotion to the legal system? In my own writing, I have argued that respect for the law really means respect for the people in one's political community. When the law represents a genuine scheme of social cooperation, disobedience is a form of free riding, and it expresses disdain for one's fellows.[61] Although expressing disdain is not the same as infidelity (because it does not necessarily mean betraying one's fellows by allegiance to a rival), it commits a moral wrong, and avoiding that wrong is the source of moral obligation. That does not mean one must never disobey the law; other moral obligations can outweigh the obligation of obedience. Even then, however, the respect we owe to our fellows demands that we could (at least in principle) offer a reasoned account to our fellows about why our disobedience represents something more than free riding.[62]

But what if the law does not represent a genuine scheme of social cooperation—for example, what if it systematically discriminates against a group? In that case, the rationale for obedience to law fails because of a fundamental lack of reciprocity. This is what Martin Luther King Jr. called "difference made legal,"[63] and like King, I believe that when difference is made legal, the victims of discrimination have no obligation to obey because their fellow citizens have snapped the bonds of reciprocity.

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59. *Ezekiel* 16:15–26, 28–34.

60. *Jeremiah* 2:18–20.

61. For a more detailed account of this argument, see LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 32–43. What I summarize here is a version of a fair-play argument. It views the law as a cooperative scheme that creates obligations when five conditions are met: (1) the scheme creates benefits; (2) the benefits are general, accruing to the entire community; (3) the scheme needs widespread participation to succeed; (4) it actually elicits widespread participation; and (5) the scheme is a reasonable or important one. *Id.* at 38; David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 803 (1991) [hereinafter Luban, *Conscientious Lawyers*]. I believe that some of my arguments in the latter paper—in which I criticize Philip Soper's argument that we can be obligated by an unfair cooperative scheme because an unfair scheme is better than none at all—apply to Wendel's position as well. *See* Luban, *Conscientious Lawyers*, *supra*, at 803–07 (laying out the points against Soper's argument).

62. LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 46–47.

63. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 83 (1964).

To sum up, solidarity with our fellow citizens can provide moral reasons to respect the law, but those reasons (a) can be outweighed and (b) exist only when the law itself is sufficiently fair. A crucial point is that disobedience to law in the face of a moral emergency is not necessarily disrespectful to one's fellows, and it is not like the paradigm form infidelity takes: betraying one person by going over to a concrete rival.

B. *Interpretive Fidelity*

Matters are different when we turn to interpretive fidelity. If an artist paints a portrait, we sometimes call it a faithful representation of the sitter; audio equipment is often described as "high fidelity"; translations can be more or less faithful to the original text. In each of these contexts, *fidelity* and *faithfulness* refer to mimetic accuracy. In such contexts, *fidelity* has to do with representation—literally, re-presentation—or interpretation.

Interpretive fidelity involves being faithful to an original. The original need not be a person; indeed, ordinarily it is not a person: the object of fidelity is a musical score, a performance tradition, a written text or verbal utterance, or the way light and shadow look on the façade of Rouen Cathedral at 7:00 p.m. on a summer evening. Even in the case of a faithful portrait of a person, we mean a faithful rendition of what the person looks like, not a moral relationship of loyalty to the subject of the portrait.

That is not to say that interpretive fidelity to an original lacks moral significance. An author who turns her novel over to a translator crosses her fingers and hopes for a faithful translation; a reader likewise counts on the translator to get it right. A trial witness testifying in a foreign language relies on the interpreter. These are moral relationships of trust, but they are different from relationships of personal fidelity.

When Wendel discusses the role of legal advisor and the torture memos, the form of fidelity to law he invokes is interpretive fidelity, not personal fidelity.[64] The "torture lawyers" were, in effect, faithless interpreters. Of course, their clients very much wanted them to give the answers they did. That fact is irrelevant to the ethics rules, which require independent, candid advice (faithful translation) and which, in my view, are right to demand it.[65] In the context of legal advice, I believe Wendel is right to demand fidelity to

64. WENDEL, *supra* note 19, at 178–84.

65. I have written extensively on the torture lawyers, and my views are eye-to-eye with Wendel's. *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Admin.: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 11–14 (2009) (statement of David Luban, Professor of Law, Georgetown University Law Center); DAVID LUBAN, *The Torture Lawyers of Washington*, *in* LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 10, at 162; David Luban, *Liberalism, Torture, and the Ticking Bomb*, *in* THE TORTURE DEBATE IN AMERICA 35 (Karen J. Greenberg ed., 2006); David Luban, *Tales of Terror: Lessons for Lawyers from the 'War on Terrorism,' in* REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 56 (Kieran Tranter et al. eds., 2010).

law—but here it means interpretive fidelity, not the obligation to obey the law that is Wendel's central topic in other chapters.

Clearly, interpretive fidelity is not a sufficient condition of obedience or respect for the law—you can interpret the law faithfully and still choose to violate it—but what about the other way around? After all, if a lawyer interprets the law unfaithfully in advising a client, the client following the lawyer's interpretation will disobey the law as it actually is written. If so, interpretive fidelity appears to be a necessary condition of respect for law. I believe, however, that the relationship between interpretive fidelity and respect for law is more complicated than one-way logical entailment. For one thing, even if a law deserves disobedience rather than respect or obedience, one might still object to disobeying it through unfaithful interpretation. It is one thing to announce, "This law is immoral and I won't obey it"—the forthright stance of conscientious disobedience—but quite another to protest, "I am not disobeying the law" because under a clever bad-faith interpretation the law permits my action. The latter is the weasel's way out. Interpretive fidelity is therefore a self-standing virtue, not merely an entailment of obedience.

V. The Remainder of Morality

A. Second-Order Reasons

Wendel's argument for displacing common morality with professional morality draws on Joseph Raz's theory of practical reasoning. The basic idea is that reasons exist at multiple levels: we of course have "first-order" reasons for or against beliefs and actions, but we also have "second-order" reasons, meaning "reasons not to act on reasons."[66] Raz focuses on a class of second-order reasons called "exclusionary" because they are absolute preemptions from engaging in first-order moral reasoning. For Raz, exclusionary reasons are central to understanding the concept of authority (and in particular the authority of law), and it is part of the very meaning of authority that it creates exclusionary reasons not to take your own first-order moral reasoning into account on a matter that the authority has settled.[67]

The problem, of course, is that it begs the question to assert that law has authority in Raz's sense, just as it begs the question to assert that legal reasons are exclusionary. The analysis of concepts alone will never break us out of the closed circle of concepts. One would have to show independently that legal reasons are exclusionary. After all, urgent moral reasons one might have for breaking the law will equally be grounds for denying the exclusionary character of legal reasons.

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66. WENDEL, *supra* note 19, at 21.

67. JOSEPH RAZ, *Authority, Law and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 194, 214–15 (1994).

Perhaps with these concerns in mind, Wendel breaks from Raz in two respects. First, he weakens the claim that legal reasons are exclusionary. On his view, "law creates presumptive, not conclusive obligations."[68] Whatever second-order reasons law creates, they are not absolutes, and presumably, a suitably weighty moral consideration can override them.

This position is far more plausible and attractive than the absolutist view that law always and everywhere preempts morality, but the attractiveness comes at some cost. Wendel's seemingly minor modification actually undermines the Razian architecture of multiple levels of reasons. How can a person know whether the tough choice she now faces falls under the exclusionary presumption or counts as one of the exceptional cases when she should engage in first-order moral deliberation? The only way she can decide is by engaging in first-order moral deliberation. In that case, the two levels collapse into one, and in place of Raz and Wendel's split-level structure, the agent must simply engage in first-order balancing of the moral obligation to respect law against the countervailing obligation to break the rule, with a presumption on behalf of sticking to the legally defined role. This view turns out to be nearly identical to my own version of moral activism.[69] It may be that the only difference between Wendel's conception of legal ethics and mine is that he assigns greater (but not absolute) weight to upholding the legal system because he finds it more fair and just than I do; he himself suggests this at one point.[70]

The second way that Wendel differs from Raz is that rather than deriving his theory of (semi)exclusionary reasons from conceptual analysis, he offers a normative argument for it.[71] The normative argument consists of the political defense of legal procedure and institutions based on value-pluralism, which we have already examined. It rests on a premise that Wendel does not articulate in so many words but that seems like the necessary source of his anxiety about the bad consequences of lawyers acting as moral free agents. The premise is that the legal system is comparatively fragile. Its system of roles cannot fulfill the purposes of legality if "officials and quasi-officials"[72] break from their roles to work equity in the face of

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68. WENDEL, *supra* note 19, at 107; *see also id.* at 21 n.*, 113. Wendel is occasionally less careful and backslides to Raz's view—for example, when he asserts that "roles do real normative work by *excluding* consideration of reasons that someone outside the role would have to take into account," and when he writes that "the lawyer's professional obligations *exclude* resorting to ordinary moral considerations in deciding how to act." *Id.* at 171 (emphasis added).

69. I develop this "deontological" version of moral activism—in which the role creates a presumption that may be overcome—in David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to* Lawyers and Justice, 49 MD. L. REV. 424, 425–35, 443–52 (1990).

70. WENDEL, *supra* note 19, at 241–42 n.67 ("To the extent [Professor Luban] believes that a legally established framework is fair and reasonable, our positions may not diverge substantially.").

71. *Id.* at 113–14.

72. *Id.* at 171. For Wendel, a lawyer is a quasi-official. *Id.*

what Wendel calls "localized injustice."[73] The system will be undermined unless its functionaries work to rule.

This premise is an empirical hunch. Fair enough, but my own hunch is quite the opposite. In labor–management settings from factories to police forces, "work to rule" is a form of job action, a kind of strike without actually going on strike. That is because in the real world we expect people to make the innumerable minor adjustments that rules cannot capture, and if they refuse to exercise discretion, the enterprise will grind to a halt. The system of rules works best when it sets broad guidelines with the expectation that people will deviate from them when common sense demands it. That is the way the world works, and good systems of rules count on it.

I believe the same is true with moral common sense: we need people to act on it. There are countless forms of antisocial behavior that the law does not prohibit, and individual conscience by itself cannot be counted on to control. Instead, we rely on informal social mechanisms of approval and disapproval, smiles and frowns, sharing and shunning to make the system work. Among those mechanisms is withdrawal or tempering of assistance.[74] As between a system followed unswervingly by role players and a system of recourse roles in which the functionaries are willing to deviate when moral common sense requires it, I think the latter actually works far better than the former. The legal system works best, I conjecture, if people keep their conscience switched on, just as they keep their common sense switched on.

These observations about the role of morality and the structure of moral reasoning are somewhat abstract, and it will help to look at an example to which Wendel devotes considerable attention: the much-discussed *Spaulding v. Zimmerman*.[75] *Spaulding* concerns a lawsuit by a youth badly injured in an auto accident. The defense did their own X-rays and their doctor discovered a potentially fatal aortic aneurism that Spaulding's own doctor had not found.[76] Rather than increase their client's financial exposure by warning Spaulding that he could drop dead at any minute, the defense lawyers kept silent and settled the case cheaply[77]—as the duty of confidentiality under the standard conception requires. This strikes most people as morally outrageous. *Spaulding* poses an awkward problem for Wendel, who thinks that in legal ethics the moral question is the wrong question. In Wendel's view, "it is a hard case, which is why it has become a classic in legal ethics."[78]

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73. *Id.* at 103.

74. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 116–69.

75. 116 N.W.2d 704 (Minn. 1962). For extensive discussion, including interviews with participants, see Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63 (1998).

76. *Spaulding*, 116 N.W.2d at 708.

77. *Id.*

78. WENDEL, *supra* note 19, at 74.

On the contrary: *Spaulding* is not a classic because it is a hard case but because it is an easy one. We know the right thing to do. Wendel himself finds "non-disclosure intolerable for moral reasons" and adds that Zimmerman's lawyers should "disclose anyway and run the risk of professional discipline."[79] Exactly. What makes the case unnerving is that everyone knows the right answer, but until fairly recently, the law of lawyering made it impossible to get there.[80] Although *Spaulding* is not a hard case, it is a hard case for Wendel's theory.

B. *Moral Remainders*

Wendel is sensitive to the concern that his ethics of fidelity to law excludes morality too much. As we have seen, one way he deals with the concern is by weakening the exclusionary force of law so that it can be overcome by sufficiently strong moral reasons. Another is through the notion of a moral remainder, a concept that Wendel borrows from the philosopher Bernard Williams.[81] When we make moral choices in which every option involves some moral wrong—call these "tragic choices"—then even the right choice will leave claims of morality unfulfilled, and these "moral remainders" do not go away—they are not simply cancelled in a moral cost–benefit analysis that leaves a net profit.[82] Wendel argues that the claims of ordinary morality that get subordinated by the lawyer's role morality can be regarded as moral remainders.[83]

The question is what work moral remainders do. Are they there simply so that "the actor feels lousy about having made the decision"?[84] Wendel doubts that this is enough, although he hopes that painfully experiencing the moral remainder might lead political actors to better decisions.[85] But what more is there? Wendel speculates that "moral remainders give rise to a retrospective obligation to make atonement in some way, perhaps by working against injustice in the system in areas that do not [a]ffect the representation of one's clients."[86]

The demand for atonement seems to take moral remainders seriously, but the form of atonement Wendel proposes makes matters too easy. The

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79. *Id.* at 75.

80. Wendel believes that the rules at the time of *Spaulding* (the 1908 Canons of Professional Ethics) may have permitted disclosure. *Id.* at 170 n.* (citing Cramton & Knowles, *supra* note 75, at 80). That would be so, however, only if we accept the court's argument that because Spaulding was a minor, failure to disclose at settlement is a fraud on the court. My own belief is that this argument was a reach on the part of the court in order to get the right result.

81. *Id.* at 12, 172–73.

82. *See id.* at 167–72 (noting that sometimes lawyers may act with "dirty hands," which may result in a "moral remainder attach[ing] to the lawyer's decision").

83. *Id.* at 172.

84. *Id.*

85. *Id.* at 173.

86. *Id.* at 12 (footnote omitted).

proposal fits nicely with the bar's anodyne ideology of public service. On this view, pro bono on some matters atones for anti-bono on others. The problem is explaining why atonement can take so indirect a form. Genuine atonement, it might be thought, requires rectification to the victim.[87] Why not, then, tell a lawyer faced with a moral remainder to apologize to the victims and make financial restitution to them? That Wendel does not even consider the direct form of atonement suggests that he does not really believe that moral remainders require atonement. In that case, it seems to me that the concept of a moral remainder does no real work.

VI. Conclusion

Lawyers and Fidelity to Law is a major book that deserves careful study. One feature that my criticisms may have obscured is the essential decency of its moral sensibility—a decency that shines through every page. The virtue Wendel's position exhibits is liberal tolerance for plural values; the virtues he demands from lawyers are fidelity to the rule of law, honesty in interpretation, and craft. All of these are admirable. As I have interpreted him, however, Wendel's position is decency at odds with itself. He wants to exclude everyday morality from legal ethics, but not completely. He recognizes deep problems in our legal institutions, but he wants to say that they still demand near absolute obedience. He wants to acknowledge moral remainders, but only within the parameters of bar ideology. Of course, anyone who writes on legal ethics experiences the same sense of unresolvable contradiction, whether you call it the problem of role morality or, as Wendel does, the political problem of dirty hands. In such a messy reality, fidelity to law is a virtue, but it is no substitute for conscience.

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87. Consider the common-sense view of Maimonides: "[T]ransgressions against one's fellowmen . . . are never pardoned till the injured party has received the compensation due to him and has also been appeased," which requires asking his forgiveness, perhaps multiple times. MAIMONIDES, MISHNEH TORAH, LAWS OF REPENTANCE, ch. 2.9, 83a–b. Wisely, Maimonides also imposes a duty on the injured party to forgive, and if he will not even after three attempts, "the one who refused to forgive is now the sinner." *Id.*

The Lawyer Knows More than the Law

LAWYERS AND FIDELITY TO LAW. By W. Bradley Wendel. Princeton, New Jersey: Princeton University Press, 2010. 286 pages. $35.00.

Reviewed by Stephen L. Pepper*

Introduction

With *Civil Obedience* in 2004, Brad Wendel made a significant and lasting contribution to the development of the theory of lawyers' ethics.[1] With *Lawyers and Fidelity to Law*, he has expanded and clarified that work. The function of the legal profession—of lawyers—is to provide access to the law. That access is provided in service to clients: to facilitate their objectives, provide them with legal structure or means, and supply knowledge as to legal possibilities and limits. Professor Wendel agrees that this is the function of the legal profession[2] and provides a coherent and practical theory for the ethics of the conduct of this function, accessible and useful to lawyers, law students, legal academics, and philosophers. Three related ideas provide the foundation for Professor Wendel's understanding: one concerning the purpose of law, the other two concerning the consequences for legal practice of this purpose. This Review will focus on, and to some extent criticize, these latter two understandings.

Why is it that we have a profession whose function is to provide access to law? Another way of asking this is, simply, why is it a good thing for citizens to have access to law? Wendel's answer is that law allows for cooperation and coordination among people with differing interests and, more importantly, with differing moral and political beliefs, conclusions, and commitments. Law provides a mechanism for the provisional settlement of such disagreement and creates a framework for moving forward despite underlying and possibly fundamental background disagreement.[3] Law, in its different manifestations, is both the procedure for that resolution and the result. This foundational premise leads directly to the two conclusions concerning lawyers' ethics on which Wendel disagrees with many other theorists and practicing lawyers.

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1. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

2. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 52, 79 (2010).

3. *Id.* at 4, 10. "In a pluralistic society, the law provides a framework for coordinated action in the face of disagreement." *Id.* at 116. *See generally id.* at 86–121. While this understanding is neither startling nor counterintuitive, I believe it had not been made explicit in the literature on lawyers' ethics prior to *Civil Obedience*.

First, lawyers' ethics should not consist of applications of ordinary morality—with the role of providing access to law as just one of the factors folded into the calculus and leading to the conclusion.[4] The law, whatever it may be, has settled the moral (and policy) questions according to Wendel, and it is wrong for lawyers to reopen that controversy after it has been resolved by the community through agreed-upon procedures.[5] Legal ethics is thus a "second-order" or "political" morality—a morality justified by the aggregate achievements and processes of the law—rather than a morality determined by the "first-order" considerations of the particular use of law the lawyer is facilitating.[6] The moral questions have been decided ahead of time and those provisional settlements are incorporated in the law. Wendel is thus an advocate of "role morality" for lawyers: the role of providing access to law (second order) justifies conduct which might otherwise be morally wrongful (first order).[7] The law, which is an aggregate moral settlement, trumps the morality of the specific situation.

Second, because of this essential and admirable function, lawyers should "respect" law in a particular, concrete sense: they should assist clients only in reaching genuine "legal entitlements."[8] Law should not be worked around or used as a pretext. The lawyer's proper ethical allegiance is not to client "interests" regardless of what a fair, objective reading of the law indicates; to the contrary, the lawyer's allegiance is limited to these genuine legal entitlements.[9] Practicing lawyers, however, commonly think of legal provisions as neutral tools to be used in any way imaginable: designed as a wrench, it is acceptable to use as a hammer if that serves the client's interests. Limiting the lawyer to enabling only genuine legal entitlements as objectively determined rules out much of the stretching and manipulation currently found ethically acceptable in the practice of law.

Thus, Wendel's two fundamental conclusions push in two quite different directions. Providing access to the law even when the particular use is morally wrongful—role-justified morality—has been condemned by many legal ethicists but is approved under Wendel's understanding of the over-arching function of law. His second conclusion—disallowing distortion and manipulation of law, limiting lawyers' pursuits to the objectively determined

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4. *Id.* at 122–55.

5. *Id.*

6. *Id.* at 18, 21–22, 86–121.

7. In Chapter 1, Professor Wendel criticizes my earlier justification of role-specific morality as being based on "first-order" values. *Id.* at 31–37. In Part VI, *infra*, I have appended a brief explanation suggesting that my argument was, in fact, a second-order argument based on the political or institutional value of access to law for the client.

8. *Id.* at 52.

9. This is developed primarily in Chapter 2, *id.* at 49–85, but the point is made frequently. *E.g.*, *id.* at 8 ("The principal argument of this chapter is that the law does not merely set the limits on permissible advocacy, but constitutes the lawyer's role. . . . [T]he legal entitlements of clients empower lawyers to do anything at all."); *id.* at 105–13.

"legal entitlements" of clients—disapproves conduct commonly considered acceptable.

I. Partially Wrong on the First Arm: Morality Is Relevant at the Point of Application of the Law

As to the first conclusion, Professor Wendel does not account sufficiently for the distinction between the general and the particular. As enacted, a legal provision is a generality—often a rule of thumb—intended in the aggregate to serve particular policy and moral purposes.[10] The lawyer, however, is present at a specific potential application of that legal provision. At that point, application of the law may or may not serve those moral or policy purposes and values; the compromise intention may have little or no connection to the specific facts; or the legally directed or facilitated result may be perverse in relation to generally accepted values or the particular values underlying the legal provision.[11] A legal provision's moral or policy compromise is up in the air, general, and abstract; lawyer and client are down on the ground where the law's effect will be concrete and specific.[12]

Consider two examples:

> [I]magine yourself in the situation of a couple with a young child, two demanding jobs, and sufficient resources for a child care worker. You have found a couple who seem by far the best available, but they are aliens without [documents] permitting them to work lawfully in the United States. You consult a lawyer and learn that hiring the couple "would be a technical violation" of the law, but there is a "process [you] could use to regularize the situation." She also informs you that while "civil penalties are technically applicable" for hiring illegal aliens "no employer sanctions have ever been applied as a result of the employment of undocumented domestic workers in [this state]."[13]

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10. Often these purposes are compromises of contending values, moral understandings, and policy preferences and conclusions; sometimes rendering the intended compromise purpose or intention not easily determined.

11. Contrary to Wendel's characterization in his reply to these reviews, this is not a claim that law is too indeterminate to serve the provisional resolution function he describes. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEXAS L. REV. 727, 727–28 (2012). Rather, the result determined by the law in the specifics of a particular situation may not fit well with the purposes or values underlying that law, or with generally accepted purposes and values.

12. David Luban develops an aspect of this point in his review in this Colloquy. "[I]n the real world we expect people to make the innumerable minor adjustments that rules cannot capture . . . . The system of rules works best when it sets broad guidelines with the expectation that people will deviate from them when common sense demands it." David Luban, *Misplaced Fidelity*, 90 TEXAS L. REV. 673, 688 (2012) (book review).

13. Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 333 (1998) (second and third alterations in original) (quoting Jamie G. Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2503–04 (1994)).

Trying to figure out the moral and policy compromises represented by the immigration laws would be difficult. Adding on the moral and policy intention (or inattention) of no enforcement in relation to domestic workers substantially complicates that task. The benefits (including moral positives) for the couple, the child, and the workers are manifest. The client couple should certainly be informed of the law—and possibly its ostensible purposes and justifications[14]—by the lawyer. Up in the air, the abstract law is clearly the opposite of a "legal entitlement" (in Professor Wendel's terminology)[15] to hire the workers—it is a legal prohibition. On the ground, the decision, and the proper weight of the law, are far more complicated and unclear. Having been informed about the law and its nonenforcement, assume the clients turn to the lawyer and ask, "Well, can we hire them? What do you think?" Is the community compromise represented by the written law the only answer the lawyer can give? This appears to be Wendel's required answer—that the lawyer must tell them, "No, you can't and shouldn't. It's unlawful." Or is the situation more complex than just the law as written, and can the lawyer take that into account in framing a more complex and nuanced answer?[16]

Consider second a corporate client who confers with its lawyer concerning a debt it admits is due and owing—it borrowed and used the money. Assume further that the debtor client is in a far stronger financial position than the creditor; the debtor can easily repay. The lawyer discovers that the debt cannot be enforced due to a statute of limitations or statute of frauds defense; in Professor Wendel's terms, the client has a legal entitlement to refuse to repay the debt. The substantive law and values of contract require payment, but these are trumped by the available procedural defense. A statute of frauds or limitations embodies an awkward policy and value compromise. It contemplates and tolerates just debts being extinguished, but it does not seem quite accurate to say that is its purpose. The purpose seems to have more to do with the staleness and unreliability of evidence after long periods of time or without a writing memorializing the agreement—that is, with establishing the accuracy and reliability of the evidence of the debt.[17] In

14. *See* Heller, *supra* note 13, at 2516–20 (describing the counsel that a "full-picture lawyer" provides).

15. *See supra* note 8 and accompanying text.

16. For two examples of such answers in similar situations, see Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 527–31 (2011).

17. *See* David G. Epstein et al., *Reliance on Oral Promises: Statute of Frauds and "Promissory Estoppel,"* 42 TEX. TECH L. REV. 913, 929 (2010) ("In general the primary purpose of the Statute of Frauds is assumed to be evidentiary, to provide reliable evidence of the existence and terms of the contract, and the classes of contracts covered seem for the most part to have been selected because of importance or complexity." (quoting RESTATEMENT (SECOND) OF CONTRACTS ch. 5, statutory note (1981))); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 76 (2005) (noting that the policy behind prohibiting plaintiffs from reviving claims after too long a time is founded on the rationale that the longer the plaintiff waits to bring his case, the higher the likelihood that the evidence will be compromised).

this imagined situation, that purpose would not be served because the client has acknowledged the genuineness of the debt privately to the lawyer. Yet for policy and value reasons—probably clarity, predictability, and administrability—the lawmakers have chosen to make a bright-line rule without exceptions or considerations of particular circumstances. The statutory defense and the legal obligations of contracts are abstract and up in the air. Client and lawyer are down on the ground with all the specifics of the situation and the particular participants. One can imagine the multiple factors that might be relevant to a corporate client's decision as to whether or not to assert the defense in a situation such as this, including the nature of the client and of the creditor, their relationship, and management's views of the values and value compromises instantiated in the applicable legal provisions and the overall situation. Professor Wendel believes that the legal entitlement not to repay the creditor ends the matter for the lawyer and that discussion concerning the larger moral, policy, and practical factors is unnecessary and possibly improper.[18] My suggestion here is that the lawyer knows more than just the law and that it is often useful to share that knowledge—including the morality, policies, and practicalities of the situation—with the client.[19]

Speaking of the just-debt hypothetical, Wendel states: "It is the goal of much of the rest of this book to establish that lawyers, when they act in a professional capacity, should be concerned only with the legal justice of their clients' situations."[20] He understands "legal justice" in this instance to mean the unenforceability of the just debt.[21] This difference between the abstract and the particular, up in the air and on the ground, gives Wendel's argument a certain abstract and wooden character. He relies on an artificially hard border between law on the one hand and morality, policy, and practicality on the other; whereas, in the real world, the relationships are fluid and dynamic.[22]

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18. WENDEL, *supra* note 2, at 28, 56.

19. See Part III, *infra*, for further development of this point.

20. WENDEL, *supra* note 2, at 28.

21. *Id.*

22. Wendel has responded that the "abstract and wooden" nature of the response I attribute to the lawyer following his view in the undocumented domestic worker example ("[Y]ou can't and shouldn't [hire the worker]. It's unlawful.") is the result of my imagining "an officious, self-righteous lawyer expressing disapproval." Wendel, *supra* note 11, at 738. To the contrary, my effort with that imagined response was to boil Wendel's position down to the nub—as expressed, for example, in the passage quoted from the book in the text immediately above. *See supra* note 20 and accompanying text. He goes on concerning the domestic worker example in his response to say: "I have no problem whatsoever with lawyers conveying a sense that the law is misguided, out of touch with reality, or perverse . . . ." Wendel, *supra* note 11, at 738. But neither the situation nor my description of it in this Review suggest any of that about the law at issue. The problem is that the law as written is abstract, clear, and univocal, while the law as it connects to the situation is complex and multivocal. The written law says one thing, and the consistent nonenforcement as to domestic employees appears to say another. It does seem somewhat abstract and wooden to me to reduce the issue to whether or not the lawyer has "counsel[ed]," "blessed or encouraged" unlawful

Wendel himself gives an apt third example in the case of Daniel Bibb, the prosecutor who assisted the defense and undermined his own case to some extent based on his firm conclusion that the defendants were innocent.[23] The "law" that Wendel relies on in this situation is internal prosecutorial hierarchy and chain of command: Bibb could not persuade his superiors to drop the case, so he proceeded as he thought justice and morality required.[24] Wendel asks, "Why should we trust Bibb's belief more than the belief of his supervisors?"[25] The answer is quite simple: Bibb is on the ground, knows more of the facts and circumstances, has been deeply involved in the case for some time, and is so deeply convinced as to be willing to take drastic and unusual action. (This last fact is also a reason to pause and consider—Bibb may have become so involved as to have become unreliable, misled by some factor we don't know of.) The supervisors are far more removed, with a far more limited and less involved view of the matter. We are justified in trusting Bibb's judgment more than the supervisors' because of his location and knowledge. In addition, our recent history with the track record of prosecutors' offices in the DNA-exoneration matters has given us substantial basis for skepticism concerning their hierarchical oversight and decisions.[26] Also, as pointed out by William Simon, there was some indication that the superiors' decision reflected a "reluctance to take responsibility for the decision to end the proceedings" rather than "a belief that the defendants were guilty."[27]

II. Law, Lawyer and Client: Three Parts, Not Two

Professor Wendel's second point argues the lawyer's obligation to the law over the lawyer's obligation to the client; he argues for a shift of allegiance from the client's "interests" to her "legal entitlements."[28] "The role of the lawyer, as distinct from other social roles . . . is constituted by a relationship between the role occupant and existing positive law."[29] But

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conduct, as Wendel seems to. *Id.* For a fuller discussion of nonenforcement and similar issues, see Wendel, *supra* note 2, at 200–03; Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995); and Luban, *supra* note 12.

23. WENDEL, *supra* note 2, at 118–21.

24. *Id.* at 119.

25. *Id.*

26. *See, e.g.*, Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (discussing examples of wrongful conviction, specifically those that resulted from faulty DNA evidence); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771 (2010) (exploring the prosecutor's ethical obligations after conviction of a criminal defendant, especially when the convictions involved DNA evidence).

27. William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEXAS L. REV. 709, 712 n.17 (2012) (book review).

28. WENDEL, *supra* note 2, at 8.

29. *Id.* at 84. Thus, the book's title, *Lawyers and Fidelity to Law*.

what is sketched as a two-part relationship (law and lawyer) is in fact a three-part relationship. This is perhaps just a matter of emphasis (Wendel is certainly aware of the presence of the client), but a highly salient one. Are lawyer and client there to serve the law—is the purpose of the relationship "fidelity to law"? Or, is the lawyer there to serve the client by providing access to the law? The answer to this is clear. The lawyer–client relationship is in fact constituted by the client's need or use for the law: that need or use (the client's "interest") comes first, necessitating the help of a person expert in the law. Wendel sometimes seems to lose sight of this priority.

From both the client's perspective and the political perspective, law is instrumental: to the client's needs in the particular situation; to society's interest in allowing cooperation and moving forward in the face of underlying disagreement. Wendel is correct that the lawyer should not intentionally undermine or misinterpret clear aspects of the law that govern or structure the client's situation (should not undo the tentative agreement represented by the law); but in his articulation, the law almost becomes a fetish—there for its own sake—rather than a means to both the client's and society's ends. I would suggest that Professor Wendel is correct in emphasizing that law creates real limits and that a lawyer's ethical obligations include honesty in determining and communicating them to the client—and that is a major and significant contribution of the book. But I think he is wrong in the implication that the lawyer is primarily a minister of the law, essentially a law enforcement officer. The lawyer has an obligation not to subvert or pervert the law, but that obligation is within the context of the lawyer's *primary* obligation to assist the client in use of the law.[30] And the client, whom the lawyer is assisting, has less of an obligation to the law.[31] For the client, law is just one factor in the many that are coming together in the particular situation.

In the domestic employment–immigration example above, the lawyer has an obligation to accurately communicate the law (including, possibly, the fact of nonenforcement), and then the client has the choice of what to do with that information, including the choice to violate the (currently unenforced in that context) written law. In the statute of frauds or statute of limitations example, the lawyer has the obligation to accurately communicate both the substantive law of contract and the available procedural defense, and the client has the choice of whether to repay or not—that is, whether to honor the obligation of the contract or take advantage of the available defense. The defense is not a legal prohibition on repaying. Nor does the defense provide a moral justification for the client for not paying. But the lawyer, following

30. Wendel, in fact, quotes the Restatement to this effect: "[T]he lawyer's basic duty is to '. . . advance a client's lawful objectives, *as defined by the client after consultation*.'" *Id.* at 78 (emphasis added) (quoting RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16 (2000)).

31. Wendel acknowledges this disparity. *Id.* at 83–84.

the obligations sketched by Professor Wendel, might well convey that second impression, explicitly or implicitly. ("My lawyer told me I don't have to repay.") Similarly, in his torture-advice example,[32] Wendel is correct that the lawyer's ethical obligation was to provide a correct and balanced understanding of the law to the client, not a distorted, manipulated, or dishonest characterization. The lawyers should have conveyed both an honest, straightforward understanding of how the law was most likely to be understood, and, if relevant to the client's interests, arguable understandings less likely to be correct but more facilitative of the client's preferences. It would then be the client's choice to possibly pick the latter, but only after having been clearly informed that such a course of conduct was, under the most straightforward understanding, probably unlawful.

I would suggest at least four aspects of what the lawyer should convey in situations where possible assistance in use of the law is morally problematic. First, "the straight, neutral or objective application of the law to the situation (the on the surface, most obvious, or most likely intended or understood meaning)"[33]—similar to what Wendel calls "legal entitlements."[34] Second, "the more capacious alternative understandings or applications of the law as it could be interpreted, argued or manipulated (by both 'sides' if this is a contested or negotiated matter)."[35] Third, "the purposes of the law or the values and policies it is designed to serve."[36] Fourth, discussed in part above and at greater length below, the moral and practical dimensions of the law and its interaction with the situation.[37] The client can then make choices from a position of knowledge, and hopefully understanding, of how the law was intended to affect, and does affect, this particular situation. By listing each separately, I do not mean to suggest that each should be presented to every client in every instance or that they be presented formulaically or formally. Some aspects or advice might, in any particular situation, be more implicit or muted than in others.[38]

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32. *Id.* at 177–84.

33. Stephen Pepper, *Locating Morality in Legal Practice: Lawyer? Client? The Law?*, 13 LEGAL ETHICS 174, 179 (2010).

34. WENDEL, *supra* note 2, at 59.

35. Pepper, *supra* note 33, at 179.

36. *Id.* at 179; *see also* Heller, *supra* note 13, at 2516–20, 2524–30 (arguing that a full-picture lawyer should explain a law's purpose to her client).

37. These are more fully explicated in Stephen Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011, 1015–20 (2010).

38. For example, the two descriptions of legal advice recently suggested as a model by Professor Kruse seem to me an appropriate mix of these four aspects. Kruse, *supra* note 16, at 524–30.

III. Moral Counsel in the Lawyer–Client Conversation

Professor Wendel and I are in quite close agreement on the basic obligation of role-specific morality for lawyers in providing access to law.[39] As he clarifies in the book, we part ways on the appropriateness of moral input from lawyer to client on the ground at the point of application or use of the law by the lawyer on behalf of the client.[40] When the client's use of the law will involve a significant arguable moral wrong, I have suggested that the lawyer ought to have an obligation to counsel with the client concerning that problem.[41]

> The lawyer ought to be held responsible for ensuring that the client knows there is, in the lawyer's opinion, a gap between law and justice, and that it is the client—not the law and not the lawyer—who is primarily responsible for injustice if it occurs. It ought to be part of the lawyer's ethical obligation to clarify that merely because one has a legal right to do *x*, doing *x* is not necessarily the right thing to do.[42]

Wendel disagrees, suggesting relations between strangers and relations between dentists and patients as the appropriate analogies for any obligation of moral counseling in the lawyer–client relationship.[43] But lawyers and their clients are not strangers. Lawyers are effectuating client conduct that has significant and, not infrequently, morally unjustifiable consequences on third parties. As Wendel so powerfully articulates in this book, the essential function and nature of law, and thus of lawyers, is sufficient justification for the role-specific morality that supports this conduct. But the lawyers are closer to the morally wrongful conduct and consequences—and directly facilitative of it—in a way that is entirely different from the interaction of strangers or the assistance provided by a dentist. (Unless, that is, the dentist is providing extremely sharp and damaging artificial incisors the patient intends to use against an opponent in an upcoming extreme-combat match.)

Without such an obligation, it is too easy for lawyer and client to each point to the other in regard to moral responsibility for the wrongdoing. In the statute of limitations or statute of frauds defense to the just debt, it is far too

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39. *Compare* WENDEL, *supra* note 2, at 141, *with* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615–19 [hereinafter Pepper, *Lawyer's Amoral Ethical Role*], *and* Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 666 [hereinafter Pepper, *Rejoinder*]. For further discussion, see *infra* Part VI.

40. *See* WENDEL, *supra* note 2, at 141–43 (arguing that moral counseling is above and beyond the duties entailed by the typical lawyer–client relationship).

41. Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 190–91 (1999). This article also provides a possible spectrum of appropriateness for such conversations, considering a number of factors, including the power and sophistication of the client. *Id.* at 192–204.

42. *Id.* at 190.

43. *See* WENDEL, *supra* note 2, at 142 ("In the ordinary lawyer–client relationship . . . there is no greater obligation to provide this kind of advice than there would be as part of any other economic transaction.").

easy for the client to point to the lawyer and the law: "My lawyer told me I have no obligation to repay the debt. It's not my fault." And it is even easier for the lawyer to point to the client and the law: "The law provides the defense and makes it a bright line, well-knowing honest debts such as this might be avoided. It's my client's right and she has chosen to take advantage of it. It's not my fault—just my well-justified role as a lawyer." Each points to the other, and both avoid moral responsibility.[44] As each points to the other, moral responsibility just seems to evaporate—each perceives the responsibility to be elsewhere.

Wendel is correct that lawyers and dentists "are on a par in terms of their expertise in moral counseling,"[45] meaning they do not have any. But lawyers are human beings in a relationship with their clients, and that is all the expertise it takes.[46] This is because there is a great deal of moral consensus in our society, and Professor Wendel is incorrect that bringing morality to bear in the ordinary cases of legal practice is to reopen a moral controversy resolved by the law. There is no moral controversy about the obligation of a corporate client to repay a just and due debt, particularly if the debtor is substantially better off financially than the creditor. Statutes of frauds and limitations, on the other hand, deal with quite distinct policy questions of how to integrate the acknowledged morality instantiated in the substantive law of contract in a functional regime of fair legal procedures, remedies, and enforcement, including the question of how rigid to make the rules—how bright and inflexible the lines should be, as opposed to how much expense and uncertainty to add by allowing the legal decision maker to consider more of the facts, more of the entire justice of the situation.

Professor Wendel appears to suggest that the lawyer for the debtor ought to behave like a legal cipher: the law and nothing more.[47] But the message conveyed by the debtor's lawyer, either explicitly or implicitly, may well have a significant impact on the client's thought and choice. And it seems unlikely that a lawyer can avoid conveying some at-least-implicit message. If the lawyer implies or suggests that only "a sap" would pay money they are not legally required to pay (or that this is tantamount to giving away the stockholders' money, if the client is a corporation), that may well influence the client. On the other hand, if the lawyer's implicit attitude or explicit message is that ordinarily the decent thing to do is repay a debt, whether or not it is legally enforceable, that also may be quite influential. This kind of subtle message often makes a consequential difference, both

44. This is further developed in Pepper, *supra* note 41, at 188–92.

45. WENDEL, *supra* note 2, at 142.

46. That is, to some extent, an overstatement. Lawyers would be better prepared for their work if legal education required a serious component of skills training in counseling. For an excellent new set of teaching materials, see STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING (2009). Training within law firms and other legal service providers could also focus more explicitly on communication with clients.

47. WENDEL, *supra* note 2, at 141–42.

with individual clients and with organizations. Considering the effect on corporate reputation were this refusal to repay to become known, or looking into what the corporate ethos or ethic is or ought to be on this kind of question, would seem well worth the time and effort.[48] It is also true, of course, that repayment is not always so unambiguously the morally correct course. The recent disagreement over the ethical propriety of strategic mortgage default is a good example.[49] It arises from the unease associated with breaching the contract and not repaying what is owed balanced against factors that suggest the situation is quite different than the "just debt" scenario depicted in Part I above: the expectation of the parties may not have included further repayment beyond giving up the home upon default, and there may be far less than clean hands on the part of the financial institutions that initiated and now hold the debt.[50]

While Wendel concedes that "[t]here is something strangely un-human about reducing all of the complexities of family relationships to rights and obligations created by formal state law," he maintains the contrary conclusion in regard to lawyers including the moral dimension in their conversations with clients: "[M]oral counseling is supererogatory—an obligation over and above the ordinary range of moral duties . . . ."[51] Supporting this conclusion, Wendel asserts that "[m]ost lawyer–client relationships . . . are arm's-length economic transactions."[52] It is true that the lawyer may be *effectuating* arm's-length transactions for the client, but I doubt that the lawyer–client *relationship* is usually this distant and disconnected. If it is, and if there is no serious moral wrong involved in the conduct, then there

48. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009). At a recent half-day ethics workshop for the 65th annual meeting of the Society of Corporate Secretaries and Governance Professionals (June 2011, Colorado Springs, Colorado), following small-group discussion of the just-debt and technical-defense scenario, most of those who spoke were quite firm that the ethos or character of their corporation would lead to repayment and that the lawyer should quite firmly clarify that to a manager inclined to the contrary. Interestingly, outside-law-firm lawyers felt less free to take this approach.

49. *See* Brent Arends, *When It's OK to Walk Away from Your Home*, WSJ.COM (Feb. 26, 2010), http://online.wsj.com/article/SB10001424052748703795004575087843144657512.html (arguing that Americans with severe negative home equity should stop paying their mortgages and should not allow their senses of morality to prevent them from deciding to default strategically on their mortgages); James R. Hagerty, *Is Walking Away from Your Mortgage Immoral?*, WSJ.COM (Dec. 17, 2009), http://blogs.wsj.com/developments/2009/12/17/is-walking-away-from-your-mortgage-immoral/ (examining the moral debate over strategic mortgage default and presenting arguments both in favor of and against strategic default).

50. *Compare* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 972 (2010) (contending that while financial institutions and the government behave "irrespective of concerns about morality or social responsibility," homeowners wrongly allow fear and shame to prevent them from strategic mortgage default), *with* Curtis Bridgeman, *The Morality of Jingle Mail: Moral Myths About Strategic Default*, 46 WAKE FOREST L. REV. 123, 144–45 (2011) (urging homeowners not to default on their mortgages because they should feel bound by a moral obligation to pay their just debts).

51. WENDEL, *supra* note 2, at 141.

52. *Id.* at 142.

would be no need for a moral conversation. If, on the other hand, there is serious moral wrongdoing and a distant and disconnected lawyer–client relationship, all the more reason for conversation: the client may be using the distance, the disconnect, and the lawyer to distance itself (or themselves) from the arguable wrongdoing and transfer responsibility to the lawyer and the law.

IV. Be a Good Lawyer; Be a Good Person: Respect for the Law and the Internal Perspective

Consider two additional examples. First, in the years leading up to its bankruptcy, Lehman Brothers regularly moved debt off its books just before the end of the quarter and reacquired the debt just after the quarterly reporting period, thus creating an inaccurate accounting picture of its financial situation, one more favorable than the reality.[53] Lehman denominated these transactions as sales followed by reacquisitions;[54] the opposite party may well have accounted for them as financing transactions. Thus, at the quarterly reporting period, neither party may have reported owning the assets for accounting purposes. Arguably, this was lawful under then-acceptable accounting practice.[55] It is unfortunately difficult to apply Professor Wendel's legal-entitlement criterion to this situation. It apparently depends on whether Lehman's chosen accounting description and demarcation lines "properly interpreted" the law or were merely "within the law."[56] The morality of the situation is much clearer: the purpose of these transactions was deception, to give an inaccurate accounting picture of the corporation. This would not be difficult for the lawyer to convey to the client conceptually—the situation was apparently quite clear. On the moral side of the matter, the difficulty would be in being candid with a powerful and sophisticated client about what it was doing (or proposing to do), not in identifying the truth. My argument is that the lawyer should have been clear to the client about two things: (1) the arguable, somewhat murky legal line; and (2) the perfectly clear moral and policy line—perfectly clear, that is, in terms of the purposes of the legal and accounting rules. (The lawyer should also have conveyed that in an after-the-fact legal assessment of the situation, (2) might affect the interpretation and conclusion in regard to (1). This was

53. Floyd Norris, *Demystify the Lehman Shell Game*, N.Y. TIMES, Apr. 2, 2010, *available at* http://www.nytimes.com/2010/04/02/business/02norris.html.

54. *Id.*

55. *Id.*; Michael J. de la Merced & Andrew Ross Sorkin, *Report Details How Lehman Hid Its Woes*, N.Y. TIMES, Mar. 12, 2010, *available at* http://www.nytimes.com/2010/03/12/business/12lehman.html.

56. "Entitlements are what the law, properly interpreted, actually provides, while working 'within the law' seems to suggest something broader and looser . . . ." WENDEL, *supra* note 2, at 59. Wendel's method resembles Professor Simon's in this difficulty, Pepper, *supra* note 37, at 1024–25, although Wendel's method is substantially more accessible and predictable, with a criterion a good deal more predictable.

clearly an Enron-like situation not many years after Enron. It should not have been difficult to describe it as such.) Professor Wendel argues that conveying (2) is "supererogatory," not required by the ethics of legal practice.[57] The key question for him is (1), which the lawyers are apparently to decide alone. If the conduct qualifies as a legal entitlement, the lawyers should proceed with assisting the client, and if not, should refuse.

Second, and to me quite similar, is the situation of the intrusive and embarrassing deposition questions concerning past sexual practices in the IUD product liability litigation.[58] The purpose of the questions was to humiliate and discourage the women plaintiffs with only a quite remote possibility of discovering a plausible alternate cause for the plaintiffs' injuries.[59] Here, again, the right *ethical* practice would seem to be candor with the powerful corporate client about the morality of the conduct.[60] The lawyer ought to clarify to the client that under the very broad criteria of discovery, the questions can be asked. But the lawyer should also explain that such questions are not genuinely aimed at serving the purpose of the discovery rules (that is, finding possibly relevant information); rather, they are aimed at a purpose having nothing to do with discovery. The lawyer should convey to the client that under these circumstances, in his or her opinion, the questions are wrongful and ought not be pursued absent some particular reason to believe them possibly relevant to causation of the injury to a particular plaintiff.[61] With some hesitation, Professor Wendel comes to

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57. Unless, that is, it is foreseeable that (2) is likely to become a large factor in coming to a legal conclusion on (1). *See* WENDEL, *supra* note 2, at 140 (conceding that moral judgments may be incorporated into the law as a matter of social fact but arguing that a lawyer's advice on those matters should be limited only to the extent of such incorporation).

58. *Id.* at 24–26, 75–77.

59. *Id.* at 24–26.

60. Wendel assumes that it is the client who wants to pursue this tactic and so does my discussion in this paragraph. Professor Katherine Kruse has reminded me that often it would be the litigating lawyer coming up with the idea of such questions, not the client, and frequently such a "hardball" lawyer might proceed without consulting the client. If the lawyer has thought of this possibility but does not want to proceed in this manner, it is an interesting question whether there is an obligation to consult with the client about it under Model Rules 1.2 and 1.4. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2009) (providing that subject to specified limitations, a lawyer shall abide by a client's decisions concerning the objectives of representation, and the lawyer shall consult with the client regarding the means used to achieve those objectives); *id.* R. 1.4 (requiring the lawyer to consult with the client regarding the means used to achieve the client's objectives and any limitations on the lawyer's conduct).

61. ABA Model Rules 1.2(a) and 1.4 require portions of such a conversation, and 2.1 authorizes the rest of it. *Id.* R. 1.2(a), 1.4, 2.1. *How* the lawyer is to convey this is a difficult question, and most law schools have not developed or required course materials and coverage to assist students in acquiring such counseling skills. Clearly, confrontation, self-righteousness, or condescension would not be a preferred mode. Rather, a modest two-way conversation, in which the lawyer is open to learning from and being persuaded by the client, would be the goal. ELLMANN ET AL., *supra* note 46, at 279–80, 289–91; *see also* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 126 (1994) (discussing the importance of shared decision making for moral judgments); Pepper, *supra* note 41, at 192–204 (proposing several

the conclusion that the lawyer alone, not the client, ought to reach that conclusion: asking the questions is not within a "genuine entitlement" of the defendant because the purpose is not to discover relevant facts.[62] To Wendel, however, the questions are unethical for the lawyer for that reason alone, and the fact that they are morally wrongful, "creepy" and "humiliating," is not relevant.[63] The reason for that irrelevance is apparently that the defense lawyer is no more required to engage with the client on the morality of the matter than if the defendant corporation were a stranger with no relationship to the lawyer, or if the professional were a dentist for the corporate executive with the decision-making authority in the matter. To Wendel it is not consequential that the lawyer is clearly not a stranger to the situation—she will be implementing the morally noxious conduct.[64]

Professor Wendel repeatedly states that the lawyer's ethical obligation of fidelity to the law requires that the lawyer treat the law as "a reason" for action in and of itself.[65] Similarly, he often emphasizes that the lawyer must "respect" the law.[66] Each of these positions seems clearly correct to me, assuming one intends the normal reading of "a" reason (that is, one among many possibly present reasons and one that might be overcome by others) and of "respect" (that is, worthy of being paid attention to and being an important consideration but not necessarily exclusionary or determinative). One can, for example, respect one's parents but not necessarily always conclude that following their advice is the best or right thing to do under the circumstances. Professor Wendel seems to mean something more decisive and exclusive than this language would ordinarily indicate:

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factors that influence the type of moral conversation to have with a client and discussing impediments to such conversations and resolutions to those impediments).

62. WENDEL, *supra* note 2, at 77.

63. *Id.* at 25 n.*; *see also id.* at 24–25, 75–77 (discussing the ethical implications of these questions in more detail).

64. As for the dentist analogy, *id.* at 141–42, it seems oddly apt to imagine this as the dentist paid by and serving the defendant, painfully pushing and scraping in the mouth of the plaintiff.

65. *See, e.g.*, *id.* at 49 ("The obligation of respect means that lawyers must treat the law as a reason for action as such, not merely a possible downside to be taken into account, planned around, or nullified in some way."); *id.* at 61–62 ("If a person is concerned merely to act and to avoid sanctions, then she may adopt any attitude whatsoever toward the law, but she cannot claim to have acted lawfully without accepting the law as a reason for action as such.").

66. *See, e.g.*, *id.* at 9 ("If legal ethics is best understood in terms of fidelity to law, however, the distinctive professional obligations of lawyers are intimately bound up with the value of respect for the law and the legal system."); *id.* at 49 ("When representing clients, lawyers must respect the scheme of rights and duties established by the law, and not seek to work around the law because either they or their clients believe the law to be unjust, inefficient, stupid, or simply inconvenient."); *id.* at 84 ("The lawyer's obligation to respect and uphold the law prohibits attempts to nullify or evade the law on the grounds it is unjust or wrongheaded. Claiming to work as a *lawyer* while simultaneously claiming no obligation of fidelity to law would be self-undermining."); *id.* at 123 ("The implication of the fidelity to law conception defended here is that the ethics of lawyering is constituted principally by the political obligation of respect for the law, not ordinary moral considerations."); *id.* at 262 n.43 ("[A] lawyer's belief that she does not have a genuine nonprudential obligation to respect the law would entail the belief that other actors within the legal system, including the prosecutor and judge, also do not have an obligation to respect the law.").

> [L]oyalty to clients *within the law* requires lawyers to interpret the law, assert positions, plan transactions, and advise clients on the basis of reasons that are internal to the law. Relying on extra-legal considerations like the justice or efficiency of a law is not permitted. . . . [F]idelity to law requires lawyers to aim at recovering the best understanding of the existing law, and to act on that basis.[67]

This is what Wendel refers to as the "internal point of view."[68] There is some truth to this position, but the obligation asserted is too narrow and confining. As noted in Part II, Wendel seems to lose sight of the fact that the lawyer is acting in service to the client, and it is the client's decision as to how to be affected by or implement the legal alternatives. The lawyer should certainly convey to the client the law as objectively interpreted in a straightforward manner ("legal entitlements," in Wendel's usage) and convey that this law is *a* reason or basis for action. The lawyer should also convey that the law, whatever it is, merits respect. But for the client (and therefore for the lawyer serving the client)[69], the law is just *a* reason—often just one factor among many—and respect for the law means that it is a special or important factor but does not mean that it is exclusive or that the most straightforward interpretation is determinative.[70] In the two examples discussed in this part, as in the two examples considered earlier (hiring the undocumented domestic workers and the just debt with a defeating technical defense),[71] the law is important; it merits serious consideration ("respect"), but it alone is not necessarily determinative of the conduct of the client and hence of the lawyer assisting the client.[72] That the formal law as straightforwardly interpreted might now permit the end-of-the-quarter manipulations, or the humiliating deposition questions, is not a sufficient reason for the lawyer to conclude her own ethical deliberation or her conversation with the client.

The lawyer should convey all four of the factors mentioned above at the conclusion of Part II, and that approach would seem to manifest both "respect" for the law and due consideration of it as a reason for conduct—the

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67. *Id.* at 71.

68. By "internal" Wendel means the "point of view of a lawyer participating in the craft of making . . . legal arguments." *Id.* at 15.

69. Professor Wendel disagrees on this point, noting that the obligations of lawyers do not mirror those of their clients. *See id.* at 103 ("The ethics of lawyers may be more demanding than the ethics of [citizen clients] and may impose a heightened obligation of respect for the law in certain cases."); *id.* at 117 ("Citizens may be permitted to disrespect the law in ways that are prohibited for lawyers. The distinctiveness of the social role of lawyer . . . must be understood with reference to the value of legality. The role of citizen, by contrast, is not so narrowly defined.").

70. *See, e.g.*, Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEXAS L. REV. 635 (2012) (book review).

71. *See supra* Part I.

72. Contrary to the quoted statement in the previous paragraph and in note 69, *supra*, Wendel may find this an acceptable stance, at least for the client. Or this may be just his understanding of Hart's characterization of the good citizen. *See id.* at 61–62 (linking the notion of "respect" for the law from the "internal point of view" to Hart's concept of the "good citizen").

"internal point of view," as Wendel categorizes it—while leaving both lawyer and client open to other aspects of the situation. In this way, the lawyer can be both a good lawyer (providing access to the law) and a good person (assisting the client in considering the law within the context of the other facets composing the particular situation).

V. Conclusion

With *Fidelity to Law*, Brad Wendel has made a substantial contribution to the ongoing conversation on the theory and practice of lawyers' ethics. His foundation is a clear and sensible articulation of the function of law, focusing on its coordination function, including the provisional resolution of underlying disagreements. Despite the presence of background and sometimes-fundamental lack of resolution, law allows for and facilitates productive cooperation. From this base, Wendel reasons to specific conclusions concerning day-to-day ethical obligations in the practice of law. As articulated in Part I above, I believe the theory's primary weakness is a failure to take account of law's abstract and general character as distinguished from the lawyer and client situated in a particular, specific situation—the law is up in the air, lawyer and client are down on the ground. Down there, amidst all the complications and nuances of the situation, law is but one of many factors. Wendel's too-exclusive focus on law in the abstract gives his ideal lawyer a too-rigid and wooden approach. Even in those situations where, with the assistance of the lawyer, the client may be engaged in significant morally wrongful conduct, in Wendel's vision the overall morality and practicalities of the situation are not a necessary part of the conversation with the client. This diminishes the lawyer's ethical function and helpfulness, at least as I would suggest it be understood and practiced. The overemphasis on the law and underemphasis on the client's situations and choices is the focus of Part II above, and Part III then moves to the question of the appropriateness of a moral component to the conversations and considerations of lawyer and client. Part IV provides a recapitulation and clarification from the perspective of two additional examples. In this Review I have thus sketched my overall admiration for Wendel's thoughtful and well-constructed ethic and my agreement with much of it, but I have focused on several important aspects of understanding and practice where I think it can be substantially improved.

VI. Addendum: Autonomy as Part of a Second-Order Justification for Role-Specific Morality

Law is special for the reasons Professor Wendel lays out,[73] and the lawyer is special because access to law is commonly dependent upon the assistance of a lawyer. From the top looking down—that is, from the societal

73. *See supra* note 3 and accompanying text.

or political perspective—law is crucial for its structuring of mechanisms of cooperation and coordination despite underlying disagreements. From the bottom looking up—that is, from the individual perspective—law is crucial because it structures, limits, and facilitates a person's choices and conduct—that is, their freedom to act or their autonomy. In my early justification of role-specific morality for lawyers, the values of autonomy and equality were specifically linked to access to law as a moral justification for lawyers providing "amoral" access.[74] It is because access to law is usually dependent upon the assistance of lawyers that they are morally justified in providing legal facilitation for lawful but morally wrongful conduct (that is, role-specific morality). My suggested justification was thus institutional—based on the importance of open access to law—or "political" as Wendel prefers to categorize it.[75] *Lawyers and Fidelity to Law* develops the justification from the top down and provides a crucial foundation for the argument in doing so. *The Lawyer's Amoral Ethical Role* was based on the other perspective, from the individual up—but the two approaches seem to be looking at the same coin from two different sides. My understanding was based on the fundamental value of access to law but did not develop how or why access to law is of special importance in the systematic and foundational way Wendel has now articulated.

Late in the book, Professor Wendel acknowledges this, referring to "Pepper's view that the lawyer's role is fundamentally about protecting the political value of autonomy, by ensuring that all citizens have access to the law."[76] In Chapter 1, however, where he focuses on my early work, Wendel joins Professor Luban in suggesting that my position is based on autonomy as a general moral value unrelated to access to law.[77] It is true that we generally prefer autonomy and free choice over constraint and governmental determination, but that does not mean that in the particular instance an act is morally justifiable just because it is autonomously chosen. Choosing not to repay the just debt may well be a moral wrong even if the statute of frauds or statute of limitations provides a valid legal defense. But the lawyer is morally justified in facilitating that moral wrong because it is a legal entitlement of the client and the lawyer's morally (and politically) justified societal role is providing access to law. The aggregate good of such access in general trumps the specific wrong of not repaying the debt in this particular situation. I attempted to clarify this years ago in a rejoinder to the

74. Pepper, *Lawyer's Amoral Ethical Role*, *supra* note 39, at 616–18. "The premise with which we begin is that law is a public good available to all." *Id.* at 616. The values of autonomy and equality of access were then steps two and four in the basic argument, but each was in relation to access to law—a public ("political" in Wendel's demarcation) good. *See also supra* notes 6–7 and accompanying text.

75. *See supra* note 6 and accompanying text.

76. WENDEL, *supra* note 2, at 141.

77. *Id.* at 31–37; *see also id.* at 141 (continuing his discussion of my position in Chapter 4).

critiques of Professors Luban and Kaufman published simultaneously with *The Lawyer's Amoral Ethical Role*:

> I agree . . . that relationships with wives, friends, colleagues, and community observers are both appropriate and essential as informal restraints on individual behavior. The informal limits provided by these relationships are probably far more important to having a decent and good society than are law and law enforcement. Thus I concur . . . regarding the propriety of a wife or friend refusing to assist in immoral but lawful conduct. . . . Where Professor Luban and I disagree is in his suggestion that a wife's refusal to assist her husband's immoral conduct is the proper analogy for lawyer conduct.
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> . . . The system of law is in form available to all, but the lawyer is the only instrument for access to the system . . . . *Lawyers are therefore more appropriately thought of as part of the formal legal system* than as part of the informal social web surrounding each of us. To see lawyers as being on the informal side of the line—like spouses or friends, free to assist or not assist on the basis of their total personalities, their idiosyncratic personal convictions and their whims—is to put law itself on that same side of the line, and to determine access to the law on the same unequal, highly contingent, often whimsical basis. To do that is to informalize and subjectify law. It is wrong.[78]

Access to law was the foundation value, and thus the argument was intended to be "second order," "political," and institutional, in Professor Wendel's terms.

78. Pepper, *Rejoinder*, *supra* note 39, at 665–66 (emphasis added) (responding to David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637). The initial article, the responses by Professors Kaufman and Luban, and the rejoinder were published together as a "Symposium on the Lawyer's Amoral Ethical Role." The observation quoted is quite close to Wendel's: "There is a significant difference, however, between social relationships and the allocation of entitlements in a political system . . . ." WENDEL, *supra* note 2, at 34.

Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn

LAWYERS AND FIDELITY TO LAW. By W. Bradley Wendel. Princeton, New Jersey: Princeton University Press, 2010. 286 pages. $35.00.

Reviewed by William H. Simon*

I. Introduction

Much of the classic writing on lawyers' ethics has a libertarian flavor. Major works by Monroe Freedman, Stephen Pepper, and others are visibly shaped in response to the specter of an oppressive state.[1] Bradley Wendel's *Lawyers and Fidelity to Law* is the clearest expression of a more recent trend toward authoritarianism. Apparently, what keeps Wendel up at night is the fear, not of totalitarianism, but of anarchy. In particular, he worries about what Norman Spaulding calls "Emersonian" moralism.[2] The Emersonian view exalts the individual who makes decisions on the basis of her private values without regard to the rules, conventions, and expectations of her society.[3] The libertarian and authoritarian impulses converge on resistance to the idea that complex or contextual judgment should play an important role in legal ethics. For the libertarians, such judgment is a threat to the autonomy of the client; for the authoritarians, it is a threat to the social order.

Wendel makes a major effort to develop the issues jurisprudentially. His rejection of expansive ethical decision making rests on a critique of the idealist jurisprudence of Ronald Dworkin[4] and an appeal to the positivism of Joseph Raz[5] as well as a more amorphous set of ideas about the role of law in coordinating activity in a pluralist society.[6]

In this Review, I respond to the authoritarian theme in *Lawyers and Fidelity to Law*. In essence, I argue: neither libertarianism nor authoritarianism is a plausible starting point for a general approach to legal

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1. *See generally* MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 18–20 (4th ed. 2010) (defending an aggressive conception of adversarial advocacy as a check against totalitarianism); Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 623 (defending an "amoral" lawyer role as a safeguard against misuse of "the vast power of 'the state'").

2. Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1938–42 (2008).

3. *Id.* at 1938–39.

4. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 46–48 (2010).

5. *Id.* at 107.

6. *Id.* at 116.

ethics. It is a great virtue of Ronald Dworkin's jurisprudence that it suggests a conception of law and legal ethics that does not depend on either perspective. Moreover, it suggests a conception of lawyer responsibility that is more plausible than either Emersonianism or moralistic positivism. By gesturing toward positivism and by surrendering to less reflective authoritarian impulses, Wendel's argument underestimates the extent to which social order depends on informal as well as formal norms and adopts a utopian attitude toward constituted power. The book persistently treats as analytical propositions what are in fact empirical assertions for which Wendel has no evidence.

I should acknowledge two qualifications. First, this is not a balanced assessment of the book. I ignore its most valuable features. Wendel's analysis of the meaning of role morality is the most sophisticated in the legal ethics literature, and his argument that the ideal of fidelity to law should be the organizing focus of ethics doctrine is compelling. These efforts deserve appreciation, but I think I can make a greater contribution to the rich discussion the book is bound to promote by focusing on the ways in which I think it goes wrong.

Second, Wendel's book has a relation to my own work that may lead some to view this critique as perverse. I think that key problems of legal ethics should be understood as arising from competing legal values rather than, as many suggest, from a discrepancy between legal and ordinary moral values. I also think that conventional libertarian views of legal ethics suffer from an implausibly narrow conception of the "bounds of the law" that limit the pursuit of client goals.[7] Wendel shares these views and advances them brilliantly. Thus, you might expect us to be allies on the most fundamental propositions. But Wendel does not see things this way. He spends several pages distancing his view from mine,[8] and I think he is right to do so. Like those of David Luban and Deborah Rhode, who are also frequently criticized in Wendel's book, my conception of legal ethics makes the idea of justice the central normative touchstone.[9] By contrast, a central theme Wendel shares with some other recent theorists of legal ethics is that concerns for justice must be subordinated to the needs of social order.[10]

7. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 39–40 (1998).

8. WENDEL, *supra* note 4, at 44–48, 133–34.

9. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 12, 15, 18 (1988); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 3 (2000).

10. Wendel's argument shares a good deal with TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (2009); DANIEL MARKOVITS, A MODERN LEGAL ETHICS (2008); and Spaulding, *supra* note 2. All of these theorists believe that the fact of moral pluralism entails a strong separation of law and morals and a consequent strong differentiation of the lawyer's professional role. This differentiation involves attenuation of the lawyer's responsibility to values of justice.

II. The Authoritarian Impulse

I begin with two examples of the visceral authoritarianism that recurs in the book.

First, in one of his less original moments, Wendel invokes the scene in *A Man for All Seasons* in which Thomas More rejects the suggestion that he forestall the lawless plot on his life by lawlessly arresting one of the conspirators. More declines to "[c]ut a great road through the law to get after the Devil."[11] His refusal is for his own safety, because, he says, "[W]hen the last law was down, and the devil turned round on you, where would you hide . . . ?"[12]

It has always bewildered me that lawyers cite this scene as support for conventional notions of fidelity to law. *Haven't they seen the end of the play?* The conspiracy proceeds, and More is killed lawlessly.[13] His own conformity proves no impediment to his destruction whatsoever. Had More followed the suggestion that the play treats as shameful, his own lawless act might have prevented a far more egregious one. I do not intend to debate what More should have done. My point is that the proposition for which the scene is famous is contradicted by the only relevant evidence in the play.

Second, Wendel expresses distress about the Emersonian praise David Luban lavished on Daniel Bibb, a Manhattan prosecutor who "threw" a case he had been assigned to present against defendants he thought, on the basis of a two-year investigation, were innocent.[14] Wendel objects that Luban failed to consider the ethical relevance of the institutional setting in which Bibb acted. His superiors had the publicly conferred responsibility for making the decision. They decided, Wendel reports, that there was "good reason" to conclude the defendants were guilty, and "[p]resumably, they made their decision upon consideration of all of the evidence" of which Bibb was aware.[15] Thus, Wendel asserts, Bibb's decision to act on his own view involved "disrespect for the legal system."[16]

Wendel is right that institutional structure is pertinent and that lawyers are not routinely privileged or obliged to act on their own views on the ultimate merits of the controversies in which they are involved. And Wendel is also right to concede that the deference Bibb owed to his superiors depended in part on whether they had made their decision in good faith and on the basis

11. WENDEL, *supra* note 4, at 132 (quoting ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS 38 (1960)) (internal quotation marks omitted).

12. *Id.* (quoting BOLT, *supra* note 11, at 38) (internal quotation marks omitted).

13. BOLT, *supra* note 11, at 94.

14. WENDEL, *supra* note 4, at 118–19. "Threw" is Bibb's own characterization. Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, N.Y. TIMES, June 23, 2008, at A1. But in fact, it appears that all he did was surrender some advantages that were of debatable legitimacy in the first place. He didn't impeach witnesses he thought were telling the truth, and he shared strategic information with the defense. *Id.*

15. WENDEL, *supra* note 4, at 118–19.

16. *Id.* at 121.

of the relevant information. Yet, Wendel ignores that the facts on this point were disputed. Bibb claimed that his superiors did not decide in good faith.[17] Surely, such an allegation should not be regarded as prima facie incredible in an era where egregious prosecutorial misconduct is frequently documented. Yet, Wendel simply "presume[s]" that the senior prosecutors' version is correct, apparently for no better reason than that they were Bibb's institutional superiors.[18]

III. Rules vs. Principles: Wendel's Flirtation with Positivism

Wendel thinks that the key issue that separates him from me, Luban, Rhode, and others concerns respect for institutionalized authority. He faults us for a "pervasive distrust of institutions" and a consequent overreliance on disembodied conceptions of justice that can only be realized in unaccountable individual judgments.[19] He emphasizes the need for deference to institutions in a pluralistic society where individual judgments about justice will often diverge. I disagree that the call for ambitious ethical judgment in the works to which Wendel objects reflects an anti-institutional bias. I think the key issue is not the extent to which institutions deserve respect but the form that respect takes. More generally, the key issue is whether the "fidelity to law" that everyone sees as central to lawyers' ethics is structured by rules on the one hand or by principles and policies on the other.

As elaborated by Dworkin, rules are explicit and categorical. They are exhaustively specified, and they either apply or do not. Principles and policies, on the other hand, can be implicit and graduated. They can be inferred from language and structure, and they can "weigh[]" in favor of decisions (provide reasons for them) without conclusively dictating them.[20]

Libertarians and many other ethicists tend to assume that the bounds of advocacy must be specified by rules. Their critics (such as me, Luban, and Rhode) argue or assume that the bounds are typically principles or policies. Wendel agrees that law is constituted by principles and policies as well as rules, but he worries that too much preoccupation with principles and policies jeopardizes the separation of law and morality. Indeed, Dworkin, in rejecting the positivist "Model of Rules," insisted that the role of principles

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17. Although the accounts are not completely clear, Bibb's quoted statements suggest that his superiors were motivated not by a belief that the defendants were guilty, but by a reluctance to take responsibility for the decision to end the proceedings. *See* Weiser, *supra* note 14 (quoting Bibb as suggesting that his supervisors were "'tak[ing] things and throw[ing] them up against the wall' for a judge or jury to sort out" in this case).

18. WENDEL, *supra* note 4, at 119.

19. *Id.*

20. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–39 (1978). Prominent features of Dworkin's work are suggestive and supportive of the arguments I make here and elsewhere. However, Dworkin's position is complex, and he has not written about lawyers' ethics. So I cannot say whether he would agree with my arguments.

and policies in the legal system precluded any strong separation.[21] Principles such as "[n]o one shall be permitted to . . . take advantage of his own wrong" or the duties of reasonableness or good faith in various contexts span legal and moral discourse.[22]

We can illustrate the contrast between the rule-based and principles-based perspectives with two hypotheticals. First, there is the problem of impeaching the truthful witness. My client is on trial for robbery. A prosecution witness will testify that he was at the scene of the crime at the relevant time. I know that the testimony is true because my client has conceded it in confidence. I also know that the witness has a prior perjury conviction. Should I impeach him with the conviction? A key position in favor of impeachment emphasizes that no *rule* prohibits impeachment. In situations where no rule prohibits an action the client prefers, libertarian ethicists would have the lawyer adopt a default rule that the client's decision prevails. On the other hand, the position against impeachment emphasizes that impeachment is inconsistent with the *principle* that the parties should not mislead the trier of fact. In impeaching the witness, the defendant impliedly represents to the trier that the witness might be testifying falsely. Of course, a proponent of impeachment could dispute whether there is any general principle against misleading the trier, or she could argue for impeachment on the basis of the principle that even a guilty defendant is entitled to put the prosecution to proof. But such arguments are explicitly a matter of principle, and when competing principles are recognized, the issues have to be resolved by deciding which are weightier. Rule-based ethics never gets to this point. Once we see there is no rule requiring forbearance, we default to client loyalty.

Wendel seems to agree with the principles-based approach to the truthful witness problem, but he worries about the dangers of excessive appeals to principles and policies.[23] In a pluralistic society, people will tend to disagree about what the relevant principles and policies are or about how they apply in particular situations. We cannot found a social order solely on informal values. We need to defer to the decisions of authoritative institutions. These institutions are legitimated by procedural norms like democracy and due process. These norms can warrant respect for institutional decisions even when we believe they are substantively incorrect.

I doubt that anyone disagrees on this point. But there remains a basic distinction between a rule-based approach to institutional authority and a principles-based approach. In a rule-based approach, a relevant norm or decision that satisfies the procedural conditions of legality (for example, bicameralism and presentment) is entitled to conclusive respect. The

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21. *Id.* at 348–50.

22. *Id.* at 23.

23. *See* WENDEL, *supra* note 4, at 191–94 (rejecting deceptive but not explicitly prohibited trial tactics).

relevant procedural rules are "exclusionary" in Joseph Raz's terms, and they displace all inconsistent substantive concerns.[24] In a principles-based approach, the authority of institutions derives from principles and policies as much as from rules, and the value of institutional authority may be weighed against informal substantive values.

It is not clear how broad the practical range of disagreement between Wendel and me is, but it may be helpful to take an extreme case where we can be fairly confident of Wendel's position. We are in the 1970s. About a dozen states still have fornication statutes criminalizing consensual sex between unmarried adults. In a majority of the states, these statutes have not been enforced at all for decades. In one county of one of the states, however, the prosecutor occasionally brings charges under the statute against pregnant unmarried women. All of the women prosecuted so far have been charged after seeking assistance under public healthcare programs for low-income people, although it is unclear how the prosecutor identifies them, and all are people of color, who collectively constitute a very small fraction of the state population. In the case we are considering, the client has conceded to her lawyer that she engaged in conduct that violated the terms of the statute. There are no relevant federal statutes. There are state and federal constitutional claims of infringement of privacy and discrimination (and perhaps a state common law claim of desuetude) that might be raised nonfrivolously as defenses. But the prospects that any such defense would prevail in the local trial court are virtually nil, and they would be only slightly better on appeal or collateral attack. The proceedings are causing trauma and humiliation to the client, and a conviction will leave her with a criminal record that could haunt her for the rest of her life. However, there is a way she could almost certainly prevail: if she and the father of her child testify that they were in another state at all times when they engaged in sexual intercourse, they will be acquitted. The problem is that the testimony would be perjury. The question is whether the lawyer can ethically present the perjury.[25]

There are, of course, rules that forbid perjury and lawyer facilitation of perjury. The question is what ethical force a lawyer should attribute to these rules in the hypothesized situation. If we follow Wendel in regarding "fidelity to law" as the most basic value of legal ethics, we still have to decide whether to understand the relevant law in rule terms or principle terms. If we take the rule-based approach, the analysis is short, and the

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24. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON THE LAW AND MORALITY 17 (2d ed. 2009). Raz's theory of legal norms seems like an unironic elaboration of Thomas Reed Powell's ironic definition of a "legal mind": "If you can think of a subject which is interrelated and inextricably combined with another subject, without knowing anything about or giving any consideration to the second subject, then you have a legal mind." THURMAN ARNOLD, FAIR FIGHTS AND FOUL 20–21 (1965).

25. The example is hypothetical but not unrealistic. For a recent example of such prosecutions, see Mark Hansen, *Miscarriage of Justice? An Idaho Prosecutor Charges Pregnant Unmarried Teens and Their Adult Boyfriends with Sex Crimes*, 82 A.B.A. J. 26 (1996).

answer is clear. The prohibitions on perjury and assisting perjury are categorical, and they satisfy the positivist's procedural test of legal validity. These are the only relevant considerations; they compel us to forego participation in the perjury. If there is any ethical reason to participate, it is not a reason of *legal* ethics.

But from a principles-based approach, the analysis is more complicated. We consider the authority of the prohibitions, not just in terms of their conformity with the procedural rules of lawmaking, but with the principles that underpin these rules—principles of democracy, fairness, and equality. We consider the extent to which these procedural principles seem manifest in the particular process in question. At the same time, we weigh substantive values that appear as principles rather than rules in various authoritative sources—principles of privacy, fairness in the exercise of administrative discretion, and nondiscrimination. It seems likely that the weight of the principles supporting the authority of the rules prohibiting perjury would be relatively weak in this case. Perjury is always bad, but in this case its main effect would be to preclude enforcement of the fornication statute. The fornication statute may be entitled to no respect. For example, it may have been enacted long ago and have survived largely due to legislative inertia, its low visibility, or the political marginality of the people against whom it is applied. Its enforcement in this case would be unfair in legally relevant ways and would do serious personal harm. In this situation, there may be no way to vindicate all the relevant legal values. However, if presenting the perjury were, on balance, the course of action that was least damaging to the relevant principles, it might seem the course of action most consistent with fidelity to law.[26]

If this conclusion seems radical, consider that principled defiance of constituted authority is an honored tradition in American public life. School children are taught to admire the Montgomery bus boycott, the Birmingham march, and the lunch counter sit-ins of the civil rights movement. Although teachers do not always mention it, all three were thought illegal at the time, and if we take a rule-based perspective, that conclusion is hard to dispute even today for the latter two.[27] Or consider that the modern fictional lawyer most often held up as an ethical role model is Atticus Finch of *To Kill a Mockingbird*. Ethical discussion tends to focus on his admirable but ethically conventional defense of an innocent man, but no one seems to have any problem with his later participation in what any lawyer who thought

26. Before ethics rules clearly forbade the practice, libertarians argued that lawyers should *routinely* present perjured testimony on behalf of criminal defendants when defendants desired to testify falsely. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477–78 (1966).

27. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), suggests that prohibitions of boycotts were unconstitutional, but *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967), specifically confirms the illegality of the Birmingham march. To my knowledge, no one argues that the lunch counter sit-ins were legal in any sense consistent with positivist conceptions of legality.

about it would have to concede is a conspiracy to obstruct justice. Finch and the sheriff agree to conceal evidence that Boo Radley killed Bob Ewell because, although Radley has a valid claim of defense-of-another, they do not trust the local judicial system to vindicate him.[28]

We could characterize such cases as sacrificing legal values to nonlegal values. But that was not how the civil rights protesters understood their actions, and I do not think it is how most people understand either the protesters' actions or Atticus Finch's. The protesters thought they were vindicating constitutional rights. And Finch and the sheriff were acting to protect Boo Radley from what they reasonably feared would be an unfair trial and a wrongful conviction. The principles they were trying to vindicate were legal ones.

Wendel is wary of any violation, however principled, of procedurally valid rules, though there is some ambiguity about the strength of his opposition. He initially takes a rule-based position toward legal authority, invoking Raz's "exclusionary reasons" idea and describing institutional authority as "replacing what would otherwise be reasons for action, as opposed to adding to the balance of reasons on one side or the other."[29] This suggests that when we have a procedurally valid statute that dictates conduct, we cannot weigh the policies and principles that underpin it against competing policies and principles. We must treat it as conclusive.

But ultimately he qualifies this conclusion. Rule-based authority is not conclusively binding but is entitled to a strong presumption.[30] Since few would dispute that some kind of presumption is warranted, a lot turns on how strong it is. Wendel does not provide any general indications of how the strong presumption might be rebutted. He concedes the legitimacy of the lawyer assistance to the classic acts of civil disobedience in the civil rights movement. However, he insists that the nonpublic or covert disobedience is not (or perhaps, is rarely) legitimate. He specifically disapproves of the conduct of New York lawyers in presenting perjury to facilitate consensual divorce under an old New York statute that required proof of fault.[31] He also suggests that the presumption of authority would not apply or would be generally rebutted in a fundamentally and pervasively unjust society like Nazi Germany.[32] But the judgment about fundamental justice he contemplates is a global one. Lawyers are entitled to weigh against the claims of

28. HARPER LEE, TO KILL A MOCKINGBIRD 312–18 (40th Anniversary ed. 1999). Principled transgression of positivist legal rules in order to vindicate more fundamental legal principles is a common theme in favorable portrayals of lawyers in popular culture. *See* William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001) (discussing such portrayals in John Grisham novels, *L.A. Law*, and *The Practice*).

29. WENDEL, *supra* note 4, at 109.

30. *See id.* at 113 (arguing that positivist legality should be regarded as creating "very weighty reasons" for compliance).

31. *Id.* at 134.

32. *Id.* at 96–97.

legal validity the general characteristics of society, but if these characteristics prove "tolerably fair,"[33] no further consideration of structural fairness or nonrule substantive concerns is encouraged. "To some extent," he says, "the whole point of legal entitlements is that they are relatively insensitive to justice or injustice in particular cases."[34]

Wendel spends more space describing his exclusionary conception of legality than he does explaining why it is a plausible basis for legal ethics. If I understand him, he makes two arguments for it.

First, he thinks this limited conception of legality is implicit in the general social understanding of the value of a legal system. For Wendel, law is fundamentally about conflict resolution. People establish a legal system because they anticipate that they will disagree about the application of substantive norms. Thus, they create a set of procedures and agree to abide by the decisions that emerge from it even if they disagree with the decisions substantively. Wendel uses the arbitration contract as a metaphor for the legal system.[35] To refuse to accord respect to a procedurally valid arbitration decision on the ground that it is substantively wrong, he says, is to miss the point of the institution.[36]

Second, he thinks a legal ethics that prescribed more inclusionary judgment for individual lawyers would threaten anarchy or what he tends to refer to as a failure of "coordination."[37] In the most general sense, law is a matter of coordination to the extent that any one person's willingness to comply with burdensome obligations is a function of the perceived willingness of others to do so. The social order is based substantially on voluntary compliance sustained by expectations of reciprocation. Perceptible noncompliance with legal obligations threatens social order. Of course, this potential arises only when the noncomplying behavior is viewed as a breach of an obligation. If noncompliance in a situation like the fornication scenario is perceived as justified or excusable, it should not encourage further noncompliance in dissimilar situations. Wendel thinks, however, that if people's obligations are determined by broadly inclusive legal judgments, people will disagree too much about what these obligations are. What one person views as justified noncompliance, others may view as simple lawlessness. And such perceptions will undermine their own willingness to comply. Thus, we need to define obligations in relatively exclusionary terms, and we need to insist on strict compliance with these obligations.[38]

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33. *Id.* at 98.
34. *Id.* at 128.
35. *Id.* at 110–21.
36. *Id.* at 110–12.
37. *Id.* at 112–13.
38. *Id.* at 111–12.

My view is that the first argument is wrong and that the second, as applied to principles-based inclusionary decision making, is counterintuitive and unsupported.

IV. General Problems with Wendel's Authoritarian Perspective

The social contract idea that underlies Wendel's first argument is wrong because conflict resolution, or the minimization of social friction, is not an adequate description of either the motivation for or the effect of institutionalized legality.

Sometimes, institutionalized legality deliberately undermines social order by disrupting stable, informal social relations. *Liberty Against the Law* is the title of a historical work that chronicles protests against the imposition of capitalist legal norms in early modern England in ways that chaotically disrupted precapitalist social relations.[39] For example, customary practices whereby herders were afforded grazing rights after harvest or merchants restrained price increases in times of shortage were eliminated in order to give the owners and merchants more control.[40] The protests were contentious, but they were responding to what the protestors considered the law's disruption of well-functioning informal relations. A more upbeat story of law-induced social disruption is the civil rights movement in the American South, which uprooted informal relations of racial subordination.

In both these stories, the effect of the imposition of positivist legality was to *increase* conflict, at least in the short term. The goal of those who supported the repression of informal social order in both cases was not peace but rather the attainment of a specific substantively desired state of affairs. The goal in the first story remains controversial; the one in the second does not. Yet both stories illustrate that minimizing social friction is not the single preeminent goal of the legal system. Only Hobbesians think state-enforced peace is a sufficient condition of a legitimate social order, and few people are Hobbesians. We want peace, but we also want legal order that encourages fairness, respect, autonomy, and efficiency in relations in civil society.[41]

There is a potential tension between the order-focused goals and the justice-focused goals of a legal system. This potential has been traditionally recognized in doctrines such as champerty and maintenance that have forbidden lawyers to encourage people who are not already inclined to assert their rights to do so. These doctrines sacrifice the justice goal of legal order to the coordination goal. However, this tendency has never been consistent, and it seems to have been decisively reversed in the United States in 1977

39. CHRISTOPHER HILL, LIBERTY AGAINST THE LAW: SOME SEVENTEENTH-CENTURY CONTROVERSIES (1996).

40. *Id.* at 31–32.

41. *See generally* Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975) (arguing that the legal system reflects both "conflict resolution" and "behavior modification" models of legality).

when the Supreme Court decided *Bates v. State Bar of Arizona*.[42] In holding that lawyer advertising is protected by the First Amendment, the Court rejected concerns about "stirring up litigation" as a constitutionally legitimate basis for restricting truthful speech by lawyers.[43]

What counts as conflict and what counts as resolution in Wendel's story seems highly artificial. Consider our hypothetical about the use of anachronistic fornication statutes to harass a vulnerable social group. On full analysis, the fornication prosecution might look more like the aggressive disruption of informal social relations by a conflict-generating state intervention than the orderly accommodation of differences of opinion. It is true, as Wendel says, that people disagree about what justice means.[44] But they also disagree about what counts as peace and about what is an acceptable price to pay for it.

Wendel's second argument is more consequential. People will not agree on when principles-based noncompliance is justified, and if they see too much of it, their sense of obligation and willingness to comply themselves will erode.

It is not clear how this argument applies in situations where lawyer and client are deciding how to act with respect to obligations that are not fully enforced. The fornication statute is an extreme example; it is hardly enforced at all. But no legal norms are perfectly enforced, and many are substantially underenforced. These situations often seem to involve relatively stable levels of voluntary compliance rather than the social unraveling the authoritarians predict. Moreover, perceived noncompliance in discrete areas, like marijuana prohibition, does not seem to regularly spill over indiscriminately into other areas. The more general objection is that the legitimacy of law—its capacity to induce compliance simply on the basis of its status as law—seems likely to depend on factors other than perceived compliance by others.[45] In particular, it seems likely to depend on the degree to which law converges with ordinary morality. There are, of course, many examples of societies where disrespect for constituted authority, even principled disrespect, is associated with intolerable disorder. The Weimar Republic is

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42. 433 U.S. 350 (1977).

43. *Id.* at 375–77.

44. WENDEL, *supra* note 4, at 88–89.

45. I am speaking of "noncompliance" here in Wendel's exclusionary terms. WENDEL, *supra* note 4, at 200–01. But what Wendel sees as noncompliance with exclusionary legal norms could sometimes be described as compliance with more inclusionary ones. Our legal system fits the exclusionary model only partially and crudely. Doctrines such as the necessity defense (that sometimes justifies an otherwise sanctionable act when the act is necessary to avoid a greater harm) and the authority of the jury to nullify in some states are especially salient repudiations of the idea that legal judgments are necessarily exclusionary. Wendel does not consistently acknowledge such facts. For example, he speaks of jury nullification as if it were simple lawlessness. *Id.* at 47. But in fact, its creators understood it as a delegation of (inclusionary) legal judgment to the jury. Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 587 (1939). On the necessity defense, see WAYNE R. LAFAVE, CRIMINAL LAW 476–86 (3d ed. 2000).

an apt one because it seems likely that much of its lawless aggression was motivated by sincere commitments to divergent interpretations of justice and social good. But it is at least as easy to think of examples of societies where discrete acts of principled noncompliance or pockets of noncompliance seem compatible with good social order. Highway speeding laws in the United States are a good example. Some people speed recklessly because they are immoral or lack good judgment, and the police rightly target them for sanctions. But other people—in fact, most people—speed moderately when it seems reasonable under the circumstances, and the police tolerate their conduct. They tolerate it, not just because they have insufficient resources to sanction it, but because traffic flows better when people are accorded this discretion.[46] Both the efficacy of coordination of driving and the legitimacy of the regulatory system would be reduced by strict compliance.

Wendel's argument concedes, as any credible argument must, that the classic, principled unlawfulness of the now-vindicated civil rights movement proved compatible with general social order. But he wants to confine this concession to open disobedience. Covert disobedience is more of a threat to social order because it is harder to call to account. Yet, after this fact is acknowledged, the question remains whether this disadvantage should be considered a cost that might be outweighed by other concerns in a balancing calculation or rather as categorically preclusive. Sometimes, open noncompliance would undermine the efficacy of the act as it would with the perjury in the fornication hypothetical or the New York divorce story; sometimes, it would subject the actor to unjust retaliation. A principled calculation would treat secrecy as a cost but would consider that the cost might be outweighed by such considerations.[47]

Wendel has neither evidence nor argument to support his contention that desirable social order depends on categorical preclusion. The clearest example he discusses—the New York divorce story[48]—tells against his position. In hindsight, it appears that the perjury practice enhanced social order and coordination by accelerating the convergence of enacted law with the informal values of the majority of people. It neutralized the effects of malfunctions in the regular lawmaking process—its overresponsiveness to well-organized interests (the Catholic Church) and its class bias (affluent

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46. *See* Brock Yates, Op-Ed., *Speed Doesn't Kill. Bad Drivers Do.*, N.Y. TIMES, July 24, 1995, at A13 (reporting that "[t]raffic studies" show that people tend to drive at what they consider a "comfortable speed," regardless of posted limits).

47. Wendel quotes the passage from Martin Luther King's *Letter from Birmingham Jail*, which describes virtuous civil disobedience as something engaged in "openly," but without quoting the passage that declares, "An unjust law is no law." WENDEL, *supra* note 4, at 124; Martin Luther King, Jr., *Letter from Birmingham Jail*, *in The Negro Is Your Brother*, ATLANTIC MONTHLY, Aug. 1963, at 78. It follows from the latter proposition that fidelity to law does not require any respect whatsoever for an unjust law, including the respect implied by open, as opposed to covert, disobedience. Of course, there might still be strategic or moral reasons other than respect for law to act openly.

48. *See supra* note 31 and accompanying text.

people had relatively easy access to out-of-state divorce).[49] There is no evidence that the practice had any spillover effects causing indefensible illegality. To the extent that people were aware of it, they seem not to have understood it as undermining the legitimacy of the state or as a signal of general tolerance for lawlessness.[50]

I could be wrong, but my argument does not depend on empirical propositions to the extent that Wendel's does. My view is that neither lawyers nor those who regulate them know enough about the indirect or aggregate consequences of lawyers' ethical decisions to incorporate them into their analyses or rules. Lawyers should focus on the direct consequences of their actions and should try to vindicate justice in the particular case: not their private, idiosyncratic notions of justice but notions of justice that can be defended in terms of legal authority and public values. Regulators should encourage lawyers in such practices and should hold them accountable when they fail to make such judgments or when their judgments are unreasonable. This is exactly what the regulators purport to do now when lawyers are charged with harming clients. "Reasonable care" is the regulatory touchstone. The rule-based approach is applied only when the issue arises from third-party harm.[51]

If the lawyer should find herself in a situation where she has reason to believe that an act of principled noncompliance that would otherwise be justifiable would have some specific effect in undermining desirable social order, she could take that into account. I doubt this situation would arise frequently, but a lawyer who determines that it has arisen should treat the damage to social order as a cost. But even if the lawyer were able to assess the indirect effects of her conduct on social order, there is no reason to treat social order as a trump that preempts concerns about justice.

My view is grounded, most basically, in values of moral autonomy and social solidarity. It is a good thing that people do what they think is right and that they try to respect the legitimate interests of their fellows. Wendel and the other law-and-order folks concede this. They all recognize that moral

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49. Editorial, *New York's Antique Divorce Law*, N.Y. TIMES (Jan. 16, 2010), http://www.nytimes.com/2010/01/17/opinion/17sun3.html (noting that efforts to enact a no-fault divorce system in New York had endured years of opposition from the Catholic Church, and commenting on the "thousands of dollars" litigants must spend under a fault system in order to obtain a divorce).

50. Wendel claims that Enron's lawyers were willing to facilitate its evasion of disclosure requirements because they accepted arguments of Enron's executives that the requirements should not apply to them because Enron had a more advanced business model than those for which the requirements were designed. WENDEL, *supra* note 4, at 134–35. Wendel cites no evidence of the lawyers' beliefs (as opposed to the executives'). The lawyers themselves have defended their conduct in thoroughly conventional terms. *See* Patti Waldmeir, *Don't Blame the Lawyers for Enron*, FIN. TIMES, Feb. 21, 2002, at 14 (quoting a Vinson & Elkins spokesperson as describing efforts for Enron as "legally appropriate" and what "every other law firm in America" does).

51. To forestall misunderstanding, I emphasize that the proposal is not that lawyers should have duties to third parties of the same strength and nature that they have to clients. The claim is that duties to third parties should have the same principles-based form that duties to clients currently have.

autonomy on the part of the lawyer is a value. They just think that the compromise of this autonomy is a price that has to be paid for the benefits of good social order. But in our current state of knowledge, this belief is a superstition. Once we disabuse ourselves of it, we should return to a focus on justice.[52]

V. Ambiguities of Coordination

Most often, the threat Wendel sees from inclusionary legal judgment to law's coordination function seems to concern the legitimacy of the system, understood in terms of its willingness to induce voluntary compliance with social norms. But occasionally, Wendel seems to have two other concerns in mind.

The first is the specific type of coordination problem that involves tightly interdependent behavior.[53] Some rules are intended to create conventions in situations where it is more important that people adopt a common practice than that the practice they adopt be the best one possible. Rules about driving on the right or the left are the classic example. Rules or protocols for telecommunications and computer networks are further examples. Even when deviating from the rule might have some benefits, these benefits would often be swamped by the costs that arise given that other people are likely to continue to abide by the rule. The exclusionary-reason idea seems exceptionally powerful here, but even here, qualifications are needed.

Most laws are not about coordination in this specific sense. It is a generally bad thing for me to kill, take other people's property, dump toxins in the water, or fail to pay my taxes, regardless of how many other people are doing so or not doing so. There are exceptional circumstances where it might be justifiable or excusable for me to do some of these things—for example, self-defense in the case of killing—but again, what other people in my situation are doing is not the key determinant.

More importantly, even in the realm of specific coordination, exclusionary legal judgment is often not the most appropriate way to achieve our goals. Sometimes it is better to let people make contextual judgments about how the policy behind the rules—coordination—can best be achieved. If rules about which side to drive on lend themselves to exclusionary reasoning, rules about highway driving speeds lend themselves to inclusionary reasoning. Traffic flows better when people drive at what they

52. An omission that Wendel's argument shares with most of the legal-ethics literature is the failure to distinguish the perspective of the regulator considering general rules of practice and the perspective of the individual lawyer making a judgment at the margin about what to do in a particular situation. Even if Wendel is right about the need for exclusionary legality at the regulatory level, that would not necessarily be the right perspective for an individual making a judgment at the margin. The regulator may need to regulate categorically because it cannot trust the judgment of lawyers in general. But it does not follow that the right advice to give an individual lawyer is to distrust her judgment and defer to exclusionary legality under all circumstances.

53. WENDEL, *supra* note 4, at 94.

consider a reasonable speed given the conditions they observe around them. Strict enforcement of the rules would impede this coordination.

The potential of exclusionary interpretation of legal norms to *impede* coordination in such situations has been widely observed. "Working to rule" is the name of a protest tactic used by workers in some industries to disrupt coordination.[54] Officials committed to fostering coordination often find they must balance respect for formal norms with respect for informal norms. In a book that examines this theme, Eugene Bardach and Robert Kagan have this to say about the "good policeman":

> [He has] a "tragic sense" of life—a recognition that law is not the sole measure of morality, that values often are in conflict, that causation and blame are not simple matters. But he combines that perspective with passion—a desire to do justice and to protect potential victims, and hence a willingness to use coercion and strict enforcement of the law in those cases where the offender deserves it or when cooperation cannot be elicited by forbearance.[55]

Surely, police officers play a central role in the law's coordinating function. Yet, Bardach and Kagan suggest that effective performance requires them to interpret inclusively rather than exclusively. Lawyers have a different role than police officers, and their responsibilities are accordingly different. But there does not appear to be any reason why the goal of coordination would require them to take a narrower approach to interpreting the norms that structure that role.

Still another of Wendel's concerns about coordination seems to focus on notice. The more accurately and easily people can learn the law, the more reliably they can anticipate its effects on their lives and the more effectively they can make use of the autonomy the law provides them.[56] It is often asserted on behalf of positivist or exclusionary conceptions of legality that they provide better notice. Rule-based law is clearer and easier to ascertain than principles-based law, the argument goes. Stated as a general, abstract proposition, the argument reflects a basic jurisprudential mistake.

The mistake arises from the generalization of the lawyer's perspective to the society as a whole. Once a dispute arises or a future contingency is defined, a lawyer may be able to determine how rule-based law applies more reliably than she can with respect to principles-based law. Even this

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54. *See* Brian Napier, *Working to Rule—A Breach of the Contract of Employment?*, 1 INDUS. L.J. 125, 125 (1972) (defining "working to rule" as "concerted action by one or more groups of members of unions . . . acted upon by the members under advice and in the belief that the action does not constitute any breach of the relevant contract of employment, even though carried out with the avowed intent of disrupting as effectively as possible the employers' business" (quoting Sec'y of State for Employment v. Aslef (No. 2), [1972] 2 W.L.R. 1370 (C.A.) 1403 (Roskill L.J.) (U.K.))).

55. EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 126 (1982).

56. WENDEL, *supra* note 4, at 43.

proposition is debatable, but we can concede it arguendo. But for the coordination argument, the relevant perspective is that of the citizen in civil society. It is not reasonable to expect him to analyze all the legal authority potentially relevant to any of his actions. Even unlimited legal assistance would not guarantee foreseeability given the uncertainty as to what situations he will find himself in. Thus, the most important determinant of foreseeability is not the analytical clarity of legal norms but the extent to which they coincide with the general expectations of the citizen. As Hayek, the past century's leading theorist of coordination, puts it,

> What has been promulgated or announced beforehand will often be only a very imperfect formulation of principles which people can better honour in action than express in words. Only if one believes that all law is an expression of the will of a legislator and has been invented by him, rather than an expression of the principles required by the exigencies of a going order, does it seem that previous announcement is an indispensable condition of knowledge of the law.[57]

VI. Anti-institutional?

There is some irony in Wendel's charge of anti-institutional bias. My book, *The Practice of Justice*, has a chapter called "Institutionalizing Ethics" that discusses the structures and processes needed for elaborating and enforcing professional-responsibility norms.[58] Deborah Rhode has an extensive article with the same title on the same subject.[59] Wendel does not engage these discussions and has almost nothing to say of his own on such matters. His concern with institutions is exhausted in a general attitude of deference toward formally established power.

The real anti-institutional bias in professional responsibility does not lie in the idealistic dispositions of academics or individual practitioners. It lies in the primitive accountability structures at both the regulatory and firm levels of the profession and in professional ideologies that resist accountability. The profession has used its substantial political power to resist outside regulation and to maintain ostensibly self-regulatory structures that are passive and lax. It uses norms of independent judgment and confidentiality to restrict monitoring of practice by regulators, investors, and insurers or other group legal-service providers. And even its most elite practitioners organize themselves in ways that have more resemblance to their nineteenth-century ancestors than to modern business organizations in other fields. This mode of organization is, if not exactly Emersonian, highly individualistic. It treats as paradigmatic the professionally certified

57. 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 118 (1973).

58. SIMON, *supra* note 7, at 195–215.

59. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994).

practitioner operating under conditions that are opaque to outsiders and that involve limited internal supervision. Yet there is strong reason to believe that more modern and open forms of organization could enhance accountability to clients, third parties, and the public.[60]

Do these new structures imply inclusionary or exclusionary legal judgment? My impression based on studies of other professions is that the most effective systems of human-service accountability combine transparent and systematic audit-type review with highly inclusionary judgment.[61]

It might turn out, however, that a reformed and more expansive system of professional regulation would mandate substantive norms different from those I have argued for. Traditionally, lawyers have sought great latitude to serve clients at the expense of third parties and the public, and they have sometimes preferred that the limits on the pursuit of client ends be framed categorically in rule terms rather than flexibly in principle terms. I disagree with both tendencies. Thus, if institutional reform were on the agenda, and it seemed likely to take a libertarian and rule-based form, I would face a practical conflict about whether and how to support reform. If reform entailed sacrifice of my substantive commitments, I might oppose it. Alternatively, perhaps the sacrifice would not be so great as to outweigh the benefits of better institutionalization. My choice would depend on the specifics of the proposals and the context.

Such conflicts among goals in specific strategic situations require compromise. I may not be able to get everything I prefer. As Wendel says, one should not expect the public realm to adopt all of one's values in a pluralistic society.[62] Note, however, that this kind of compromise is quite different from the one Wendel thinks pluralism entails. In a practical political situation with real alternatives, I might plausibly believe that my sacrifice of some commitments would be compensated by enhanced vindication of others. But Wendel urges that we adopt a general policy of sacrificing our principles in the interest of an entirely abstract conception of social order without any reason to believe our sacrifice will produce any good at all.

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60. *See* Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466, 496–97 (2010) (describing the legal-regulatory framework in New South Wales, which attempts to encourage firms to adopt modern management and supervisory practices); *see also* William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985, 1987–92 (2006) (describing the contributions that risk management can make to the teaching of ethics and the theory of ethics); William H. Simon, Why Is There No "Quality Movement," in Law Practice? (2010) (unpublished manuscript) (on file with author) (discussing the applications of a potential quality movement to the legal profession).

61. *See generally* Kathleen G. Noonan, Charles F. Sabel, and William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523 (2009) (evaluating such systems in the welfare context); John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation*, 4 SOC. & LEGAL STUD. 307 (1995) (describing such systems in the nursing-home context).

62. WENDEL, *supra* note 4, at 36.

In the current circumstances of primitive institutionalization of professional-responsibility norms, lawyers have a lot of discretion to take both good-faith and bad-faith actions. Wendel's arguments will have no effect on bad-faith actions. The people inclined toward them are not listening. But if conscientious lawyers listen to Wendel, they will more often do things they believe to be unjust than they would if they listened to those he criticizes. If moral autonomy is a value, then there is a cost to this sacrifice. It should not be incurred without better reasons than Wendel gives.

Conclusion

Wendel is right that in a pluralistic society, the public realm must be governed by an overlapping consensus rather than more comprehensive and controversial moral views. If it meets certain minimal conditions of justice, this overlapping consensus deserves respect, and lawyers have an important role to play in enacting and fostering this respect. But Wendel mistakenly assumes, first, that the consensus must be embodied in the forms defined by positivist legality, and second, that respect must take the form of rule-based deference rather than principles-based deference. In fact, the moral infrastructure of the public realm is a mix of formal and informal, legal and moral. And most often the respect is owed to principles manifested in legal institutions, not to their formal expression.

Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics

W. Bradley Wendel*

In Martin Scorsese's concert film *Shine A Light*, guitarist Jack White joins the Rolling Stones on stage for one song.[1] As he is playing and singing, he keeps stealing glances at Mick Jagger and is unable to stop grinning like an idiot. It is obvious to any viewer what he is thinking in that moment: "Holy s---, I'm playing *with the Rolling Stones*!" I know exactly how he feels, since the legal ethics equivalent of the Rolling Stones have been gracious enough to invite me onto the stage with them. Like Jack White growing up listening to Keith Richards, I have been reading and learning from the scholars in this Colloquy for as long as I can remember—maybe copping a few licks while trying to find my own distinctive sound, but always conscious of the pioneering work of my predecessors. Not only do I admire the work of my reviewers enormously, but I am deeply grateful for the sympathetic mindset with which they approached the book. Reading through the reviews, I frequently found myself saying, "Yes, that's exactly the point." Engaged critics make disagreement an even more urgent matter for an author, as there is no way to write off such criticism as the result of misunderstanding or as attacking a straw version of the position in the book. As a result, I fear that I have not done justice to all of the points raised in these reviews. In some instances, the book has to speak for itself.[2] In other cases, a satisfactory response to a challenging point raised in one of these reviews would require a separate essay, well beyond the space constraints of this brief response. I am hopeful that the reviews are only the beginning of a debate about the book, because I have a lot more to say!

I. Indeterminacy

All of the reviewers express, in one form or another, the concern that law cannot perform the function assigned to it in my theory. They accurately summarize the argument that the law supersedes societal controversy and provides a moderately stable, provisional framework for cooperation,

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1. SHINE A LIGHT (Paramount Classics 2008).

2. For example, Pepper and Simon object strongly to my take on the case of Daniel Bibb, the prosecutor in the Manhattan District Attorney's office who allegedly contrived with defense lawyers to scuttle the retrial of two defendants whom Bibb believed were innocent. Stephen L. Pepper, *The Lawyer Knows More than the Law*, 90 TEXAS L. REV. 691 , 696 (2012) (book review); William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEXAS L. REV. 709, 711–12 (2012) (book review). Maybe readers will remain unpersuaded, but I really do not think I can improve on the arguments in the book.

notwithstanding normative and empirical disagreement. They worry, however, that the law is incapable of settling society-wide disagreement. If it is not, there would seem to be little reason to respect it. Kruse puts the objection quite clearly and powerfully: "If law lacks the capacity to settle deep and persistent normative controversy in society, then Wendel's functional argument for the legitimacy of law falls away."[3] The problem is not that the process is random, like consulting a Magic 8-Ball, but that the law merely reproduces social disagreement in the guise of legal interpretation. Pepper appeals to what H.L.A. Hart refers to as the open texture of law.[4] Hart notes that subsuming specific facts under instances of a general rule calls for the exercise of judgment, and no rule can determine its own application in advance.[5] The law may also embody awkward compromises, have more than one purpose, or be such a hodgepodge that it is essentially purposeless.[6] Kruse makes a similar point when she says, "[I]t is questionable that law has the capacity to settle moral controversy."[7] Simon's objection is different. He does not so much assert the indeterminacy of law as rely on its determinacy and claim that I have gotten the legal analysis wrong because I assume a formalistic style of legal reasoning.[8]

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3. Katherine R. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, 90 TEXAS L. REV. 657, 663 (2012) (book review).

4. *See* H.L.A. HART, THE CONCEPT OF LAW 127–28 (2d ed. 1994) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.").

5. *See id.* at 130 ("We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified."). Pepper's criticism is clearly indebted to Hart:

> As enacted, a legal provision is a generality .... The lawyer, however, is present at a specific potential application of that legal provision.... A legal provision's moral or policy compromise is up in the air, general, and abstract; lawyer and client are down on the ground where the law's effect will be concrete and specific.

Pepper, *supra* note 2, at 693.

6. *See, e.g.*, Pepper, *supra* note 2, at 693 (arguing that laws are enacted as general rules of thumb to achieve certain moral or policy purposes but that their real-world application is often more nuanced or complex).

7. Kruse, *supra* note 3, at 658.

8. Simon relies on Dworkin's argument in *Model of Rules I* that positivism cannot account for the role that principles play in legal reasoning. *See* Simon, *supra* note 2, at 712–13 ("Dworkin, in rejecting the positivist 'Model of Rules,' insisted that the role of principles and policies in the legal system precluded any strong separation."); RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14 (1978). Dworkin's critique of positivism is that it features an implausible model of adjudication, in which a judge's decision is either determined by applicable rules or left to the standardless exercise of discretion. DWORKIN, *supra*, at 34–35. What we call legal judgment, according to Dworkin, is better understood as the balancing of rules against principles of political morality; these principles do not dictate results but "incline a decision one way, though not conclusively." *Id.* at 35. In places, however, Simon ascribes to Dworkin an implausible view about the scope of principles. For example, he says that impeaching a witness known to be telling the truth by introducing evidence of the witness's prior criminal conviction would violate the principle that parties should not mislead the trier of fact. Simon, *supra* note 2, at 713. Not only does this

Despite differences in detail, the critics' objections come down to this: The law does not provide some fixed point of reference but can be adapted by clever lawyers to their clients' needs. Rather than replacing client interests with legal entitlements, lawyers just obscure the rent-seeking process with a rhetorical façade. In the book, I quoted King Louis XII of France, who supposedly complained that "[l]awyers use the law as shoemakers use leather; rubbing it, pressing it, stretching it with their teeth, all to the end of making it fit their purposes."[9] If lawyers really do have this power of pressing the law into whatever shape best fits their clients' purposes, the law cannot provide a framework for social cooperation that transcends disagreement. Not surprisingly, I do not accept the shoe-leather criticism, as stated by King Louis or by my critics here. The problem in a short response like this one is to demonstrate how law can be relatively stable and determinate. Since I cannot reargue the book in a few pages, I will only suggest that legal scholars should pay more attention to what lawyers actually do, as opposed to arguing about abstractions.

For example, I have written extensively about the legal advice given during the Bush Administration Department of Justice (DOJ) lawyers who concluded that domestic and international law prohibiting torture did not prohibit interrogation techniques amounting to torture, when performed by American interrogators as part of the so-called war on terror.[10] My response was that the lawyers had failed in ethical terms *as lawyers*, not because torture is terrible in ordinary moral terms (although it is), but because the legal advice given reflects an attitude of contempt, or at least indifference, toward the law. Recently, it has been reported that DOJ lawyers in the Obama Administration have prepared a still-secret memo authorizing the President to kill American citizens abroad without a trial, as long as the President certifies that they were taking part in hostilities between al Qaeda and the United

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reasoning elide the client's legal entitlement to put the state to its proof, but it relies on a principle that is too abstractly stated. Legal principles are different from moral principles in that they gain content and force only as instantiated as legal reasons. In the impeachment example, the principle that one should not mislead the trier of fact is instantiated in fairly specific rules with clearly defined triggering conditions and exceptions. The clearest illustration is the prohibition on presenting false evidence, including the testimony of clients and nonclient witnesses. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2009). The prohibition applies only when the lawyer knows the evidence to be introduced is false, with *knowledge* defined as "actual knowledge." *Id.* R. 1.0(f), R. 3.3 cmt. 8. Moreover, the lawyer should first attempt to dissuade the client from committing perjury, and if that fails she should seek the guidance of the court, which may order the lawyer to proceed with normal questioning of the witness or may permit the lawyer to put on the testimony in a narrative format. *Id.* R. 3.3 cmt. 7. I am not denying the existence of principles or their role in legal reasoning, but it is important that lawyers rely on reasons internal to the law, not free-floating moral ideals that, whatever their attractiveness, are not part of the law.

9. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 69 (2010).

10. *See generally* W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107 (2009) (book review). The torture memos are discussed in the book in Section 6.1. WENDEL, *supra* note 9, at 177–84.

States and it is impossible or impracticable to capture them alive.[11] The government relied on that advice to authorize the killing of Anwar al-Awlaki and his sixteen-year-old son. One of three things must be true about these recent killings and the legal advice given to the President: (1) the legal advice is a sound, faithful interpretation of governing law, and the Obama DOJ lawyers acted ethically while those in the Bush DOJ did not; (2) the legal advice is just as unsound as that contained in the torture memos prepared by the DOJ in the Bush administration and should be criticized in the same terms; or (3) there is no way to praise or blame either group of lawyers because the law is like shoe leather and can be formed into whatever shape is needed to satisfy the client's wishes. The legal analysis authorizing the killing of al-Awlaki and his son is still secret, so it has not been subjected to the extensive, critical scrutiny given to the Bush-era torture memos, but when the Obama administration memos finally surface, as they undoubtedly will, I expect conscientious lawyers who are experts in the relevant fields of law to debate whether the legal analysis is sound. For academic critics to assert the indeterminacy of law is essentially to abandon the ideal of legality and the norms of the very craft we purport to teach to our students. Strong indeterminacy claims have always struck me more as rhetorical posturing than serious jurisprudential arguments, although there are some sophisticated sociolegal accounts of the way clients actually experience and comply with law that deserve serious attention.[12] The only way to really refute an indeterminacy argument, however, is to get inside the practice of making and evaluating legal arguments.

II. Exclusion of Morality

Simon is correct to note that I distinguish my position from his, as well as from those of Luban and Deborah Rhode, in not seeing justice as the central normative touchstone for legal ethics.[13] If the role of the lawyer is not to be understood in terms of justice, then what social good could it serve? Critics like Luban, who accuse the book of adopting a Panglossian stance on the legal system,[14] are conflating my argument about the lawyer's role with a

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11. *See, e.g.*, Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, *available at* http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html (reporting on the killing of Anwar al-Awlaki by a drone-fired missile in Yemen); Glenn Greenwald, *The Killing of Awlaki's 16-Year-Old Son*, SALON (Oct. 20, 2011), http://www.salon.com/2011/10/20/the_killing_of_awlakis_16_year_old_son/singleton ("The Executive Branch decided it has the authority to target U.S. citizens for death . . . . It then concluded in a secret legal memo that Awlaki specifically could be killed, but refuses to disclose what it ruled or in which principles this ruling was grounded.").

12. I discuss Kruse's critique of this argument in Part III. *See infra* notes 34–43 and accompanying text.

13. Simon, *supra* note 2, at 710.

14. Part III of Luban's review is entitled "The Best of All Possible Legal Systems," an allusion to Voltaire's Dr. Pangloss who, in turn, was a satire of Leibniz's purported solution to the problem of evil. David Luban, *Misplaced Fidelity*, 90 TEXAS L. REV. 673, 679 (2012) (book review).

more general argument about the social value of the law. To be sure, the position I take on the lawyer's role depends on the social value of the law, but it is limited in an important way: The task of legal ethics is to understand what constitutes right and wrong conduct by lawyers. Right conduct may be, as I argue, exhibiting respect for the law in advising one's clients and in representing clients in litigation, and the reason this is right for lawyers may relate to the social goods sought to be secured by the law. This does not mean, however, that one can always conclude that the law represents a positive good for a particular client in a particular case. Luban rightly characterizes the problem of overcrowded prisons and conditions of confinement that may constitute torture as a matter of international law.[15] It truly would be the height of smug complacency to address the prisoners in one of these torture-chamber prisons and tell them they should be grateful for the goods secured by the law.[16] That stance would have the quality of bad theodicy, which confidently informs people that they should thank God for their suffering because God undoubtedly intends to use that suffering for good elsewhere in the world.[17] But my argument is not that the law is always good for all people; rather, it is that if there is good to be found in law, the legal system, and the legal profession, it should be understood in a particular way. It is good that people have available to them a way of organizing society that manifests respect for one another as equals. This is not all there is to life, however, and it certainly should not be understood as crowding out other means of social interaction, problem solving, moral deliberation, and self-understanding.[18]

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15. *Id.* at 681.

16. *Id.*

17. *See, e.g.*, BART D. EHRMAN, GOD'S PROBLEM: HOW THE BIBLE FAILS TO ANSWER OUR MOST IMPORTANT QUESTION—WHY WE SUFFER 8 (2008) (discussing various philosophical approaches to the problem of theodicy).

18. In an extremely interesting section of his review, Luban unpacks the word *fidelity* and charges me, in effect, with making a category mistake. Luban, *supra* note 14, at 681–86. Allegations of marital infidelity do not mean merely violating some abstract norm of devotion or loyalty; rather, they signify specifically going over to a rival, a transfer of allegiance, switching sides. *Id.* at 681–82. Betrayal of a friendship likewise means abandoning a person, either in favor of another or in favor of oneself. *Id.* at 682–83. Similarly, religious fidelity means refraining from idolatry or the worship of other gods. *Id.* at 683–84. In all of these cases, fidelity is something owed to another with whom one is in a direct personal relationship, unmediated by abstract duties or relationships constituted through institutions. *Id.* at 684–85. Luban and I are in complete agreement that the obligation, if any, to respect the law must derive from respect for the people in one's political community, and that disobedience (or, I might add, working around the law) is a form of free riding that expresses disdain for one's fellow citizens. *Id.* Because fidelity is a value associated with intimate relationships, however, fidelity-related duties are necessarily reciprocal, and a lack of faithfulness by one party can "snap[] the bonds of reciprocity." *Id.* at 685. When a person or group within a political community is abandoned or subjected to discrimination by the majority, it would be cruel to call upon these marginalized citizens to express fidelity to the law, because "the law"—in personal terms, the majority of members of the political community—has already been unfaithful. *Id.* It would be tantamount to forcing a betrayed spouse to remain in a marriage while the other spouse continues cheating. Luban thus inverts the image of faithfulness, constancy, and loyalty that I meant to invoke in the title of the book, turning it into a powerful

As Luban notes, however, the entire structure may be a bit fiddly if any morality is allowed to creep back into deliberation. The process through which people are able to transcend uncertainty and disagreement, by replacing first-order reasons for action with the second-order reasons given by the law, may unwind if lawyers frequently resort back to first-order reasons.[19] This "resorting back" would occur if second-order reasons are not truly exclusionary but are only presumptive or weighty. Luban has relied on the idea of recourse roles,[20] under which, in some cases, the best way to remain faithful to the requirements of a role is to violate them. A role is constituted for some end or ends. In the great majority of cases, the way someone acting in a role will best accomplish those ends is to follow the directives of the role. There may be instances, however, in which the best way to achieve the ends of a role is to do something that is not permitted by the constitutive rules of the role. In order to make this determination, the occupant of a role must have recourse back to the ends of the role (hence the name *recourse role*).[21] Recourse roles nicely capture the role-differentiated nature of obligations faced by many professionals without losing touch entirely with the broader social ends for which the professional role is constituted. As I have noted in a paper published after the book, recourse roles do not necessarily license wide-open moral deliberation; "rather, an agent has recourse only to certain considerations, such as the specific task the role is designed to accomplish."[22] It is actually Simon, not Luban, who should rely on the idea of recourse roles, because Simon's overall argumentative strategy is to juxtapose what many would agree is the end of the lawyer's role (legal justice) with the injustices that frequently result in particular cases. It seems less plausible to think that the end of the lawyer's role is to do good in ordinary moral terms, although some philosophers have argued that law has authority only to the extent that it improves compliance with morality.[23] In my view, which I think is shared by most practitioners,

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critique of injustice—"difference made legal" in the words of Martin Luther King Jr. *Id.* at 684–85. It is the case that I had interpretive fidelity in mind when I thought of the title of the book, but the dual meaning of the word does underscore the importance of fairness and reciprocity as the foundation of the obligation to respect the law. *See id.* at 685–86 (agreeing that interpretive fidelity can be an obligation of lawyers).

19. Luban, *supra* note 14, at 687 ("Wendel's seemingly minor modification actually undermines the basic Razian architecture of separating multiple levels of reasons.").

20. *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 15–36 (1973) ("[I]t is precisely to the concept of their [social] role that people turn when they want to understand what they can and cannot do."). As Luban notes in his review, he relied on the structure of recourse roles in his reformulation of the position in *Lawyers and Justice. See* Luban, *supra* note 14, at 687 n.69 (citing David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to* Lawyers and Justice, 49 MD. L. REV. 424 (1990)).

21. KADISH & KADISH, *supra* note 20, at 21–22.

22. W. Bradley Wendel, *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 553 (2011).

23. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 98–99 (2001) (observing that the most important element of

lawyers are not all-purpose agents who facilitate moral deliberation; rather, they are simultaneously representatives of clients and ministers of the law who help clients fit their conduct within the scheme of rights and duties created by the law.

Whether the end of the lawyer's role is taken to be justice or morality, recourse roles are vulnerable to the problem of pluralism. One of the principal arguments in the book, which none of the reviewers seems to disagree with, is that reasonable, conscientious people may disagree in good faith about what is required by morality or justice in a particular situation. As a result, there is a missing "who decides?" question embedded in the recourse strategy: Suppose a lawyer believes that asserting a client's legal entitlement, either as the basis for legal advice or in litigation, will result in either injustice (to use Simon's conception of the end of the role)[24] or an ordinary moral violation (Luban's conception).[25] Now suppose the client disagrees with the lawyer and insists that the lawyer take the lawful action that would vindicate the client's legal entitlement. Is it the lawyer's prerogative to decide whether to act directly on the end of the role? If so, then giving the lawyer this decision-making authority undercuts the agency nature of the lawyer–client relationship.[26] On the other hand, of course, the lawyer must worry about her own moral (not legal) agency. In the vast majority of cases in a basically just society, however, a lawyer can assume that she is not committing a moral wrong by helping clients order their affairs with respect to their legal entitlements. I do not deny the existence of injustice that

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understanding a law is understanding what the moral authority that created the law intended the law to mean); Heidi M. Hurd, *Interpreting Authorities*, *in* LAW AND INTERPRETATION 405, 425 (Andrei Marmor ed., 1995) (arguing that the interpretation of laws must be based upon how well laws "conform our conduct to the demands of morality").

24. Simon, *supra* note 2, at 715–17.

25. Luban, *supra* note 14, at 676–78.

26. Pepper worries that an obligation of fidelity to law that is too strict will cause lawyers to lose sight of their obligation to serve clients. Pepper, *supra* note 2, at 696–97. His objection underscores the fiduciary nature of the attorney–client relationship, as elaborated in countless cases. *See, e.g.*, Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1287–88 (Pa. 1992) (enforcing a preliminary injunction against attorneys who breached their fiduciary duty to their client). One reason Fried's lawyer-as-friend metaphor has had staying power is that it makes this relationship of trust and confidence central to the lawyer's ethical duties. But a lawyer is not *just* a fiduciary; a lawyer is a fiduciary with respect to the client's interests and the law. Lawyers have the privilege and the burden of representing their clients' interests, zealously, *within the bounds of the law*. A lawyer does not have a simple, straightforward fiduciary relationship with only one party; rather, the lawyer and the client are both encumbered by other duties—in this case, respect for the law—and those duties affect the way the lawyer must carry out her fiduciary obligations to the client. *Cf.* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 31–32 (1987) ("The client in such a triangular situation is not a person alone—the *A* of classical legal hypotheticals, where '*A*, the owner of Blackacre' does something to or is done something by *B*. One who has become another's guardian is no longer *A* but has become '*A* encumbered by duties to *B*.'"). Picking up on this analysis, the lawyer in my conception of legal ethics is the representative of "the client encumbered by duties to the law" and also has her own directly owed duties to respect the law. The lawyer does not merely assist her client in acting but also in meeting the client's legal obligations while acting.

anyone would recognize as such, notwithstanding pervasive moral pluralism. Rather than try to design a system of legal ethics around those extreme cases, however, I wrote this book to account for the nature of the good that lawyers do—most of the time.[27]

III. Exclusion of Politics

Luban, Kruse, Simon, and Alfieri charge me with being, in Luban's words, "[an apologist] for the status quo."[28] Law by itself may not have much to offer to impoverished, marginalized communities like West Grove, which is served admirably by Alfieri, his colleagues, and their students.[29] I also would not restrict a community organizer, activist, and lawyer to formalistic strategies and wooden obedience to law, and in fact, I would wholeheartedly endorse the multifaceted strategy of private fundraising, a media campaign, public protests, and political pressure to prevent the closure of libraries that are vitally important to the West Grove community.[30] As Simon rightly observes, "principled defiance of constituted authority is an honored tradition in American public life."[31] I share Simon's admiration of courageous men and women who participated in lunch-counter sit-ins and the Birmingham march.[32] He is correct that sit-ins and the like were illegal at the

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27. In the book I quote Larry Alexander and Fred Schauer's observation that it would be odd to focus the study of constitutional law primarily on *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; and *Korematsu v. United States*, 323 U.S. 214 (1944). WENDEL, *supra* note 9, at 102–03. The Supreme Court has, from time to time, really stuffed it up. A lawyer seeking to understand the way courts interpret the Constitution would be advised to focus mostly on cases that continue to be debated by the Court as expressions of still-viable constitutional doctrine.

28. Luban, *supra* note 14, at 680.

29. Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEXAS L. REV. 635, 635–36, 652–56 (2012).

30. *See* Alfieri, *supra* note 29, at 4–5 ("[T]he [Historic Black Church] Program contemplated a media campaign (e.g., editorials and letters), public protest (e.g., a march, rally, or sit-in), and political pressure (e.g., reporting selected public officials to regulatory agencies for the purposes of investigating ongoing unethical or unlawful conduct in unrelated matters), all to persuade local municipal and county officials to help mobilize public opposition to the proposed closing." (footnote omitted)).

31. Simon, *supra* note 2, at 715. Critics sometimes say I am making a fetish out of the law and legal authority—Simon's use of the word "authoritarian," *id.* at 718, captures the flavor of this sort of objection—but it is important to emphasize that the authority of law is, in my view, ultimately grounded in the value of equality and the obligation to treat one's fellow citizens with respect. Simon thinks the fear of anarchy keeps me up at night, *id.* at 709, but the boogeyman in the closet of the book is better identified as solipsism and arrogance. I am gratified to see Simon concede that "lawyers are not routinely privileged or obliged to act on their own views on the ultimate merits of the controversies in which they are involved." *Id.* at 711. Perhaps I have been misreading him for years, but I have always understood Simon as arguing for precisely the contrary—i.e., that lawyers either may or must consider whether the actions they take on behalf of their clients are likely to promote justice. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 138 (1998) ("Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.").

32. Simon, *supra* note 2, at 715.

time, but there is nothing wrong with a lawyer participating in civil disobedience, defending clients after the fact against charges of trespassing or disorderly conduct, or even advising clients to engage in civil disobedience, as long as the lawyer clearly states that the justice of the client's cause does not make the activity lawful. Conversely, the availability of some strategies of resistance based on legality, political legitimacy, and legal rights does not preclude the use of nonlegal strategies to accomplish the end of social justice.[33] The only inference I am concerned with blocking is the one drawn from the justice of some outcome to its legality.

Kruse perceives that I envision the law as the hero in an allegory in which society faces trouble in the form of an impasse caused by empirical uncertainty or normative pluralism.[34] But like my colleague Jim Henderson's feckless superhero Captain Torts,[35] the law sometimes either fails to rescue people from trouble or manages to make things even worse through its intervention.[36] Kruse agrees that the law transforms controversy, and she acknowledges that this is a good thing, but she denies that the law ever really settles anything. In the debate over same-sex marriage, for example, "the language of law continues to provide ways to formulate and package the issues in the debate," using analogies with civil rights claims raised by interracial couples to clarify the rights at stake.[37] This transformation is not complete, however; it is a repackaged moral debate, but the terms of the debate are still set by "reason and the public good," not merely by what is lawful.[38] The law merely provides additional conceptual

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33. *Cf.* Alfieri, *supra* note 29, at 33–34 ("In the context of low-income communities of color, democratic lawyering offers race- and identity-conscious strategies of advocacy and counseling fashioned from dissenting voices traditionally outside law, legality and legitimacy . . . . [L]awyer candor, collaboration, and a race-conscious conversation best steer the normative assessment of legal–political strategies . . . and the practical consideration of alternative nonlegal tactics . . . .").

34. *See* Kruse, *supra* note 3, at 663 ("Wendel's functional argument in a nutshell is that we should respect the law despite our moral disagreement with its content because law does for us something that we cannot do for ourselves: law rescues us from moral pluralism.").

35. One of my goals as a legal academic is to make better known the story of Captain Torts, one of the great unpublished characters in jurisprudence:

> Captain Torts is a fellow about [Henderson's] size (let us simply say a large person), [who] wanders through our society seeking to protect people from the wrongs of others. Captain Torts is dressed in a baggy leotard, with a cape and a large yellow T in a circle on his chest. Whenever he hears of someone in distress, he enters the scene (usually, if possible, through a window) and attempts a rescue. Much of the time, he is a welcome addition, and helps to correct imbalances of power between persons in the society. Occasionally, . . . Captain Torts is resented by the people that he tries to help. On those occasions, the people try to push him back out the window. What all of this means, Henderson leaves to the reader.

JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS: TEACHER'S MANUAL 20 (7th ed. 2007).

36. For an example of an argument that the law sometimes makes societal disagreement worse, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

37. Kruse, *supra* note 3, at 667–68.

38. *Id.* at 668.

resources, such as notions of rights, duties, and due process, with which to conduct this ongoing debate.[39] This leads Kruse to a challenging critique of my position, namely that the functional and normative arguments to respect the law should be recast as argument to respect the legal *system*. A legal system consists of much more than enacted laws to be followed—including multiple avenues for citizen participation in the process of democratic self-government. In contrast with my nightmare of intractable disagreement, Kruse posits a noble dream of law opening a space within which a plurality of moral viewpoints can thrive.[40] Society should not aim for settlement (even on a provisional basis) of moral controversy, but it should provide avenues for peaceful, constructive disagreement to thrive.

The book does attempt to account for "the complex interplay created between private compliance with (or deviance from) law and public lawmaking."[41] Drawing from the work of Lauren Edelman and Mark Suchman, Section 6.4.2 shows how employers responded to the legal definition of sexual harassment and the obligations imposed on employers to prevent a hostile work environment.[42] Kruse is correct that the process of complying with antidiscrimination laws is not a simple, linear one of reading a law and obeying its clear directive; instead, the meaning of the laws emerged through application, as employers tried to figure out how to comply with an uncertain, shifting mandate. Law therefore enables politics rather than preempting disagreement. I do not disagree with this way of putting Kruse's criticism if the relevant actors believe themselves to be attempting in good faith to ascertain what the law permits or requires. Respect for the law may include grudging acquiescence as well as open disobedience.[43] What is

39. Although controversy continues about same-sex marriage, the law does settle at least some issues. If the clerk of Tompkins County, New York, refuses to issue a marriage license that covers a same-sex union (a highly unlikely occurrence given the politics of Ithaca, but it's a hypothetical), then one can criticize the county clerk in terms of the ethics of public office for substituting his or her own view about morality for a legal entitlement to receive a marriage license.

40. Kruse, *supra* note 3, at 670–71.

41. *Id.* at 671.

42. *See* WENDEL, *supra* note 9, at 203–07.

43. To be clear, I do not intend anything in the book to ground a criticism of community lawyers as abusers of the law, as Alfieri fears. Alfieri notes that "daily combat against inner-city poverty and racial inequality requires the creative enlargement of conventional lawyer roles and functions as well as the expansion of constitutional, statutory, and common law entitlements." Alfieri, *supra* note 29, at 649. I could not agree more. There is a deep and subtle debate between some proponents of critical legal studies on the one hand, and critical race theory on the other, over whether legal rights are oppressive or empowering. Patricia Williams argues, for example, that legal rights are a way of insisting that powerful white actors recognize the dignity and power of African-Americans. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146–66 (1991). For Williams, assertions of rights confront the denial of human needs in a way that requires acknowledgement of these needs. *See id.* at 153 ("For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being."). Although I lack Williams's eloquence, I have tried to say something similar: progressives should not make such a totalizing critique of power imbalances in society that they call into

ruled out, however, is covert nullification or manipulation of the law. There is room in my vision of legality for lunch counter sit-ins as well as the back-and-forth between courts and employers that created the existing law of sexual harassment through an iterated process of court challenges and new mandates to employers. Legal settlement is not a one-time event. Rather, it can be a process by which actors in society orient themselves around legal rights and duties. This does not preempt nonlegal ordering, but it does make possible a distinctive kind of order in which citizens justify their actions to each other with reference to social procedures that reflect shared values of equality and dignity.

IV. Stupid Laws

It is not surprising that my reviewers have sought to embarrass the position in the book by pointing to laws that, as Pepper nicely puts it, have results that "may be perverse in relation to generally accepted values or the particular values underlying the legal provision."[44] Pepper's example is a prohibition on hiring undocumented workers, which prevents a working couple from hiring a child-care provider.[45] Simon imagines the discriminatory enforcement of an archaic fornication statute that criminalizes consensual sex between unmarried adults.[46] Although they put the objection more kindly, what they are really saying is, "Surely you cannot mean that *this* law is deserving of respect!" But to quote the late Leslie Nielsen's character in *Airplane!*, "[I do mean that], and stop calling me Shirley!"[47]

In Pepper's case, the lawyer cannot tell the couple that it is legally permissible to hire the undocumented worker. Pepper envisions the lawyer giving categorical and somewhat dismissive advice: "[Y]ou can't and shouldn't [hire the worker]. It's unlawful."[48] He is right that the situation is more complex, morally speaking, than the law as written, and a lawyer is free to convey these additional subtleties to the clients in the form of moral counseling. Nevertheless, the presence of nuance and complexity in the world does not undercut the conclusion that the distinctive aspect of the role of lawyer—as opposed to others who dispense advice about morally complex

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question the capacity of official institutions to recognize rights in favor of disempowered citizens against the powerful. My critics here are fond of ascribing various anxieties to me, so I will admit to worrying that treating the law instrumentally will result in a long-term impairment of its capacity to underwrite demands for respect by the powerless.

44. Pepper, *supra* note 2, at 693.

45. *Id.* at 693–94.

46. Simon, *supra* note 2, at 714.

47. The actual bit of dialogue, for those who are not children of the 70s and 80s, is:

Dr. Rumack: I won't deceive you, Mr. Striker. We're running out of time.

Ted Striker: Surely there must be something you can do.

Dr. Rumack: I'm doing everything I can, and stop calling me Shirley!

AIRPLANE! (Paramount Pictures 1980).

48. Pepper, *supra* note 2, at 694.

subjects—is that lawyers are responsible for ensuring that their advice conforms to the duties and permissions contained in the law. The "abstract and wooden"[49] tone of the advice given by the lawyer in Pepper's hypothetical is the result of Pepper imagining an officious, self-righteous lawyer expressing disapproval of the client's predicament. I have no problem whatsoever with lawyers conveying a sense that the law is misguided, out of touch with reality, or perverse, but these judgments by the lawyer do not give the lawyer license to counsel the client—even indirectly, with a wink and a nod—to ignore the law. If the client chooses to take the risk of violating the law, as long as the lawyer has not blessed or encouraged this conduct, the legal and moral blame rests with the client.[50]

I also worry a bit that labeling some laws as anachronistic, foolish, or otherwise undeserving of respect reflects a certain elite condescension toward normative positions with which we (the "royal we") disagree. Personally, I think it is idiotic that there is a criminal statute prohibiting unmarried adults from having consensual sex, but evidently, a substantial number of my fellow citizens believe that the existing antifornication statutes have got the balance just right.[51] I have to recognize that my reaction to this statute reflects other beliefs I have concerning sexual morality and the appropriate scope of the criminal law that may not be universally shared, and that the law is not so crazy that no rational human being could ever endorse it. Although none of the reviewers here has misinterpreted my view as moral relativism of the kind familiar to anyone who has taught an introductory ethics class, I want to be clear and say that I believe it is *really* correct to say that there is nothing morally wrong with premarital sex, and even if there were, it would not be appropriate to criminalize it. Nevertheless, I acknowledge that others have deliberated conscientiously about this question and have reached the contrary conclusion.

V. Conclusion: My Nightmares and Noble Dreams

Luban and Kruse allude to Hart's opposition between the nightmare of unlimited judicial discretion and the noble dream of a profession (in Hart's case, the judiciary; as Luban suggests, lawyers in their capacity as legal

49. *Id.* at 695.

50. A lawyer who takes this stance is not a "legal cipher," as Pepper suggests. *Id.* at 700. In my view, the propriety of moral counseling within the attorney–client relationship is an entirely contingent matter. Some clients, as a result of a long-term professional relationship characterized by trust and mutual respect, might appreciate a lawyer telling them that it would be morally wrongful to plead the statute of limitations to escape a legal obligation. Pepper is also right to note that a particular client may have business reasons for doing the decent thing notwithstanding a legal entitlement to the contrary. *Id.* at 701 & n.48. In these cases, moral counseling would be appropriate—maybe even expected by the client—but it is not a requirement of the role as such.

51. If there is truly no remaining support for the law, it may be invalid under the doctrine of desuetude. I am assuming here that the statute has been challenged on these grounds and has not been invalidated for that reason.

advisors) dedicated to a craft that contributes to social stability and solidarity.[52] As this metaphor shows, a theory of law or legal ethics may be animated by a fear that a different approach is the road to some imagined hell. The major figures in the field of legal ethics—many of whom I am honored to have as critics in this Colloquy—seem, ironically, to be worried about an excessive tendency on the part of citizens and lawyers to obey the law. Simon exalts civil disobedience and even nullification of law,[53] Luban reminds us that the Milgram Experiments demonstrated that people are not particularly inclined to resist unjust authorities,[54] and even Pepper and Freedman—who have resolutely defended the standard conception against its academic critics for many years—have been concerned to provide avenues for conscientious objection by lawyers.[55] The nightmare case in the back of the minds of these theorists is the German legal profession in the Third Reich or the American legal profession in the Jim Crow South, all too willing to lend their assistance and expertise to the administration of an unjust regime by faithfully interpreting and applying positive law. The figure of the lawyer-as-Eichmann haunts many legal ethicists. Their noble dreams, on the other hand, invoke real lawyers like Louis Brandeis or fictional characters such as Atticus Finch to highlight the virtues of wisdom, discretion, and informed judgment about both morality and the law.[56] Not surprisingly, these lawyers tend to be nonconformists and mavericks, willing to disobey orders or blow the whistle if they believe the client's ends are unjust.[57]

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52. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 131–32 (2007); Kruse, *supra* note 3, at 670–71. Nicola Lacey has taken this phrase as the subtitle for her biography of Hart, suggesting that the great philosopher's life was itself both of these things. NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004).

53. In one of my favorite papers of his, Simon argues that portrayals of lawyers in popular culture tend to depict lawyers as praiseworthy to the extent they are willing to violate the law in service of higher moral principles. William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421, 447 (2001).

54. LUBAN, *supra* note 52, at 237–66.

55. Pepper does so in the context of moral counseling. Pepper, *supra* note 2, at 699–702. Freedman insists that lawyers must make a morally grounded choice to represent any given client and are fully morally accountable for those choices. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 4.02, at 69–72 (4th ed. 2010).

56. *See, e.g.*, Simon, *supra* note 2, at 715–16 (citing HARPER LEE, TO KILL A MOCKINGBIRD 312–18 (40th Anniversary ed. 1999) (noting that Atticus Finch agreed with the sheriff to conceal evidence of Boo Radley's involvement in the death of Bob Ewell); SIMON, *supra* note 31, at 127–35 (citing approvingly the ethics of Brandeis, who while a lawyer in private practice sought to dissuade powerful clients from engaging in antisocial projects).

57. *Cf.* Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065, 1067 (2010) (arguing, *inter alia*, that the types of lawyers picked out as admirable by many theories of legal ethics would actually be dysfunctional in institutional practice settings).

My nightmare is set in a world in which not all lawyers possess the rectitude and trustworthiness of Brandeis and Finch but are just as keen to act as moral free agents. The fear is not really anarchy, as Simon believes,[58] but the abuse of power. The figure that haunts my dreams is that of John Yoo, presenting his "legal" advice with a straight face to the President, informing him that the law authorizes waterboarding, or of the in-house and retained lawyers for Enron who authorized the transactions that eventually toppled the company. In my dreams the lawyers do not believe themselves to be acting wrongly; rather, they think they are respecting the ethical principle of zealous advocacy. Never mind that they are counseling clients or structuring transactions, not acting as advocates—they believe themselves to be ethically permitted to rely on strained, distorted, and implausible (or, stated more positively, creative and aggressive) interpretations of law to advance their clients' ends. Even worse, they may believe themselves to be doing something morally praiseworthy because it is in the public interest. John Yoo, for example, clearly sees himself as a hero and a patriot for doing whatever was necessary to protect the American people from terrorism.[59]

My noble dream is not a lawyer of extraordinary wisdom and discretion but merely a regular person who balks at bending the law out of shape to permit her client to do something. In a basically just society, lawyers perform a valuable function, but it is one different from that performed by members of the clergy, psychotherapists, writers, political leaders, activists, community organizers, and citizen protesters. The role of lawyers is more technocratic but no less noble. Bureaucrats like Eichmann can be the instruments of monstrous evil, and the Third Reich could not have functioned without the willing assistance of people just doing their jobs. But the rule of law can be a great good too, and it also cannot exist without people doing their jobs.

Within a moderately decent society, the ethics of lawyers *acting as lawyers* has to be oriented toward the law, not morality or justice. If lawyers wish to be activists or dissidents, they can be, but it is essential that they not confuse these very different social roles. I am not blind to the injustices that remain in the United States, but the *legal* response to these injustices should not be individual acts of sabotage or nullification. Lawyers can and should advocate for change, but as always, it should be zealous advocacy within the bounds of the law.[60] One of the principal aims of this book was to restore the

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58. Simon, *supra* note 2, 709.

59. *See generally* JOHN YOO, WAR BY OTHER MEANS (2006).

60. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) ("A lawyer should represent a client zealously within the bounds of the law."). The notion of zeal survives in the modern disciplinary rules only in a few comments. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 2 (2009) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* R. 1.3 cmt. 1 ("A lawyer must also act with . . . zeal in advocacy upon the client's behalf."). Nevertheless, the *Model Code* formulation has remained influential and is quoted tirelessly by lawyers as a concise summary of their ethical obligations.

last part of the lawyer's mantra just stated to its proper place in legal ethics. Without the constitutive obligation of fidelity to law, lawyers are just sophists—offering nothing beyond the kind of half-baked moral advice that any decent client could supply for herself. If there is something distinctive about our profession, it has to be a commitment to the value of legality and a corresponding obligation to respect the law.

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Notes

Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*

"As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side."[1]

I. Introduction

As Lord Denning's oft-quoted observation illustrates, American courts are often the forum of choice for foreign plaintiffs, who seek to take advantage of our liberal pretrial discovery rules; generous jury awards; and plaintiff-friendly liability laws, which allow both compensatory and punitive damages.[2] To alleviate concerns about hearing cases with only a tenuous connection to the chosen jurisdiction, American courts have primarily employed the common law doctrine of forum non conveniens.[3] Forum non

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1. Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730 at 733 (Eng.).

2. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (explaining that American courts are attractive to foreign plaintiffs because of the availability of extensive discovery rules); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323–24 (1994) (asserting that favorable liability rules and the high probability that American juries will award large amounts in damages make litigation in the United States very appealing to foreign litigants).

3. Forum non conveniens is one of the most controversial common law doctrines, and the federal standard has been endlessly debated and criticized by academics. *See generally* Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609 (2008) (discussing the efforts of other countries to preclude United States forum non conveniens dismissal of lawsuits by citizens of those countries); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006) (arguing that the forum non conveniens doctrine intrudes on congressional power and is therefore unconstitutional); David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353 (1994) (criticizing the doctrine as protectionist and arbitrary); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986) (arguing that forum non conveniens is unnecessary and that jurisdictional doctrines are adequate to protect defendants and courts); Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 NW. J. INT'L L. & BUS. 53 (2003) (arguing that forum non conveniens is illegitimate and instead proposing a preservation-of-court-access statute); Weintraub, *supra* note 2 (discussing the question of whether federal courts sitting in diversity must apply state law to forum non conveniens motions). These articles are representative of the vast amount of literature discussing the doctrine.

conveniens allows a court, even though it has both personal jurisdiction over the parties and subject matter jurisdiction over the controversy, to decline to exercise this jurisdiction in favor of a more appropriate forum. In 1981, in *Piper Aircraft Co. v. Reyno*,[4] the United States Supreme Court held that "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."[5] Many states quickly followed suit, modifying their own state law of forum non conveniens to reflect the federal courts' hostility to foreign plaintiffs' choice of forum; however, not all states have adopted the federal standard, and a considerable amount of variance exists in the forum non conveniens doctrines of the fifty states.[6] While federal courts sitting in diversity apply federal forum non conveniens law, not the law of the state in which the court sits,[7] the Supreme Court has expressly declined to rule on whether federal forum non conveniens law should preempt state law in cases involving foreign plaintiffs.

This Note proposes that Congress should enact a federal standard of forum non conveniens that would preempt state forum non conveniens law in transnational cases.[8] A legislative standard of forum non conveniens would clarify the federal doctrine and assist in resolving the myriad circuit splits surrounding forum non conveniens in federal court. Additionally, the federal standard would preempt state forum non conveniens law in transnational cases, creating uniformity between the state and federal courts. Not only would a uniform standard limit the endless forum jockeying of both plaintiffs and defendants in these cases,[9] it would also allow more federal control over cases that potentially implicate important foreign-relations issues.

This Note is divided into five parts. Part II outlines the evolution of the federal doctrine of forum non conveniens and analyzes the application of the current federal standard as it applies to lawsuits filed by foreign plaintiffs. Part III discusses the variance of forum non conveniens doctrine in the state courts and considers the evolution of forum non conveniens in three states that have followed divergent paths in developing their forum non conveniens doctrines: Florida, Texas, and Delaware. Part IV proposes that Congress pass a statute expressly preempting state forum non conveniens law with a

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4. 454 U.S. 235 (1981).

5. *Id.* at 256.

6. *See infra* Part III.

7. *See infra* subpart II(A).

8. For the purposes of this Note, I will use the terms *transnational litigation* and *transnational motion to dismiss for forum non conveniens* to identify cases in which the defendant moves to dismiss for forum non conveniens and argues that the appropriate alternative forum is located outside of the United States.

9. *Cf.* RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 256 (6th ed. 2011) ("State courts in states with no or limited forum non conveniens doctrines become magnet forums for foreign plaintiffs injured abroad. . . . [F]ederal courts, even in diversity cases, apply a robust federal forum non conveniens doctrine. Thus plaintiffs use tactics designed to prevent removal to federal court.").

federal standard of forum non conveniens in transnational litigation. Part IV also analyzes the policy implications, both positive and negative, of federal preemption of state forum non conveniens doctrine. Part V concludes.

II. Forum Non Conveniens in Federal Court

A. *State or Federal Law?*

Because forum non conveniens is considered "procedural" under the *Erie* doctrine,[10] federal courts generally apply federal forum non conveniens law, rather than the forum non conveniens law of the state in which the federal court sits. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."[11] While the issue has not been definitively decided by the United States Supreme Court, many federal circuits have explicitly decided the *Erie* issue in favor of applying federal law.[12] Thus, despite the Supreme Court's silence on the topic, commentators and courts generally consider forum non conveniens "procedural" under the *Erie* doctrine and agree that courts should apply the federal standard to forum non conveniens motions.[13]

B. *Modern Doctrine:* Gulf Oil Corp. v. Gilbert

Modern federal forum non conveniens law originated in *Gulf Oil Corp. v. Gilbert*,[14] in which the Supreme Court announced, "[T]he principle of *forum non conveniens* is simply that a court may resist imposition upon its

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10. The doctrine is named for *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

11. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

12. The First, Fifth, Ninth, and Eleventh Circuits have all explicitly addressed the question of whether the *Erie* doctrine requires federal district courts sitting in diversity to apply state forum non conveniens law and have determined that it does not. *See* Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 50 (1st Cir. 1990) (reviewing a district court's forum non conveniens dismissal under the federal standard and concluding that state forum non conveniens law should not be binding on federal courts in diversity cases); *In re* Air Crash Disaster near New Orleans, La., 821 F.2d 1147, 1159 (5th Cir. 1987) ("We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases. . . . [A] federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum."); Ravelo Monegro v. Rosa, 211 F.3d 509, 511–12 (9th Cir. 2000) (holding that forum non conveniens is procedural rather than substantive but noting that the result would likely remain the same even applying state law); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir. 1985) (holding that forum non conveniens is procedural rather than substantive under the *Erie* doctrine because forum non conveniens is "a rule of venue, not a rule of decision").

13. *See, e.g.*, 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828, at 293–94 (2d ed. 1986) ("[I]t seems quite clear that . . . these are matters of the administration of the federal courts, not rules of decision, so . . . state rules cannot be controlling." (citing *Sibaja*, 757 F.2d 1215)).

14. 330 U.S. 501 (1947).

jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[15]

In *Gilbert*, the issue was "whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*."[16] *Gilbert* originated as a domestic case in the Southern District of New York, where the court granted the defendant's motion to dismiss for forum non conveniens.[17] Emphasizing that the forum non conveniens doctrine "leaves much to the discretion of the court to which plaintiff resorts," the Supreme Court held that the district court did not abuse its discretion in dismissing the suit.[18]

In formulating a federal standard of forum non conveniens, the Court enumerated both private and public interest factors to be considered and noted that trial courts should have substantial discretion in deciding forum non conveniens motions.[19] The private interest factors include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[20]

The public interest factors include court congestion, the burden of jury duty on a community with no connection to the litigation, and difficulties in applying unfamiliar law.[21] Despite endorsing the use of forum non conveniens in appropriate cases, the Court cautioned that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[22]

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15. *Id.* at 507. United States courts allowed discretionary dismissal of cases unrelated to the forum as early as the nineteenth century. *See* Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (C.C.D. Pa. 1801) (No. 17,682) (dismissing a suit for back wages by a Danish seaman against a Danish captain and concluding that the case should be decided by a Danish court). However, the term *forum non conveniens* was not widely disseminated in the United States until 1929 in a law review article by Paxton Blair that examined the history of the doctrine. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 21–22 (1929); *see also* RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 37 (2007) (explaining that the term *forum non conveniens* first gained attention in the United States with the publication of Blair's article). The early precursor to federal forum non conveniens doctrine was most often invoked in admiralty cases, but the Supreme Court eventually extended it to other contexts as well. *Id.* at 39.

16. 330 U.S. at 502.

17. *Id.* at 502–03.

18. *Id.* at 508, 512.

19. *Id.* at 508.

20. *Id.*

21. *Id.* at 508–09.

22. *Id.* at 508. The Court expanded upon this deference to the plaintiff's choice of forum in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), which was decided on the same

C. Modern Doctrine and the Foreign Plaintiff: Piper Aircraft Co. v. Reyno

The Supreme Court revisited the question of forum non conveniens—this time in the context of a lawsuit brought by a foreign plaintiff—in *Piper Aircraft Co. v. Reyno* in 1981.[23] The lawsuit was initiated by survivors of several Scottish citizens killed in a plane crash that occurred in Scotland.[24] The defendants—Piper Aircraft Company (the aircraft manufacturer) and Hartzell (the propeller manufacturer)—moved for a forum non conveniens dismissal, and the district court granted the motion, citing the *Gilbert* factors.[25] The district court reasoned that an alternative forum was available in Scotland, that the plaintiffs were foreign citizens seeking to take advantage of the United States' liberal tort rules, and that the connections with Scotland were "overwhelming."[26] The Third Circuit reversed the district court, determining that forum non conveniens dismissal was inappropriate where it resulted in an unfavorable change of applicable law for the plaintiff.[27]

The Supreme Court reversed the Third Circuit, holding that forum non conveniens dismissal was appropriate.[28] In its approval of the district court's *Gilbert* analysis, the Court found that the district court properly distinguished cases brought by resident or citizen plaintiffs from cases brought by foreign plaintiffs.[29] Noting that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient," the Court reasoned that when the plaintiff is foreign, the presumption that the plaintiff's choice of forum is convenient "applies with less force."[30]

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day as *Gilbert*. In *Koster*, the Court addressed the standard for a plaintiff who chooses to sue in his home forum, explaining that "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Id.* at 524. The Court again emphasized the significance of the plaintiff choosing the "home forum" in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981).

23. 454 U.S. at 238–46.

24. *Id.* at 238.

25. *Id.* at 241.

26. Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 731–32 (M.D. Pa. 1979).

27. *See* Reyno v. Piper Aircraft Co., 630 F.2d 149, 164 (3d Cir. 1980) ("But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, should not, despite its convenience, result in a change in the applicable law. Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified." (footnote omitted) (internal quotation marks omitted)).

28. *Piper Aircraft*, 454 U.S. at 238. The Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247. It then noted that if an unfavorable change in law were given substantial weight in the forum non conveniens calculus, the doctrine would become "virtually useless" because the plaintiff will usually select the forum with the most favorable law, even if that forum is plainly an inconvenient location for the litigation. *Id.* at 250. On the other hand, the Court cautioned that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight." *Id.* at 254.

29. *Id.* at 255.

30. *Id.* at 255–56.

D. *The Federal Forum Non Conveniens Standard Under* Piper Aircraft

Piper Aircraft clarified the standard for federal forum non conveniens set forth in *Gilbert*, especially as applied to lawsuits brought by foreign plaintiffs. Under *Piper Aircraft*, the federal forum non conveniens inquiry begins with a determination of whether an adequate alternative forum exists.[31] If an appropriate alternative forum exists, the court must next use the *Gilbert* test and balance the public and private interest factors.[32] There is a presumption that the plaintiff's chosen forum is convenient; however, if the plaintiff is foreign, the court will apply this presumption with substantially less force.[33] District courts have substantial discretion in considering whether dismissal is appropriate under *Gilbert*, and the appellate court may reverse only when there has been "a clear abuse of discretion."[34]

Commentators have criticized the *Gilbert* test and *Piper Aircraft* for producing "arbitrary and inconsistent decisions"[35] and for often foreclosing litigation altogether by dismissing the suit in favor of a forum that is practically unavailable.[36] However, *Piper Aircraft* (and its endorsement of the *Gilbert* test) remains the primary source of guidance for federal courts making forum non conveniens determinations in cases involving foreign plaintiffs.[37] In applying *Piper Aircraft*'s standard, courts of appeals have been quick to affirm dismissals of lawsuits brought by foreign plaintiffs, often openly expressing concerns about "forum shopping."[38]

III. State Law of Forum Non Conveniens

Because federal courts sitting in diversity apply a federal forum non conveniens doctrine that often favors dismissal, state courts have become increasingly popular forums for foreign plaintiffs who are injured abroad.

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31. *Id.* at 254 n.22.

32. *Id.* at 257.

33. *Id.* at 255.

34. *Id.* at 257.

35. Lear, *supra* note 3, at 1152.

36. *See* Robertson, *supra* note 3, at 371 ("[E]veryone knows that international plaintiffs who suffer forum non conveniens dismissals in the United States are typically unable to go forward in the hypothesized foreign forum.").

37. *See* BRAND & JABLONSKI, *supra* note 15, at 4 (describing *Piper Aircraft* as the most recent foundational case of the forum non conveniens doctrine).

38. *See* Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 67, 71, 77 (2d Cir. 2003) (affirming the forum non conveniens dismissal of Liberian plaintiffs' lawsuit against Chase Bank and noting that it is likely that foreign plaintiffs' choice of a United States forum tends to be driven by "forum-shopping for a higher damage award or for some other litigation advantage" rather than by convenience); Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001) ("[T]he more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands . . . .").

While most states have recognized the doctrine of forum non conveniens, the states have varying standards for dismissal. Some states expressly follow the federal standard; other states follow a modified version of the federal standard; still others follow a different standard altogether. This part will examine the evolution of the forum non conveniens doctrines of three states that have taken drastically different paths in developing the doctrine. Florida will serve as an example of a state in which the state supreme court adopted the federal doctrine of forum non conveniens to address concerns about foreign plaintiffs filing lawsuits with little or no connection to the forum. Texas will serve as an example of a state in which the state supreme court abrogated the doctrine of forum non conveniens but the legislature reinstated it soon after, citing concerns about the state becoming a forum of last resort in the United States. Finally, Delaware will serve as an example of a state in which the forum non conveniens standard imposes an extremely high burden of proof upon defendants, making dismissals rare.

A. Florida

1. Kinney System, Inc. v. Continental Insurance Co.—In 1996, the Florida Supreme Court resolved uncertainty in the state's forum non conveniens doctrine, declaring in *Kinney System, Inc. v. Continental Insurance Co.*[39] that "the time has come for Florida to adopt the federal doctrine of forum non conveniens."[40] The court was concerned that its prior decision in *Houston v. Caldwell*[41] adopted a more rigorous standard for dismissal than the federal standard, which led to a large number of suits by foreign plaintiffs being litigated in Florida.[42]

Under the *Houston* standard of forum non conveniens, a lawsuit could not be dismissed for forum non conveniens if any of the parties was a Florida resident.[43] In overruling *Houston* and expressly adopting the federal standard of forum non conveniens, the *Kinney* court cited evidence that foreign plaintiffs' practice of filing lawsuits in the United States for injuries that occurred abroad was "growing to abusive levels in Florida"[44] and determined that the state's forum non conveniens doctrine needed to be revised.[45] The

39. 674 So. 2d 86 (Fla. 1996).

40. *Id.* at 93.

41. 359 So. 2d 858 (Fla. 1978).

42. *Kinney*, 674 So. 2d at 88.

43. *Houston*, 359 So. 2d at 861.

44. *Kinney*, 674 So. 2d at 88 (citing Michael J. Higer & Harris C. Siskind, *Florida Provides Safe Haven for Forum Shoppers*, FLA. B.J., Oct. 1995, at 20, 24–26; Linda L. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501 (1993); Jacques E. Soiret, *The Foreign Defendant: Overview of Principles Governing Jurisdiction, Venue, Extraterritorial Service of Process and Extraterritorial Discovery in U.S. Courts*, 28 TORT & INS. L.J. 533, 562 (1993)).

45. *Id.*

court noted that defendants in diversity actions cannot remove to federal court if they are residents of the state in which the lawsuit was filed;[46] thus, the court reasoned that Florida's rigorous standard for forum non conveniens dismissal was "disadvantaging some of its own residents—a result clearly not intended by *Houston*."[47] The court also cited the "additional burdens" imposed upon the state courts "over and above those caused by disputes with substantial connections to state interests."[48] Finally, the court questioned the state's interest in policing events that occur abroad,[49] concluding that this type of regulation "more properly is a concern of the federal government."[50]

2. Forum Non Conveniens in Florida After Kinney.—The *Kinney* standard for forum non conveniens dismissals is now codified in the Florida Rules of Civil Procedure.[51] After *Kinney*, Florida courts continued to expand the state's forum non conveniens doctrine to prevent forum shopping by foreign plaintiffs. Florida courts have used stronger language than is contained in *Piper Aircraft* to describe the lack of a presumption in favor of a foreign plaintiff's forum, holding that "no special weight should [be] given to a foreign plaintiff's choice of forum."[52]

Florida has also extended its forum non conveniens doctrine to allow dismissal of cases in which foreign countries have passed "blocking statutes," which preclude the foreign country's courts from exercising jurisdiction over cases that have been dismissed for forum non conveniens in the United States. In *Scotts Co. v. Hacienda Loma Linda*,[53] the plaintiff's lawsuit was dismissed for forum non conveniens in Florida state court.[54] A Panamanian court had already refused to take jurisdiction over the lawsuit pursuant to the country's recently enacted blocking statute.[55] Although the Panamanian forum was therefore practically unavailable to the plaintiffs, the Florida appellate court nevertheless reasoned that the plaintiff was not entitled to reinstatement of its claim in Florida:

> [A] plaintiff in a lawsuit dismissed here for forum non conveniens may not render an alternative foreign forum "unavailable" and thereby

46. *Id.*; *see also* 28 U.S.C. § 1441(b) (2006) ("Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable *only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*" (emphasis added)).

47. *Kinney*, 674 So. 2d at 88.

48. *Id.*

49. *See id.* at 89 ("Nor are we convinced that any individual state has an absolute obligation to police the foreign actions of American multinational corporations.").

50. *Id.*

51. FLA. R. CIV. P. 1.061(a).

52. Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1118 (Fla. Dist. Ct. App. 1997).

53. 2 So. 3d 1013 (Fla. Dist. Ct. App. 2008).

54. *Id.* at 1018.

55. *Id.* at 1015.

> obtain reinstatement here by (a) itself inducing the foreign court to dismiss the foreign action or (b) relying on foreign laws or decisions *plainly calculated to preclude dismissal* in Florida under *Kinney*.[56]

Additionally, Florida courts have expansively interpreted the definition of an "adequate alternative forum." In *Resorts International, Inc. v. Spinola*,[57] a Florida court determined that neither the unavailability of a jury trial nor the unavailability of lawyers who will work on a contingency-fee basis renders a forum inadequate for purposes of a forum non conveniens dismissal.[58] The Florida Supreme Court has also determined that dismissal of a suit may be appropriate under *Kinney* even if the dismissed suit will have to be adjudicated in *more than one* alternative forum, as long as "the case consists of distinct claims that could have been severed and adjudicated separately."[59]

Because of the advances the Florida courts made after *Kinney*, the Florida doctrine is somewhat *more hostile* to foreign plaintiffs than the federal doctrine; thus, federal preemption would likely result in fewer transnational lawsuits being dismissed for forum non conveniens. Federal preemption would also shift the burden to the federal government to address forum non conveniens issues with foreign relations implications—a task that the *Kinney* court pointed out was better suited to the federal government.[60]

B. Texas

In Texas, the legislature, rather than the courts, determined that a more robust doctrine of forum non conveniens was necessary to stop an influx of lawsuits with little or no connection to the state.

1. Dow Chemical Co. v. Castro Alfaro.—The legislative concerns about forum non conveniens arose after the Texas Supreme Court concluded that the legislature statutorily abrogated the forum non conveniens doctrine in Texas in 1990.[61] In *Dow Chemical Co. v. Castro Alfaro*,[62] Costa Rican employees of Standard Fruit Company sued the defendant companies,

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56. *Id.* at 1017–18 (emphasis added).

57. 705 So. 2d 629 (Fla. Dist. Ct. App. 1998).

58. *Id.* at 629–30.

59. Bacardi v. Lindzon, 845 So. 2d 33, 40 (Fla. 2002) (affirming forum non conveniens dismissal of the lawsuit even though the only alternative was for the plaintiff to adjudicate part of the lawsuit in the Cayman Islands and part of the lawsuit in Liechtenstein).

60. *See supra* notes 49–50 and accompanying text. Blocking statutes, like the one at issue in *Scotts Co. v. Hacienda Loma Linda*, are an example of the particular types of foreign relations issues that might arise when state courts dismiss lawsuits in favor of a foreign forum. Federal preemption of state forum non conveniens law in these cases would provide a uniform standard for states to follow. This would ensure that it is the federal government, and not the individual states, that formulates policies for addressing these foreign statutes. For further discussion of blocking statutes as they relate to federal preemption of forum non conveniens, see *infra* section IV(A)(1).

61. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990).

62. 786 S.W.2d 674 (Tex. 1990).

alleging that they were injured by pesticides manufactured by the defendants and sold to Standard Fruit.[63] The question before the Texas Supreme Court was whether the legislature had abolished the doctrine of forum non conveniens in Texas Civil Practices and Remedies Code § 71.031, a statute that allowed citizens of foreign countries to file lawsuits in Texas even if the death or injury occurred on foreign soil, as long as certain enumerated conditions were met.[64]

In abrogating the forum non conveniens doctrine in Texas, the plurality based its decision solely on statutory interpretation.[65] The concurring and dissenting justices, however, were much more concerned with the policy implications of abolishing forum non conveniens.[66]

In his concurrence, Justice Doggett was extremely critical of forum non conveniens, accusing Texas corporations of labeling a trial in Texas as "'inconvenient' when what is really involved is not convenience but connivance to avoid corporate accountability."[67] He argued that "a forum non conveniens dismissal is often outcome-determinative" and thus is often "in reality, a complete victory for the defendant."[68] Justice Doggett also argued that personal jurisdiction requirements sufficiently limited the number of cases brought in Texas,[69] that concerns about docket backlog were unwarranted,[70] and that foreign comity would be best served by preventing American multinational corporations (MNCs) from using developing countries as "'dumping grounds for products that had not been adequately tested.'"[71]

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63. *Id.* at 675.

64. *Id.* at 674; TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986) (amended 1997).

65. *Dow Chemical*, 786 S.W.2d at 674–79. The plurality reasoned that forum non conveniens existed in Texas long before the predecessor to § 71.031 was enacted; thus, because the statute provided an absolute right to bring a lawsuit and did not mention a forum non conveniens exception, the plurality concluded that forum non conveniens had been legislatively abolished in Texas. *Id.* at 676–79.

66. *Id.* at 680–89 (Doggett, J., concurring); *id.* at 689–90 (Phillips, C.J., dissenting); *id.* at 690–97 (Gonzalez, J., dissenting); *id.* at 697–702 (Cook, J., dissenting); *id.* at 702–08 (Hecht, J., dissenting). The exception is Justice Hightower, who emphasized in his concurrence that the plurality did *not* base its decision on policy: "The issue for this court, however, is not whether the doctrine is a good, fair and desirable one for the people of Texas; the issue is whether the doctrine is available because of legislative actions that have been taken." *Id.* at 679 (Hightower, J., concurring). Justice Hightower also explicitly invited the legislature to amend the statute "to clarify its intent" if it had not, in fact, intended to abrogate the doctrine of forum non conveniens in Texas. *Id.* at 680.

67. *Id.* at 680 (Doggett, J., concurring).

68. *Id.* at 682–83.

69. *See id.* at 685 ("[A] state's power to assert its jurisdiction is limited by the due process clause of the United States Constitution. . . . The personal jurisdiction–due process analysis will ensure that Texas has a sufficient interest in each case entertained in our state's courts." (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945))).

70. *Id.* at 686.

71. *Id.* at 687 (quoting Lairold M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95, 98 (1980–1981) (quoting *U.S.*

The dissenters' opinions echoed the policy justifications for forum non conveniens generally. Justice Gonzalez predicted that the decision would have a devastating effect on the Texas judicial system and would "forc[e] our residents to wait in the corridors of our courthouse while foreign causes of actions are tried."[72] Justice Gonzalez also disagreed with the plurality's interpretation of legislative intent to abolish the doctrine, asserting that "there is *absolutely* no indication that the legislature sought to abolish the doctrine."[73] Justice Cook, who was primarily concerned with forum shopping by foreign plaintiffs, compared the plaintiffs to "turn-of-the-century wildcatters" who "searched all across the nation for a place to make their claims" and "hit pay dirt in Texas."[74] In his dissent, Justice Hecht concluded that "for this Court to give aliens injured outside Texas an absolute right to sue in this state inflicts a blow upon the people of Texas, its employers and taxpayers, that is *contrary to sound policy*."[75] Justice Hecht also disagreed with the statutory interpretation of the plurality, maintaining that the statute did not "create an absolute right to bring a personal injury action in Texas no matter how little it has to do with this state . . . and how burdensome it is to the courts and the people of Texas."[76]

2. *Analysis of* Dow Chemical.—The various opinions in *Dow Chemical* are illustrative of the forum non conveniens policy debate in the United States. While the plurality purported to base its decision solely on statutory interpretation and Justice Hightower attempted to emphasize this point in his concurring opinion, it is clear that a majority of the members of the court (Justice Doggett and the four dissenting justices) were heavily influenced by the policy implications of adopting the doctrine of forum non conveniens in Texas. Both Justice Doggett and the dissenting justices employed fiery rhetoric to describe the dire consequences of adopting the opposing side's view. The attitudes of both sides were characteristic of the nationwide debate over forum non conveniens; those in favor of a robust doctrine of forum non conveniens argued that vast judicial resources will be expended on cases with no connection to the forum, and those opposed to forum non conveniens labeled the doctrine a defense tactic for American MNCs to avoid liability for their tortious acts abroad.

Export of Banned Products: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the H. Comm. on Gov't Operations, 95th Cong. 44 (1978) (statement of S. Jacob Scherr, Attorney, National Resources Defense Council))).

72. *Id.* at 690 (Gonzalez, J., dissenting).

73. *Id.* at 693.

74. *Id.* at 697 (Cook, J., dissenting).

75. *Id.* at 702 (Hecht, J., dissenting) (emphasis added).

76. *Id.* at 704. Chief Justice Phillips agreed with the policy arguments set forth in Justice Hecht's dissent but declined "to foretell whether dire consequences [would] follow" the decision. *Id.* at 689–90 (Phillips, C.J., dissenting).

3. *Texas Legislature Supersedes* Dow Chemical.—Less than three years after the Texas Supreme Court decided *Dow Chemical*, the Texas Legislature passed a statute implementing a doctrine of forum non conveniens in Texas.[77] The original version of the statute distinguished between plaintiffs who were not legal residents of the United States and plaintiffs who were legal residents of the United States.[78] For a plaintiff who was not a legal resident of the United States, the trial court could dismiss if it found that, "in the interest of justice," a lawsuit for wrongful death or personal injury "would be more properly heard in a forum outside this state."[79] On the other hand, if the plaintiff were a legal resident of the United States, the court could only dismiss for forum non conveniens if the party seeking the dismissal proved certain conditions pertaining to the existence of a suitable adequate alternative forum.[80] Thus, the original forum non conveniens statute drew a sharp distinction between residents and nonresidents, giving the trial court nearly absolute discretion to determine dismissal for nonresidents. The statute also favored Texas residents, providing that trial courts could not even consider motions to dismiss for forum non conveniens if any properly joined plaintiff was a Texas resident.[81]

In 2003, the legislature eliminated the distinction between resident and nonresident plaintiffs.[82] Under the current statute, if the trial court finds that "in the interest of justice and for the convenience of the parties" a wrongful death or personal injury claim would be more properly heard in another forum, the court "shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action."[83] In making this determination, the current version of the statute requires the trial court to "consider" six enumerated factors pertaining to the suitability of an alternative forum, irrespective of whether the plaintiff is a United States resident.[84] The Supreme Court of Texas has determined that in cases where the factors weigh in favor of dismissal (even if they do not "strongly" weigh

77. Act of Feb. 23, 1993, 73d Leg., R.S., ch. 4, § 1, 1993 Tex. Gen. Laws 10 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051), *repealed in part by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.09, sec. 71.051(a), 2003 Tex. Gen. Laws 847, 855. The statute was subsequently upheld against a constitutional challenge by the Texas Supreme Court. Owens Corning v. Carter, 997 S.W.2d 560, 571 (Tex. 1999). The plaintiffs contended that the statute violated the Privileges and Immunities Clause of the United States Constitution. *Id.* at 568. The court rejected this argument, citing United States Supreme Court precedent allowing states to discriminate on the basis of state residency, but not state citizenship. *Id.* at 570–71 (citing Douglas v. New Haven R.R. Co., 279 U.S. 377 (1929)). The court concluded that § 71.051 was constitutional because its distinctions were based on Texas *residency* only. *Id.*

78. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a)–(b) (West Supp. 1994).

79. *Id.* § 71.051(a).

80. *Id.* § 71.051(b).

81. *Id.* § 71.051(f)(1).

82. Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 3.04, .09, sec. 71.051(a)–(b), 2003 Tex. Gen. Laws 847, 854, 855.

83. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b), (i) (West 2008).

84. *Id.*; *see supra* note 80 and accompanying text.

in favor of dismissal), the trial court is required to dismiss the case.[85] Due to the limited discretion of the trial court in denying motions to dismiss, in practice, the Texas standard will often be harsher than the federal standard in cases brought by foreign plaintiffs.

C. Delaware

Unlike Texas and Florida, Delaware has yet to adopt a robust standard of forum non conveniens. While the Florida Supreme Court and the Texas Legislature both acted to implement a doctrine that would prevent an influx of lawsuits unrelated to the state, Delaware's forum non conveniens doctrine puts a very heavy burden of proof on defendants seeking forum non conveniens dismissal.

1. Delaware's Overwhelming-Hardship Standard.—In cases that are first filed in Delaware,[86] Delaware uses the *Cryo-Maid* factors[87] in determining whether forum non conveniens dismissal is appropriate. Under the modern formulation, the factors include

> (1) the relative ease of access to proof;
>
> (2) the availability of compulsory process for witnesses;
>
> (3) the possibility of the view of the premises;
>
> (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
>
> (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
>
> (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.[88]

Nevertheless, even if all of the *Cryo-Maid* factors favor adjudication in the alternative forum, the defendant must show overwhelming hardship for the court to dismiss the case: "It is not enough that all of the *Cryo-Maid* factors may favor [the] defendant. The trial court must consider the weight

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85. *In re* Ensco Offshore Int'l Co., 311 S.W.3d 921, 929 (Tex. 2010) ("The statute's language simply does not require that the Section 71.051(b) factors 'strongly' favor staying or dismissing the suit. Here, all the factors weigh in favor of [the] claim being heard in a forum outside Texas, and the statute *required* that the trial court grant the motion . . . ." (emphasis added)).

86. The overwhelming-hardship standard does not apply to cases that were not first filed in Delaware. Lisa, S.A. v. Mayorga, 993 A.2d 1042, 1047 (Del. 2010). Thus, only "[w]here the Delaware action is the first-filed, the plaintiff's choice of forum will be respected and rarely disturbed, even if there is a more convenient forum to litigate the claim." *Id.* This policy, according to the Delaware Supreme Court, operates to "discourage forum shopping and promote the orderly administration of justice." *Id.*

87. The factors take their name from *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).

88. Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 837–38 (Del. 1999).

of those factors in the particular case and determine whether any or all of them truly cause both inconvenience and hardship."[89]

Delaware's overwhelming-hardship standard has allowed cases to survive motions to dismiss for forum non conveniens where they likely would have been dismissed under the federal standard. For example, in *Ison v. E.I. DuPont de Nemours & Co.*,[90] the Delaware Supreme Court reversed the forum non conveniens dismissal of a lawsuit by foreign plaintiffs for injuries that occurred in England, Wales, Scotland, and New Zealand.[91] The court determined that the defendant had not sustained its overwhelming-hardship burden, "even though the plaintiffs [were] foreign and ha[d] no connection" to the Delaware forum.[92] The "key factors" in the court's decision included the fact that the defendant, which was incorporated in Delaware, maintained its principal place of business there and that "significant contacts" existed in Delaware with the allegedly defective product.[93] The court in *Ison* emphasized that there were connections to Delaware other than the defendant's place of incorporation: "This is not a case of weighing the foreign plaintiffs' choice of forum (whether it be 'forum shopping' or not) against a defendant whose only connection is that it is incorporated in Delaware. We need not express an opinion on such a case because it is not before us."[94]

Two years later, however, just such a case did come before the court in *Warburg, Pincus Ventures, L.P. v. Schrapper*.[95] In *Warburg*, the litigation's only connection to Delaware was the defendant's status as a Delaware limited partnership.[96] While the defendant argued that the overwhelming-hardship standard should not apply in cases where the only connection to Delaware was the defendant's status as a Delaware business entity, the court disagreed.[97] The defendant also argued that important foreign witnesses were beyond the reach of the compulsory process of a Delaware court, that evidentiary and discovery procedures of the Hague Convention would impede a trial under Delaware discovery rules, and that foreign law governed the dispute;[98] however, the court affirmed the denial of the defendant's motion to dismiss, deeming the motion to be "based on little more than generalized references to the garden-variety concerns and expenses that characterize transnational litigation."[99] Thus, Delaware courts have strictly

89. Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship, 669 A.2d 104, 105 (Del. 1995).
90. 729 A.2d 832 (Del. 1999).
91. *Id.* at 834–35.
92. *Id.* at 842.
93. *Id.* at 843.
94. *Id.* at 842–43.
95. 774 A.2d 264 (Del. 2001).
96. *Id.* at 267.
97. *Id.* at 268.
98. *Id.* at 269–71.
99. *Id.* at 272.

construed the overwhelming-hardship standard and have repeatedly denied motions to dismiss for forum non conveniens, even when the lawsuit is brought by a foreign plaintiff and has only a tenuous connection to Delaware.

2. *Analysis of Forum Non Conveniens in Delaware.*—Unlike Texas and Florida, which have self-corrected their doctrines of forum non conveniens to closely mirror the federal doctrine (albeit through different government branches), Delaware has remained an extremely friendly forum for foreign plaintiffs who wish to litigate claims in the United States arising from injuries that occurred abroad.

Although the Delaware Supreme Court expressly considered the federal standard set forth in *Piper Aircraft*, the court ultimately declined to adopt that standard, asserting that it "tends significantly to disfavor foreign plaintiffs."[100] Thus, the overwhelming-hardship standard—which will only be met in "*rare cases* where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in *manifest hardship* to the defendant"[101]—remains the standard that defendants must meet to secure forum non conveniens dismissal in Delaware.

Delaware is "the favored state of incorporation for U.S. businesses."[102] In fact, "[o]f the corporations that make up the Fortune 500, more than one-half are incorporated in Delaware[,]"[103] Delaware has credited "the Delaware courts and, in particular, Delaware's highly respected corporations court, the Court of Chancery" as being among the primary motivators for incorporation in Delaware.[104] In light of this corporation-friendly background, it is important to consider Delaware's policy reasons for its forum non conveniens doctrine, which appears to be detrimental to its own corporations. In the domestic context, commentators have suggested that the overwhelming-hardship standard is only one of the ways in which Delaware "attempt[s] to gain complete control over the adjudication of Delaware corporate law cases."[105] Others have proposed that Delaware's restrictive forum

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100. Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 840, 842 (Del. 1999). The Delaware Supreme Court also explicitly acknowledged the existence of federal preemption in foreign relations: "State courts are not preempted by federal law in the context of international litigation between private parties unless a federal law, treaty or constitutional provision applies." *Id.* at 840 n.28. Thus, "[a]bsent federal statutory law preempting state [forum non conveniens] standards, many states have deviated from the standard set in *Piper Aircraft*." *Id.* at 840. The court concluded that federal preemption in the area of foreign relations "does not apply when the litigants are private foreign parties as distinct from sovereign entities." *Id.* at 840 n.28. However, this question remains undecided by the United States Supreme Court. *See infra* note 109 and accompanying text.

101. *Ison*, 729 A.2d at 835 (emphasis added).

102. LEWIS S. BLACK, JR., DEL. DEP'T OF STATE, DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007).

103. *Id.*

104. *Id.*

105. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 104–07, 137 (2009). Interestingly, Delaware's forum non

non conveniens doctrine "takes as a starting point that publicly traded companies incorporate in Delaware (and pay its high franchise taxes) at least in part because of its high-quality and specialized courts and, as a general matter, want important and high-profile cases to be decided by Delaware judges."[106] These policy issues—as well as Delaware's inherent interest in managing its own judicial docket—must be considered in the preemption analysis.[107]

IV. Federal Preemption of Forum Non Conveniens: A Proposal

The time has come for Congress to enact a uniform standard of forum non conveniens that would be binding on both federal and state courts in transnational forum non conveniens motions.[108] As the Supreme Court has made it clear that it is unwilling to consider the question of whether federal law should preempt state law of forum non conveniens,[109] congressional action is necessary. A federal forum non conveniens statute would define the

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conveniens policy sweeps more broadly than is necessary to accomplish this goal, as "the Delaware Supreme Court has been no less inclined to keep forum merely because another state's corporate law governs the dispute." *Id.* at 106. It has been suggested that this approach is inconsistent with "the most elementary principles of comity." *Id.* at 107.

106. Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 748–49 (2009).

107. For a discussion of the federalism implications for federal preemption of forum non conveniens, see *infra* section IV(B)(1).

108. Federal preemption of forum non conveniens has been suggested before. *See* Mark D. Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Common Law*, 4 INT'L TAX & BUS. LAW. 155, 156 (1986) ("[This Article] suggests that under the national power over the foreign relations[,] Congress should enact a statute authorizing the federal courts to develop *forum non conveniens* rules serving U.S. foreign relations goals."). This Note proposes that, rather than authorizing the federal courts to preempt state law by creating federal common law, Congress itself should determine the substantive forum non conveniens standard to be applied in transnational cases. Due to the already uncertain nature of the common law doctrine that the federal courts have crafted, *see infra* notes 153–54 and accompanying text, and the sensitive foreign relations issues at stake, *see infra* section IV(A)(1), this Note suggests that Congress should legislatively mandate the forum non conveniens standard to be used in transnational cases.

109. For example, in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), the Court held that federal forum non conveniens law did not preempt state law in a domestic admiralty case, *id.* at 452–53, but it declined to reach the question of whether state law is preempted in a transnational admiralty case. *Id.* at 457 ("*Amicus* the Solicitor General has urged that we limit our holding, that *forum non conveniens* is not part of the uniform law of admiralty, to cases involving domestic entities. We think it unnecessary to do that. Since the parties to this suit are domestic entities, it is quite impossible for our holding to be any broader."). Similarly, in *Chick Kam Choo v. Exxon Corp.*, the Court declined to reach the argument that federal forum non conveniens law preempted state law:

> It may be that respondents' reading of the pre-emptive force of federal maritime *forum non conveniens* determinations is correct. This is a question we need not reach and on which we express no opinion. We simply hold that respondents must present their pre-emption argument to the . . . state courts, which are presumed competent to resolve federal issues."

486 U.S. 140, 150 (1988).

federal doctrine[110] and would explicitly preempt state law of forum non conveniens in transnational litigation. Thus, if the defendant moved to dismiss the lawsuit in favor of an alternative *foreign* forum, the federal standard would apply, whether the plaintiff were a foreign citizen or an American citizen.[111] While a federal statute would have the benefit of defining the contours of the federal forum non conveniens doctrine and perhaps resolving the circuit splits that predominate the doctrine in federal court,[112] this part will focus primarily on the preemption aspect of the statute.

There are three primary reasons that Congress should preempt forum non conveniens doctrine in transnational litigation. First, preemption would increase federal control over forum non conveniens determinations that implicate the United States' foreign relations, which is consistent with the plenary power of the federal government in this area. Second, preemption would make forum non conveniens determinations more consistent across jurisdictions, which would reduce forum shopping and eliminate the battle over removal to federal court. Third, forum non conveniens in transnational litigation is often the deciding factor in whether an American MNC may be held liable in a United States court for its actions abroad; the federal government, and not the states, is in the best position to strike a balance

110. While Congress could codify the *Gilbert* test, the actual forum non conveniens standard contained in any future federal statute is largely beyond the scope of this Note. Thus, while I will discuss the policy implications of the various possible approaches that Congress could take in a forum non conveniens statute, I will largely focus on the merits of the general argument for federal preemption of state forum non conveniens law, without proposing a particular federal standard to be adopted.

111. Much of the academic literature has focused on litigation brought by foreign plaintiffs; however, any motion to dismiss for forum non conveniens where the alternative forum is outside of the United States has both international comity and foreign relations implications. Thus, while cases brought by foreign plaintiffs will frequently be the most problematic in terms of finding an adequate connection to the American forum, I propose that federal preemption of state doctrine should not be limited to cases brought by foreign plaintiffs but should instead be applied to transnational litigation generally.

112. In the federal doctrine of forum non conveniens, "[c]ircuit splits abound." Lear, *supra* note 3, at 1148. For example, the amount of deference afforded a foreign plaintiff's choice of forum varies substantially depending on the circuit. *Compare, e.g.*, Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) (requiring a defendant to make "'a clear showing of facts which . . . establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent'" (quoting Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir. 1983))), *with* Iragorri v. United Techs. Corp., 274 F.3d 65, 71–72 (2d Cir. 2001) (en banc) (embracing a sliding scale of presumptions dependent upon the plaintiff's motives for choosing the U.S. forum). Additionally, choice-of-law analysis has varying weight depending on the circuit, with some circuits refusing to engage in the forum non conveniens analysis if American law governs the dispute and others allowing dismissal even if federal law exclusively governs the dispute. *Compare, e.g.*, Needham v. Phillips Petroleum Co. of Nor., 719 F.2d 1481, 1483 (10th Cir. 1983) ("If American law is applicable to the case, the *forum non conveniens* doctrine is inapplicable"), *with* Cruz v. Mar. Co. of Phil., 702 F.2d 47, 48 (2d Cir. 1983) (per curiam) (holding that the applicability of federal law does not preclude a district court from dismissing for forum non conveniens). These are only a few of the most prominent examples of the circuit splits that exist in forum non conveniens jurisprudence.

between protecting American corporations and ensuring that they are held accountable in appropriate cases.

On the other hand, federal preemption of forum non conveniens raises federalism concerns because it will decrease state control over cases filed in state courts. Preemption will impose the federal forum non conveniens doctrine on all fifty states, some of which have expressly declined to adopt the federal standard. Additionally, it may be argued that federal preemption of forum non conveniens will not produce uniformity in light of the discretionary nature of the doctrine. Ultimately, federal preemption's benefits outweigh its drawbacks; therefore, Congress should act swiftly to pass a forum non conveniens statute.

A. Why Preemption?

1. Federal Control over Foreign Relations.—In light of the federal government's plenary foreign-relations power, Congress should preempt state doctrine of forum non conveniens in transnational litigation because these cases often implicate international comity and the foreign relations of the United States.[113] Allowing each of the fifty states to use a different standard for forum non conveniens dismissal of transnational cases undermines the federal government's interest in maintaining control of all aspects of foreign relations.

a. Foreign Sovereigns' Interest in Forum Non Conveniens.—In the vast majority of transnational litigation, the foreign parties involved are private parties and not the foreign sovereigns themselves. However, foreign sovereigns nevertheless have demonstrated a significant interest in the fate of their citizens in American courts. For example, some nations have passed "blocking statutes,"[114] which are designed to prevent the existence of an

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113. Due to various constitutional commitments of foreign affairs powers to the federal government, the Supreme Court has found that the Constitution reflects "a concern for uniformity in this country's dealings with foreign nations and indicat[es] a desire to give matters of international significance to the jurisdiction of federal institutions." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964). Thus, "foreign affairs and international relations" are "matters which the Constitution entrusts solely to the Federal Government." Zschernig v. Miller, 389 U.S. 429, 436 (1968). The Court has also made it clear that the federal government need not look to state policies when exercising its foreign affairs powers: "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies." United States v. Belmont, 301 U.S. 324, 331 (1937). Commentators generally agree. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996) ("At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist.'"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1621 (1997) ("In foreign affairs, the nation must speak with one voice, not fifty.").

114. Ecuador, Dominica, Nicaragua, Costa Rica, and Guatemala have all enacted some form of blocking statute. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 22 (2003–2004). For further discussion of blocking statutes and their effect on American forum non conveniens doctrine, see generally Heiser, *supra* note 3.

"adequate" foreign forum by withdrawing jurisdiction over cases by their citizens that have been previously dismissed in another country on the basis of forum non conveniens.[115] While courts have handled blocking statutes differently,[116] a uniform reaction to these statutes from the federal government is necessary to ensure consistent adjudication.

Additionally, foreign sovereigns have sought to intervene in lawsuits brought by their citizens in the United States, both in favor of and against the American court's taking jurisdiction.[117] The Eleventh Circuit has recognized the important foreign relations implications of foreign sovereign intervention:

> In some cases, . . . federal courts may have to address arguments presented by a foreign sovereign that has intervened or filed an amicus brief. In such cases, the sovereign may allege that the case will impair its national economic or policy interests if the case is allowed to proceed in the United States. [This is] but [one] of the ways in which issues of foreign relations arise in the *forum non conveniens* area.[118]

Both blocking statutes and foreign-sovereign intervention illustrate that foreign nations often have a vested interest in the outcome of lawsuits filed by their citizens in the United States. The federal government, rather than the state governments, should be responsible for formulating a cohesive policy for forum non conveniens dismissals in these cases; however, Congress must preempt state forum non conveniens doctrine to accomplish this goal.

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115. *See* Heiser, *supra* note 3, at 610 ("Although this legislation often refers generically to cases where the plaintiff resorts to his country's courts 'due to the declinature of foreign judges' who had jurisdiction, there is little doubt that these blocking statutes are intended specifically to prevent courts in the United States from finding that an alternative forum is 'available' to hear the plaintiff's lawsuit.").

116. A Florida court, for example, has held that an alternative forum's blocking statute does not preclude the court from dismissing a lawsuit for forum non conveniens. *See supra* notes 53–56 and accompanying text. However, other states have held that blocking statutes do preclude forum non conveniens dismissal. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 190 F. Supp. 2d 1125, 1129–32 (S.D. Ind. 2002) (denying a motion to dismiss for forum non conveniens and concluding that Venezuela was not an adequate alternative forum because, under Venezuelan law, the plaintiffs could not submit to the jurisdiction of the Venezuelan court after a forum non conveniens dismissal in the United States).

117. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 197–98 (2d Cir. 1987) (explaining that the Union of India brought suit in a United States court for the disaster in Bhopal, purporting to act on behalf of its citizens in the capacity of *parens patrie*). Foreign sovereigns have also intervened to urge American courts to dismiss suits brought by their own citizens, as the government of Ecuador did during the litigation against Chevron. *See Texaco Petroleum, Ecuador and the Lawsuit Against Chevron*, CHEVRON CORP. 4, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf ("The government of Ecuador intervened . . . to inform the federal court that: 1) only the [Ecuador] government had authority over Ecuador's public lands; 2) the plaintiffs had no independent right to litigate over public lands; and 3) the Settlement and Release . . . disposed of the remediation issues raised by the . . . plaintiffs . . . .").

118. Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1313 (11th Cir. 2002).

b. The Effect of Preemption of Foreign Relations.—While this Note does not propose a specific forum non conveniens standard to be adopted by Congress,[119] it should be noted that the foreign-relations implications of federal preemption will vary depending on the content of the standard adopted by Congress. Both within the United States and in the international community, commentators have been skeptical of forum non conveniens, criticizing the doctrine as protectionist and accusing American courts of discriminating against foreign plaintiffs.[120] This criticism will only increase if federal preemption results in more hostility to foreign plaintiffs. In those circumstances, federal preemption has the potential to damage foreign relations. On the other hand, many states—like Florida and Texas—have essentially adopted the federal standard, except that both Florida and Texas have modified the doctrine so that it is harsher toward foreign plaintiffs in some cases.[121] Thus, preemption—even under the relatively harsh *Gilbert* standard—might decrease the number of forum non conveniens dismissals in those states, placating foreign sovereigns that view forum non conveniens as protectionist (such as those that have passed blocking statutes).

While the effect of federal preemption using the *Gilbert* factors is somewhat uncertain, considering the vast amount of literature that has criticized the *Gilbert* factors and *Piper Aircraft*,[122] Congress would certainly be justified in making changes to the doctrine. To be truly effective, the forum non conveniens statute would have to definitively resolve contentious issues such as the effect of blocking statutes and foreign-sovereign intervention on the forum non conveniens analysis, the definition of a truly "adequate" alter-

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119. *See supra* note 110.

120. *See, e.g.*, Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 493 (2002) (asserting that the Hague Convention on Jurisdiction and Judgments "attempts to prevent a protectionist approach to the application of the convention rule on *forum non conveniens*" by prohibiting discrimination on the basis of nationality); Peter Prince, *Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach Is Better*, 47 INT'L & COMP. L.Q. 573, 574 (1998) ("Indeed, the US approach openly discriminates in favour of local litigants, placing unfair obstacles in the way of foreign plaintiffs wishing to sue US companies in the United States."); Hu Zhenjie, Forum Non Conveniens: *An Unjustified Doctrine*, 48 NETH. INT'L L. REV. 143, 159–60 (2001) (criticizing forum non conveniens as a mechanism that allows American jurisdictional rules to be "exorbitant" enough that American plaintiffs can nearly always get judicial relief while still ensuring that foreign plaintiffs' claims can be easily dismissed).

121. *See supra* notes 57–64 and accompanying text. Florida, in particular, has been extremely hostile to foreign plaintiffs and has refused to consider blocking statutes in its forum non conveniens calculus. This disregard of foreign law has the potential to anger foreign sovereigns and should be addressed by Congress.

122. *See supra* notes 35–36 and accompanying text; *see also* Emily J. Derr, Note, *Striking a Better Public–Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 821 (2008) ("Many scholars condemn the forum non conveniens doctrine as 'arbitrary,' 'incoherent,' abused, and even 'unconstitutional.'" (footnotes omitted)); John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 662 (2004) ("Critics of forum non conveniens . . . conclude that judicial economy and fairness are achieved not by analyzing the suitability of the American forum but by permitting foreign plaintiffs' claims to proceed.").

native forum, and the amount of deference merited by a foreign plaintiff's choice of forum—all issues that the *Gilbert* factors fail to adequately resolve. With its vast legislative resources,[123] Congress is in the best position to consider the competing policies and accompanying foreign-relations concerns and to determine an appropriate forum non conveniens standard.

2. The Value of Uniformity: Forum Shopping and the Battle for Removal.—Another important justification for preemption of state forum non conveniens doctrine is that it would create more uniformity in the adjudication of transnational disputes. Uniformity between the state and federal courts would (1) decrease incentives to engage in forum shopping, (2) decrease instances in which the parties battle over removal to federal court, and (3) increase the predictability of the outcome of forum non conveniens motions, thus decreasing the time and money required to litigate this issue.

While the definition of the term *forum shopping* has never been entirely clear, it is often characterized by courts as an unsavory litigation tactic employed by plaintiffs to inconvenience or harass the defendant:

> The concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit[,] . . . raising the fear that applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails).[124]

However, other judges have characterized forum shopping as simply an exercise in good judgment by the plaintiff:

> "Forum-shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.[125]

Whatever the merits of the forum-shopping debate, federal courts have been especially willing to dismiss lawsuits by foreign plaintiffs when they

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123. Each piece of proposed legislation is referred to a committee, which considers the bill, holds hearings, and adopts any necessary changes. *The Legislative Process*, HOUSE.GOV, http://www.house.gov/content/learn/legislative_process/. Committees have the resources to consider the vast policy implications of federal preemption of forum non conveniens; they "are where Congress gathers information; compares and evaluates legislative alternatives; identifies policy problems and proposes solutions; selects, revises, and reports out measures for the full chamber to consider; monitors the executive branch's performance of its duties; and investigates allegations of wrongdoing." HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1789–1994, H.R. DOC. NO. 103-324, at 143 (1994).

124. Sheldon v. PHH Corp., 135 F.3d 848, 855 (2d Cir. 1998) (quoting Olmstead v. Anderson, 400 N.W.2d 292, 303 (Mich. 1987)) (internal quotation marks omitted).

125. The Atlantic Star, [1974] A.C. 436 (H.L.) 471 (Lord Simon of Glaisdale) (appeal taken from the Court of Appeal).

believe that the plaintiff has engaged in forum shopping.[126] The current disparity in forum non conveniens doctrines in state and federal courts strongly encourages forum shopping.

Because forum non conveniens is generally considered procedural under the *Erie* doctrine, federal courts sitting in diversity apply federal forum non conveniens law.[127] In the forum non conveniens context, there is not only incentive for parties to forum-shop "horizontally" (among the courts of different states), but also to forum-shop "vertically" (between a state court and a federal court sitting in that state). Thus, "even when a foreign plaintiff sues a corporate defendant in a state with a relaxed forum non conveniens doctrine, if the defendant is able to remove the suit to federal court . . . it will be able to defeat the application of the state forum non conveniens rule."[128]

This anomaly often leads to a battle over removal, with the ultimate outcome of the litigation turning on whether the defendant is able to remove the lawsuit to federal court.[129] Under current federal law, if federal jurisdiction is based on diversity of citizenship, a defendant may remove the case to federal court only if none of the defendants in the case is a citizen of the state in which the litigation was originally filed.[130] If the plaintiff files the lawsuit in a state such as Delaware, which rarely dismisses on forum non conveniens grounds, the success of the lawsuit might depend on whether the defendant is able to remove the litigation to federal court.[131] In these cases, plaintiffs often manipulate their litigation strategy to prevent removal to federal court, using tactics such as joining a defendant who is domiciled, is incorporated, or has its principle place of business in the state of the plaintiff's chosen forum; or joining a defendant with the same citizenship as the plaintiff, thereby destroying federal diversity jurisdiction.[132] Additionally, at least one circuit has held that all alien parties are considered to have the same citizenship for

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126. *See* Vivendi SA v. T-Mobile USA Inc., 586 F.3d 689, 695–96 (9th Cir. 2009) (affirming the dismissal of the plaintiff's claim because the plaintiff engaged in forum shopping and used "eleventh-hour" efforts to strengthen the connection of the case to the United States); *see also supra* note 38 and accompanying text.

127. *See supra* subpart II(A).

128. Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 526 (1996).

129. *See id.* at 531–32 (discussing the frequently outcome-determinative nature of forum non conveniens dismissals).

130. 28 U.S.C. § 1441(b) (2006).

131. *See* Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 101 (2009) ("Not only are the vast majority of forum non conveniens motions granted by the federal courts, the federal standard is often more aggressive, or more aggressively applied, than the standards in the state courts." (footnotes omitted)).

132. *See* 28 U.S.C. § 1332(a) (defining diversity jurisdiction); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that for federal diversity jurisdiction to exist, complete diversity between all of the parties is required), *overruled on other grounds by* Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844). For further discussion of tactics used by plaintiffs to prevent removal in transnational litigation, see WEINTRAUB, *supra* note 9, at 256–58.

purposes of diversity jurisdiction.[133] Thus, in order to prevent removal, a foreign plaintiff can simply join any other alien party as a defendant in the litigation.

Undoubtedly, federal preemption of forum non conveniens doctrine in transnational cases would reduce the amount of forum shopping, both vertical and horizontal, used by the parties in order to gain a forum non conveniens advantage. However, an important question must be addressed: why should Congress attempt to reduce forum shopping by preempting state forum non conveniens doctrine? There are two primary disadvantages to encouraging forum shopping: (1) it is time-consuming, and (2) it is taxing on resources—not only those of the parties but also those of the courts. Because the current system of forum non conveniens actually *encourages* plaintiffs to forum-shop, litigation over removal and forum non conveniens dismissals can often take years, with both parties expending millions of dollars before the court ever hears the merits of the case. For example, in *Piper Aircraft*, the lawsuit started out in a California state court in July 1977.[134] The defendants then removed the lawsuit to a federal district court in California and moved for transfer to a district court in Pennsylvania.[135] After the suit was transferred, the defendants moved to dismiss for forum non conveniens, and the district court granted the motions in October 1979.[136] Plaintiffs then appealed to the Third Circuit, where the case was reversed and remanded for trial.[137] However, the United States Supreme Court granted certiorari and eventually affirmed the district court's dismissal of the case for forum non conveniens on December 8, 1981.[138] Thus, the plaintiffs in *Piper Aircraft* went through five courts in four and one-half years, only to have their case dismissed in favor of a foreign forum.

Whatever the merits of the ultimate forum non conveniens determination in *Piper Aircraft*, both parties would likely have preferred to adjudicate this issue with less wrangling over removal and more certainty over what law would apply to the forum non conveniens motion. A uniform standard of forum non conveniens between the state and federal courts in transnational litigation, while insufficient to resolve the underlying forum dispute, would allow a more expedient forum non conveniens resolution. Because the parties will be certain at the outset of the litigation that federal law will apply to any forum non conveniens motion, regardless of whether the lawsuit is filed initially in state or federal court, plaintiffs will have no

133. *See* Chick Kam Choo v. Exxon Corp., 764 F.2d 1148, 1153 (5th Cir. 1985) (holding that because "the danger is remote that [an] alien plaintiff will benefit from local bias of state courts or juries" by suing another alien, the two alien parties are deemed to have the same citizenship and therefore diversity jurisdiction is not available).

134. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 239–40 (1981).

135. *Id.* at 240.

136. *Id.* at 241.

137. *Id.* at 244.

138. *Id.* at 235, 246, 261.

need to "shop" for the state forum with the least rigorous forum non conveniens doctrine. Additionally, plaintiffs will have no incentive to use litigation tactics to prevent removal, and defendants will have no (forum non conveniens-related) reason to advocate for removal.[139]

3. Liability of American Multinational Corporations: Striking a Balance.—A final argument in favor of federal preemption is the effect that forum non conveniens doctrine has on the overall liability of American MNCs. The debate over MNC liability has been stated as follows:

> [T]he apparent conflict in *forum non conveniens* [is] between a U.S. court's interest in preventing itself from becoming the "dumping ground" of international litigation, and the need to protect foreign plaintiffs from the tortious acts of U.S. MNCs. Presently, dismissal for *forum non conveniens* under the federal common law approach often is tantamount to finding for the MNC, as foreign plaintiffs are frequently without a remedy in their home forum.[140]

Thus, in considering forum non conveniens dismissals in cases involving acts committed by American MNCs abroad, there are two competing policy interests: (1) ensuring that American courts are not overwhelmed and that American MNCs are not singled out for excessive lawsuits by foreign plaintiffs for acts that occurred abroad, especially when foreign companies could not be sued in the United States for the same behavior; and (2) ensuring that American MNCs are held accountable for their behavior, especially if the acts that gave rise to the lawsuit are strongly connected to the MNCs' business activities within the United States.

While the exact balance that should be struck between these competing interests is beyond the scope of this Note,[141] the appropriate entity to strike the balance is undoubtedly the federal government, not the fifty governments of the states. Because the liability of MNCs for activities that occur abroad implicates not only the foreign relations of the United States but also the foreign-commerce power of Congress, Congress is the appropriate body to consider the policy arguments on both sides. A consistent statutory standard of forum non conveniens would also allow American MNCs to accurately assess their liability and adjust their actions accordingly. With the current

139. Defendants may prefer a federal forum independent of any difference in the forum non conveniens doctrine applied; however, that aspect of the "battle for removal" is beyond the scope of this Note.

140. Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 421 (1995) (footnotes omitted).

141. For further discussion on holding American MNCs accountable in American courts for their activities abroad, see generally Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (2002) and Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153 (2003).

state of the forum non conveniens doctrine, whether a court grants a motion for forum non conveniens dismissal has little to do with the connections that the litigation has to the forum.[142] Instead, dismissal is controlled by the state in which the suit is filed and whether the defendant can secure removal to federal court.[143] While different substantive law may apply to the lawsuit depending on the forum in which it is filed, federal preemption of state forum non conveniens doctrine will, at the very least, allow defendant MNCs to better estimate whether they will be required to defend, on the merits, a lawsuit for activities that occur abroad.

B. Arguments Against Preemption

Though I ultimately conclude that the benefits of federal preemption outweigh the drawbacks, I will briefly discuss the primary arguments against congressional preemption of state forum non conveniens doctrine. The first—and most important—concern about federal preemption is whether it violates the principles of federalism. A secondary concern is whether federal preemption would actually accomplish uniformity and make forum non conveniens outcomes more predictable.

1. But What About Federalism?—In proposing to shift the balance of power from the states to the federal government, a principal concern must always be whether this shift is compatible with ideals of federalism. While federalism is difficult to define precisely, it encompasses the delicate balance of power between the state and federal governments: "Federalism refers to the multifaceted political power relationships between governments within the same geographic setting. . . . [It] is the organizational mechanism through which governments manage power."[144] Because federal preemption of state forum non conveniens doctrine effectively decreases state power and increases federal power, it raises federalism concerns.

The forum non conveniens doctrines of the three exemplary states discussed in Part III (Florida, Texas, and Delaware) are helpful in considering preemption's effect on federalism. Due to the defendant-friendly modifications that Florida and Texas have made to their doctrines,[145] a federal forum non conveniens statute is likely to result in fewer dismissals than the current doctrine of either state. In addition, it appears that both states' adoption of robust forum non conveniens doctrines were primarily motivated by fear of overburdening their court systems and driving businesses from the state.[146] These concerns would be alleviated by a federal standard because

142. *See supra* Part III.

143. *See supra* Part III; *supra* notes 129–33 and accompanying text.

144. LARRY N. GERSTON, AMERICAN FEDERALISM: A CONCISE INTRODUCTION 5 (2007).

145. *See supra* notes 57–64 and accompanying text.

146. The Florida Supreme Court explicitly noted these concerns when it adopted the federal rule in *Kinney*. *See supra* notes 46–48 and accompanying text. The Texas Legislature had similar

there would be no incentive to forum shop among different states—all states would apply the same standard in transnational disputes, relieving the pressure on individual states to protect their own businesses and court systems.

On the other hand, federal preemption would also affect states like Delaware, which has resisted adopting the federal standard of forum non conveniens.[147] Delaware's overwhelming-hardship standard appears to be rooted in a desire to keep cases involving Delaware law in Delaware courts and to allow Delaware corporations to benefit from the comparative expertise of Delaware courts like the Court of Chancery.[148] The limited nature of the federal preemption proposed here would not dramatically affect Delaware's ability to implement these policies. Delaware's interest in keeping cases in which Delaware law would apply is already somewhat addressed by the *Gilbert* factors, as one of the public interest factors examines whether a court will have to apply unfamiliar law.[149] If the application of unfamiliar law weighs in favor of dismissal, the application of the forum's own law certainly weighs in favor of keeping the case in that forum. Additionally, when drafting the preemption statute, Congress should consider a state's interest in applying and developing its own law and could insert an exception in the statute allowing a state to keep any case in which its own substantive law applies.[150] As for Delaware's interest in ensuring that its own corporations get the benefit of the state's specialized courts, in transnational litigation it is typically the defendant, a Delaware corporation, trying to remove the dispute from the Delaware court. If the Delaware corporation is the *plaintiff*, the strong presumption in favor of plaintiffs who choose their home forums should be sufficient to protect Delaware's interests, but Congress should nevertheless consider this policy concern when drafting the statute.

It should be noted that the three model states, though they are representative of the various attitudes that states have toward forum non

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concerns: "It appears that a primary concern of the legislature was the deterrent effect that *Alfaro* might have upon business in Texas." Carl Christopher Scherz, Comment, *Section 71.051 of the Texas Civil Practice and Remedies Code—The Texas Legislature's Answer to* Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99, 109 n.47 (1994); *see also supra* section III(B)(3) (discussing the Texas Legislature's action to supersede *Dow Chemical Co. v. Alfaro*). The legislature reasoned that defendants incorporated in Texas would otherwise be disadvantaged because they would not be able to remove the lawsuit to federal court—where it could be dismissed for forum non conveniens—and thus businesses would have little incentive to incorporate or establish a principal place of business in Texas. Scherz, *supra*, at 109 n.47.

147. *See supra* note 100 and accompanying text.

148. *See supra* notes 101–07 and accompanying text.

149. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) ("There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.").

150. Practically, the application of the forum's own law will be a rare occurrence in forum non conveniens motions in transnational litigation because the activities giving rise to the suit often occur in a foreign country and, typically, the law of that country will apply.

conveniens, are not illustrative of all of the federalism implications of preemption of forum non conveniens. Nevertheless, balancing the federalism issues with the importance of federal control over foreign relations, the benefits of federal preemption outweigh the burden on the states of applying a federal doctrine. Congress would be able to address adequately many of the states' concerns in the statute without sacrificing the necessary uniformity or the utility of the doctrine.

2. *Uniformity: A Realistic Goal?*—Another concern about federal preemption of state forum non conveniens doctrine is that it may actually fail to produce uniformity and predictability. This concern is highly dependent on the preemption statute codifying the *Gilbert* standard, as this standard has often been criticized as producing arbitrary and inconsistent decisions.[151]

The Supreme Court itself questioned the predictability of the *Gilbert* test in *American Dredging Co. v. Miller*,[152] noting that allowing states to apply their own forum non conveniens doctrine in domestic maritime cases would not violate the uniformity requirement of maritime law because forum non conveniens "is most unlikely to produce uniform results."[153] While the results in a factor-based test will never produce perfect uniformity, using a uniform standard to decide all motions to dismiss for forum non conveniens in transnational cases still has the inherent value of allowing litigants to be certain about the standard that will govern the motion. And, whether or not the final forum non conveniens determinations will be uniform, a uniform standard will decrease the unchecked forum shopping and the disputes over removal that are so common in contemporary transnational litigation in the United States.

Finally, although concerns about consistency under the *Gilbert* standard are well-founded, these concerns do not speak to whether or not the federal standard of forum non conveniens should preempt the state doctrine in certain transnational cases. Rather, these concerns speak to the *content* of the federal standard that Congress should codify in preempting state doctrine. Congress is not bound to the *Gilbert* standard; it is free to modify the judicial

151. *See supra* note 35 and accompanying text; *see also* Lear, *supra* note 3, at 1148 ("For many years the federal judiciary has treated forum non conveniens as a housekeeping rule for the federal court system. If indeed this is correct, the federal house is in need of a serious spring cleaning. Circuit splits abound, the standards used and the evidence required for forum non conveniens dismissals vary widely among the district courts, and reverse forum shopping through removal and transfer is commonplace." (footnotes omitted)); Robertson, *supra* note 3, at 378 ("We need to deal with the distant litigation problem by devising reliable rules rather than leaving it to trial judges' unbridled discretion." (internal quotation marks omitted)).

152. 510 U.S. 443 (1994).

153. *Id.* at 453. As to the uniformity aspect of forum non conveniens, the Court maintained that the multiple factors considered in conjunction with the discretionary nature of the doctrine make it "almost impossible" to predict the outcome of a motion to dismiss for forum non conveniens. *Id.* at 455. Thus, forcing state courts to apply the federal standard of forum non conveniens likely would not create uniformity of decisions.

doctrine of forum non conveniens as it chooses.[154] This criticism of preemption is thus better addressed when debating the question of the standard of forum non conveniens that Congress should adopt rather than when debating the question of whether Congress should preempt state doctrine at all.

V. Conclusion

Congress should codify a federal standard of forum non conveniens that would be binding on the states in cases where the defendant moves to dismiss for forum non conveniens in favor of an alternative foreign forum. The primary reasons for federal preemption in this area include (1) the need for federal control over transnational forum non conveniens, which has important foreign-relations implications, (2) the inherent value of uniformity in transnational forum non conveniens, which would reduce both forum shopping and the battle for removal, and (3) the necessity of striking a *national* balance regarding the liability of American MNCs. Among the arguments against federal preemption are that it would violate the principles of federalism and that it may not produce either uniformity or predictability. These criticisms, however, do not outweigh the benefits of federal preemption. If foreign litigants are indeed drawn to the United States "as a moth is drawn to the light," the volume of transnational forum non conveniens motions is only likely to increase over time; thus, Congress should act quickly to remedy the haphazard application of forum non conveniens across the states and implement a uniform federal standard in transnational litigation.

—Sidney K. Smith

154. Some commentators have even argued that the Supreme Court's doctrine of forum non conveniens is an unconstitutional usurpation of congressional power. *See* Lear, *supra* note 3, at 1148 (describing the federal courts as being in "congressionally occupied territory without constitutional support").

Three Strikes and You're In: Why the States Need Domestic Violence Databases*

Domestic violence entered the public consciousness during the 1970s,[1] *and activists' demands for attention and redress since then have brought about many changes in the law's response to abuse within the family.*[2] *This Note examines the beginning of what may become a new trend in legal responses to domestic violence: legislation establishing databases or registries of domestic abusers. Though no law has yet been passed to create such a database, several states have proposed variations of it. This Note examines Texas and New York, two states in which these databases were recently proposed, as model jurisdictions for analyzing the databases' possible pros and cons. It first discusses feminist goals in the reformation of legal responses to domestic violence and concludes that a statewide database is a necessary and effective way of continuing the reform effort. It then appraises the possible criticisms that such a database would face and proposes a solution based on a preexisting program that many states already implement. Finally, it delves into the question of cost and posits that the benefits derived from a domestic violence database would greatly outweigh any monetary burdens it might impose.*

In 2011, two states saw legislators propose a controversial new measure to be incorporated into the criminal justice system—a database or registry that would publish information about domestic abusers.[3] Both databases would have made public the abuser's name, address, and photograph, along with a description of the offenses of which the abuser was found guilty.[4] Access to the databases would have been available without cost to the general public via a searchable website[5] or special telephone number.[6] Although these proposals aimed to reduce domestic violence by warning past and potential victims, both proposals died in committee.[7]

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1. *See* Leah J. Dickstein & Carol C. Nadelson, *Introduction* to FAMILY VIOLENCE: EMERGING ISSUES OF A NATIONAL CRISIS, at xi, xii (Leah J. Dickstein & Carol C. Nadelson eds., 1989) (documenting the first active movement against the phenomenon in 1973).

2. *See* Martha Albertson Fineman, *Preface* to THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE, at xi, xii–xv (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (summarizing changes in the law as a result of feminist critiques of the legal system).

3. Amanda Gordon, *Domestic Violence Registries*, CONN. OFF. LEGIS. RES. (June 27, 2011), http://www.cga.ct.gov/2011/rpt/2011-R-0196.htm.

4. Tex. H.B. 100, 82d Leg., R.S., § 3 (2011); S. 3819, 2011 Leg., Reg. Sess., § 2 (N.Y. 2011).

5. Tex. H.B. 100, § 3.

6. N.Y. S. 3819, § 2.

7. Gordon, *supra* note 3.

Such proposals are relatively new, but the 2011 bills were not the first of their kind. One of the bills represents Texas's second attempt at creating a domestic violence database.[8] In the last three years, similar bills have been proposed in California[9] and Virginia,[10] and there is evidence of legislative interest in the idea in Nevada.[11] Despite the bills' admirable goal of protecting the public from batterers, none have passed.[12]

In this Note, I argue that despite the disheartening results of efforts thus far, state legislators should continue to advocate for domestic violence databases. I first examine the goals of domestic violence legal reform in light of the goals of the feminists who first brought the problem to public attention and find that a domestic violence database would be an appropriate and efficient tool to combat the problem of abuse in the family. I then compare the Texas and New York bills and conclude that the Texas bill provides a more cost-effective and reasonable means of establishing the database. Finally, I examine several arguments against the database, including concerns about its cost-effectiveness, and determine that the database can withstand such attacks.

I. Why the Database Is Necessary and Appropriate

A domestic violence database is needed in order to protect victims of abuse.[13] The criminal justice system has faced significant problems in attempting to aid these victims, and a domestic violence database could resolve these problems. Domestic violence databases offer a preventative—rather than remedial—approach to combating this pervasive social problem while promoting feminist goals and supporting women's autonomy. Because the database presents a relatively unproblematic way for the state to reduce domestic violence and because domestic violence is still a major problem in

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8. Representative Joaquin Castro proposed a similar bill in the 81st Legislative Session. Tex. H.B. 2754, 81st Leg., R.S. (2009).

9. Assemb. B. 1771, 2008 Leg., Reg. Sess. (Cal. 2008); *see also No Refuge for Domestic-Violence Perpetrators*, S.F. CHRON., Oct. 12, 2010, *available at* http://articles.sfgate.com/2010-10-12/opinion/24130205_1_domestic-violence-domestic-violence-statewide-registry (discussing the possibility of implementing a domestic violence registry in California).

10. H.B. 1932, 2011 Gen. Assemb., Reg. Sess. (Va. 2011); *see also* Abby Rogers, *Financial Woes Doom Domestic Abuse Registry*, VA. STATEHOUSE NEWS (Mar. 14, 2011), http://virginia.statehousenewsonline.com/3222/financial-woes-doom-domestic-abuse-registry/ (describing the funding issues that eventually caused the Virginia bill to lose support).

11. In Nevada, Assemblyman James Ohrenschall has discussed his plans to propose a bill creating a domestic violence registry. Henry Brean, *Domestic Violence Registry Proposed*, LAS VEGAS REV.-J. (Sept. 26, 2008), http://www.lvrj.com/news/25958094.html. However, no such bill has been proposed. *Id.*

12. Gordon, *supra* note 3.

13. Throughout this Note, gendered language is used to discuss domestic problems generally. This language is not intended to suggest that women are never batterers, or that men are never victims of domestic violence.

the United States, every jurisdiction should implement a database as quickly as possible.

A. The Problems with the Law's Current Response to Domestic Violence

These days, talk of "empowering" the victims of domestic violence focuses entirely on empowerment after abuse has already occurred—basically, empowerment in prosecuting the abuser, severing ties with him, and building a new life on one's own.[14] The bills introduced in Texas and New York, conversely, propose an entirely new kind of empowerment by giving potential victims the chance to make informed decisions about their dating partners and thus to avoid abusive relationships entirely.

The need for a preventative resource on the front end of abusive relationships is all the more pressing because of the law's inadequacies in dealing with domestic violence after it has occurred. The law's failure to address domestic violence as a crime when it was first brought to public attention during the 1970s is common knowledge.[15] This is not to say that progress has not been made. A variety of measures have been implemented to ensure that the legal system is responsive and sensitive to victims and that domestic violence laws are vigorously enforced. These measures include retraining police officers to recognize the seriousness of the problem, enabling warrantless arrests of domestic violence offenders, passing mandatory arrest statutes, removing the marital exemption from rape statutes, instituting no-drop policies for prosecutions, and enacting anti-stalking laws.[16] Texas, for example, has an anti-stalking statute[17] and permits warrantless arrests for individuals suspected of domestic violence,[18] and at least one Texas county has instituted a no-drop policy.[19]

14. *See, e.g.*, Noël Bridget Busch & Deborah Valentine, *Empowerment Practice: A Focus on Battered Women*, 15 AFFILIA 82, 86 (2000) (applying empowerment theory to social work with victims of domestic violence to allow victims to "gain power and access to resources" after they have been abused); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 938 (1999) ("[Pre-trial release hearings] provide[] an ideal setting in which to balance the State's interest in addressing crimes of domestic violence and the private autonomy interests of the victim.").

15. *See, e.g.*, JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE 12–13 (1989) (explaining the developing awareness of family violence during the 1970s and enforcement problems with the new domestic violence laws); NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 196 (2006) ("[H]istorically . . . police officers did not respond as rapidly to domestic violence calls or treat intimate violence situations as seriously as other violent crimes.").

16. *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1533–41 (1993) [hereinafter *Legal Responses*] (noting the relative success of those measures in improving the legal response to domestic violence).

17. TEX. PENAL CODE ANN. § 42.072 (West 2011).

18. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(4) (West Supp. 2010).

19. *Family Violence Unit*, TARRANT COUNTY CRIM. DISTRICT ATT'Y, http://www.tarrantda.com/specialunits/familyviounit.htm. For discussion of no-drop policies generally, see *infra* notes 29–31 and accompanying text.

These reforms signal a positive change, at least in terms of the willingness of the criminal justice system to aid victims of domestic violence. However, they have given birth to a host of new problems in the domestic violence context. On the more innocuous side, some of these policies are simply ineffective. Anti-stalking statutes, for example, are often disregarded by the police and are difficult to enforce.[20] Mandatory-arrest policies do not necessarily increase enforcement against abusers because police officers often exercise discretion in determining whether probable cause of domestic violence exists.[21] Similarly, civil protective orders against abusers are ineffective when police officers can decline to enforce them,[22] a problem vividly and terrifyingly demonstrated by the facts of *Town of Castle Rock v. Gonzales*.[23] In addition, victims' lack of knowledge about the availability of protective orders, along with language barriers and unfamiliarity with the legalese used in the courtroom, seriously hamper the potential benefits of these orders.[24]

On the more damaging side of things, these measures can create additional problems for victims of domestic violence. Mandatory arrest statutes have increased the number of women arrested for incidents of domestic violence; the arrested women often inflict only defensive wounds and are "the primary perpetrators much less often than their male partners."[25] From a broader perspective, these arrest statutes have had a negative effect

20. *See* Jennifer L. Bradfield, Note, *Anti-stalking Laws: Do They Adequately Protect Victims?*, 21 HARV. WOMEN'S L.J. 229, 260–65 (1998) (describing problems with the justice system's response to stalking, particularly in that police officers will often wait until the situation has "escalated to the point of violence or near-violence" before taking action under an anti-stalking statute).

21. LEVIT & VERCHICK, *supra* note 15, at 198; *see also Legal Responses*, *supra* note 16, at 1537 (arguing for mandatory arrest because the discretionary expanded arrest powers have been little-used and the laws prohibiting domestic violence are still under-enforced).

22. *Legal Responses*, *supra* note 16, at 1510 ("Protection orders . . . are frequently violated, rarely produce an arrest for violation, and often fail to prevent further violence.").

23. 545 U.S. 748 (2005). The respondent in the case was a woman who had obtained a protective order against her husband during divorce proceedings. *Id.* at 751. The protective order required her husband to maintain a certain distance from the family home. *Id.* One evening, her three children went missing from the home. *Id.* at 753. The respondent contacted local police multiple times with information about her husband's whereabouts, asking them to find and protect her children. *Id.* When her children did not return, she showed up at the police station after midnight, but the police took no action. *Id.* at 753–54. Three hours later, her husband showed up at the police station and opened fire; he was killed when the police officers shot back. *Id.* at 754. The bodies of the three children were found in his car; he had murdered them earlier in the night. *Id.* The Supreme Court ruled that the respondent's due process rights had not been violated by the city's failure to enforce the order, affirming dismissal of the suit. *Id.* at 768.

24. Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 169–71 (1993).

25. LEVIT & VERCHICK, *supra* note 15, at 199. Women have been arrested for inflicting harm on their husbands or intimate partners regardless of whether they were acting in self-defense. *Legal Responses*, *supra* note 16, at 1538–39.

because they have been used disproportionately to arrest racial minorities.[26] In addition, the prospect of mandatory arrest may deter victims from calling law enforcement in the first place.[27] Finally, some studies have shown that mandatory arrest may actually increase violence against the victim by angering the batterer further, leading to escalated violence when he returns home.[28]

No-drop policies, in which prosecutors are not allowed to drop charges, even at a victim's request,[29] have also had a harmful effect on some victims of domestic violence. These policies fundamentally interfere with a victim's autonomy by forcing her to continue with "a process over which she has no control."[30] In addition, they may subject the victim to further intimidation or violence from her batterer as a way of retaliating against her for participating in his prosecution.[31]

Finally, though the law has tried, it has not yet reached a point where it can successfully sever a battered woman from her abusive relationship. This is because the factors that cause a victim to stay with her batterer are multifaceted, and the law does not (and perhaps cannot or should not) address all of them. The reasons that a woman cannot leave her abusive husband go beyond the physical or mental abuse and extend into the economics of the family. The traditional family features "a sexual division of labor, and concomitant dependency and restricted opportunities for women."[32] Realistically, from the point at which a woman gets married and has children, she often no longer has a voice or an exit—at least not without incurring the disapproval of society.[33] Victims are often isolated due to their batterers' efforts to completely control their lives; as a result, they have nowhere to turn to if they leave their relationships.[34] Abusers frequently provide victims with the resources necessary for survival—a home, food, and clothing (for

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26. LEVIT & VERCHICK, *supra* note 15, at 198–99.

27. *Legal Responses*, *supra* note 16, at 1538.

28. *Id.* at 1539.

29. *Id.* at 1540.

30. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996).

31. *Legal Responses*, *supra* note 16, at 1541. No studies have shown that aggressive prosecution policies lead to increased violence by the batterer. Hanna, *supra* note 30, at 1866 n.73. However, the possibility that some victims may be subject to increased violence as a result of a process that they cannot control certainly raises questions about no-drop policies. This possibility should be considered when evaluating the wisdom of such policies.

32. June Carbone, *What Do Women Really Want? Economics, Justice, and the Market for Intimate Relationships*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY 405, 412 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

33. *Cf. id.* at 416 ("Unhappily married women remain married . . . because the younger the children, the more of them, and the less the mother earns, that is, the greater her 'specialization' within the family, the less the woman's ability to leave or credibly threaten to do so. Without the possibility of 'exit,' 'voice'—and the ability to share the burden of changing diapers or making school lunches—diminishes as well.").

34. LEVIT & VERCHICK, *supra* note 15, at 190.

the victims as well as their children)—and victims commonly have no job skills.[35] To some extent, the services provided by shelters for homeless women can remedy these problems.[36] However, out of necessity, shelters can only provide temporary relief, are not available to all victims,[37] and are often understaffed and underfunded.[38]

Therefore, something more is needed to solve the plight of battered women.[39] As demonstrated above, it is often too late by the time the law intervenes, so what is needed is a solution that arrives earlier in the relationship—before the relationship has reached the point where the victim cannot leave despite the law's efforts. The domestic violence database proposes to intervene at the earliest possible moment—before the relationship has even begun.

June Carbone has noted women's "systemic vulnerability" within the traditional model of marriage, which is primarily caused by their "domestic role in marriage, their premarital education and socialization, [and] their limited opportunities within the workplace."[40] Feminists have argued that a more egalitarian model of marriage would redress this vulnerability, positing that "women's greater independence gives them the ability to renegotiate the terms of an intrinsically oppressive relationship—or to leave if their concerns remain un[ad]dressed."[41] However, it is difficult for any party to negotiate a better position for itself if not fully informed about the other party.[42] This is where the domestic violence database comes in. The database provides information crucial to a woman's decision of whether to embark on a relationship with an individual. The information is particularly necessary because a woman making this decision will often have very little else to alert her to the fact that her potential partner is a batterer—many batterers are kind and charismatic during the beginning stages of the relationship.[43]

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35. *Id.*

36. *Legal Responses*, *supra* note 16, at 1506.

37. *See id.* at 1508 (noting that "lack of knowledge or other barriers to access" limit the availability of shelters).

38. *Id.* at 1506 ("Shelters are typically underfunded, understaffed, and unable to respond fully to the needs of battered women.").

39. I am not attempting to assert that the reform efforts have been useless. On the contrary, it is clear that countless victims of domestic violence have benefited immensely from them, and certainly, the situation is better now than it was thirty years ago. *See infra* notes 15–19 and accompanying text. However, violence against intimate partners is a problem that sadly has not gone away despite the reforms.

40. Carbone, *supra* note 32, at 413.

41. *Id.* at 405.

42. *See* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 26 (2000) ("The more information that a party has, the more likely it is that he or she can see the context of a given situation clearly and respond accordingly.").

43. Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19, 22.

Furthermore, the database could be helpful to women who are already victims of domestic violence. An additional barrier to leaving the abuser is love. A woman may not leave her abuser because she does not want to lose the relationship she has cultivated with him, despite the violence.[44] Batterers often follow violent incidents with "honeymoon phases" in which the batterer shows remorse for his actions, promises to change, and temporarily becomes a loving partner.[45] Though this is a recurring cycle,[46] many victims believe their batterers when they say that each episode of violence is the last and that the abuse will cease from then on.[47] It is possible that a woman stuck in this cycle would turn to the database (or receive information about it from a friend or family member), learn that her intimate partner has behaved in the same way in the past, and realize that he is not going to change. This realization may be enough to push the woman to get help and to take the steps she needs to extricate herself from the abusive relationship.

Although reforms to the criminal law have made great leaps in improving law enforcement's response to domestic violence, domestic violence nevertheless remains a major issue for too many women. Domestic violence is the most frequent cause of injury for women between the ages of fifteen and forty-four.[48] The law's efforts thus far have concentrated mainly on how to resolve the problem once domestic violence has already occurred; no preventative measures have been implemented. This is particularly unfortunate because domestic violence is a recurring crime from which victims are often unable to extract themselves. Furthermore, the law's post-violence efforts have raised problems of their own. Against this backdrop, the creation of a domestic violence offender database is essential. The database could prevent women from entering into abusive relationships so that the problems with post-violence enforcement are never encountered. In addition, the database may be helpful to victims who are trapped in relationships because they believe that their abusers will change.

B. The Database and the Public–Private Dichotomy

The criminal law reforms addressing domestic violence have reflected a consistent pattern of moving the problem from the private sphere to the

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44. *See id.* ("A victim may say she still loves the perpetrator, although she definitely wants the violence to stop. . . . [M]ost [people in an abusive relationship] do not immediately leave . . . when treated badly; they tend to try harder to please the abuser.").

45. *See* Hope Toffel, Note, *Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 349 (1996) (explaining the "cycle of violence," which consists of three stages: the tension-building phase, the acute-battering phase, and the phase of loving contrition).

46. *Id.*

47. Buel, *supra* note 43, at 22.

48. Judith A. Smith, *Battered Non-wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 94 (2005).

public sphere.[49] For the most part, this move has been viewed as progress because the original conception of domestic violence as a private issue was largely the reason behind the failure of the state to protect women from harm.[50] In this part, I examine the consequences of this shift, particularly its impact on the autonomy of domestic violence victims. Most of the changes have done damage to the autonomy of victims while claiming to help them. The domestic violence database, conversely, both preserves and enhances a potential victim's autonomy.

Much feminist theory in recent years has been devoted to the idea of autonomy, particularly with regard to reproductive rights[51] and sexuality.[52] Not much has been said on the topic of autonomy relating to domestic violence, however. This is perhaps not surprising, as the problem of domestic violence is rooted in one intimate partner's need to control the other. This does not mean, however, that autonomy is a concept ill-fitted to the issue of domestic violence.

The word *autonomy* has its origin in politics,[53] but it has been imported from the public sphere into the personal to stand for the idea of self-

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49. *See* BLACKMAN, *supra* note 15, at 1 ("In the last two decades, intimate violence has gone from the taboo to the talked about.").

50. Hanna, *supra* note 30, at 1869.

51. *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (arguing that the Court in Roe v. Wade, 410 U.S. 113 (1973), should have used sex-equality considerations in finding a constitutional right to abortion, as reproductive autonomy is necessary for women to participate in society as equals to men); Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CENTER REP., July–Aug. 1990, at 6 (criticizing the unlimited reproductive liberty stemming from women's autonomy that is typically advocated by feminists and suggesting that this approach devalues children and ignores moral concerns about reproduction); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) (outlining an approach to reproductive rights that the author terms the "sex equality approach," which posits that a woman's control over her reproductive capacity is necessary to achieve equality between the sexes); Angela Thachuk, *Midwifery, Informed Choice, and Reproductive Autonomy: A Relational Approach*, 17 FEMINISM & PSYCH. 39 (2007) (discussing Canadian midwifery and its capacity to maximize women's reproductive autonomy).

52. *See generally* YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008) (presenting a series of essays advocating for increased female sexual power and autonomy); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (arguing that feminist scholars have focused too much on the danger inherent in sexual activity and not enough on the pleasure possible for a woman with both negative and positive sexual liberty); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993) (discussing the possibility of reforming the criminal-rape law so that it protects female sexual autonomy); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992) (arguing that the law of rape, despite its many reforms, still fails to protect women's autonomy); Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005) (arguing for the adoption of a standard of affirmative consent in rape law and positing that only such an affirmative-consent standard will allow women to regain control over their sexual encounters).

53. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446 (1983).

government.[54] Pared down to its most basic form, the right to autonomy is "the right to decide how one is to live one's life, in particular how to make . . . critical life-decisions."[55] According to John Stuart Mill, this right to autonomy extends to all decisions in the personal domain—decisions that do not directly affect other persons.[56] Furthering this argument, Mill asserts that legal paternalism is at odds with the right to autonomy when the law tries to invade this personal domain.[57] Even if the law claims to be acting for the best interest of the individual, this invasion is not justified because the right to autonomy supersedes the law's interest in that individual's personal good.[58] On the other hand, the law is fully justified in intervening when a person's decision extends outside of the personal sphere and harms another individual.[59]

As domestic violence became criminalized, the state moved deeper and deeper into what was once conceived as the personal sphere. Domestic violence prosecutions occupy an uncomfortable position with regard to the idea of autonomy.[60] On the one hand, the state is clearly justified in interfering with the batterer's autonomy because his actions and decisions are hurting another individual—his autonomy has extended beyond the personal domain. On the other hand, prosecuting a batterer against the victim's will conflicts with many decisions that are solely within the victim's personal domain—whether to stay in an intimate relationship, how to raise her children, etc.[61]

Although Carol Hanisch famously announced that "the personal is political,"[62] there are nonetheless benefits to maintaining a private domain free from government intervention, even for women and even from a

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54. *See id.* ("Indeed it is plausible to suppose that . . . 'personal autonomy' is a political metaphor.").

55. *Id.* at 454.

56. *Id.* at 455; JOHN STUART MILL, ON LIBERTY 15 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

57. *See* MILL, *supra* note 56, at 16 ("The only freedom which deserves the name, is that of pursuing our own good in our own way . . . . Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and [the] practice [of regulating private conduct].").

58. *See id.* ("Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.").

59. *Id.* at 14.

60. *See, e.g.*, Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1256 (2010) (acknowledging the tension between the aims of criminal law and the concept of victim autonomy).

61. *See, e.g.*, *id.* at 1274–75 (characterizing women who refuse to participate in the prosecution of their abuser as "quite rational individuals who are making the best choices they can under constrained circumstances").

62. Carol Hanisch, *The Personal is Political*, WRITINGS BY CAROL HANISCH, http://www.carolhanisch.org/CHwritings/PIP.html.

feminist perspective.[63] For example, it is the concept of privacy that allows women the freedom to use birth control[64] and to maintain a right (albeit a limited one) to abortion.[65] Conversely, the idea that all victims benefit from public intervention and state-mandated participation in the prosecution process is disturbingly paternalistic.[66]

The dilemma posed by the collision between domestic violence in the public sphere and the victim's personal autonomy is not one that can be resolved in this Note. However, the domestic violence database is a way for the state to respond to the problem of domestic violence without running into that dilemma. The database simultaneously strengthens and preserves the woman's autonomy. As discussed above, the fundamental concept underlying autonomy is the right to choose.[67] A woman's decision of with whom to pursue a romantic relationship is a highly personal one that cannot be invaded without hampering her autonomy. At the same time, that decision is the turning point in determining whether the woman will become a victim of domestic violence. A domestic violence database enhances her decisional strength by equipping her with information that she could use to avoid making a choice that might eventually lead to her victimization. On the other hand, the database does not interfere with the woman's autonomy. No one is required to use the database, and no state-sponsored consequences result from refusing to heed its information. Despite the public nature of the database, each person's choice of whether and how to use it is a private decision.

The move of domestic violence from the private to the public realm, while an important and necessary change, has not been entirely smooth. Some reform efforts have encroached upon the victim's autonomy while trying to mete justice on her batterer. While the domestic violence offender database does not solve these problems, it does provide a way for the state to get involved without infringing on a woman's autonomy. As such, it ought to be a welcome addition to the tools that law enforcement currently wields against domestic violence.

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63. *See* Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1177–78 (1993) (arguing that privacy can increase autonomy for women and help to achieve feminist goals).

64. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that a law forbidding the use of contraceptives unconstitutionally invaded the right to privacy).

65. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding in part that the right to privacy covers a woman's choice of whether or not to terminate her pregnancy); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

66. *See* Hanna, *supra* note 30, at 1872 ("Some feminists argue that allowing the state to decide for women in a male-dominated system is paternalistic . . . .").

67. *See supra* notes 53–59 and accompanying text.

II. Crafting the Ideal Bill: Lessons from HB 100 and S3819

Though the Texas and New York bills are similar in spirit, they have important differences that could prove crucial to each bill's success. This part discusses the two most important differences: the prerequisite number of offenses required and the difference between a database and a registry. In both respects, the Texas bill should serve as a model for other states looking to pass a domestic violence database measure because it contains safeguards superior to New York's proposed legislation while leaving out extraneous and potentially harmful measures. The best version of the bill would create a database of offenders who have at least three domestic violence convictions on their records.[68] Although the database would be accessible to the general public, offenders would not be required to update their information or to notify friends, neighbors, or partners. The database would be most effective in jurisdictions like Texas that have Batterer Intervention Programs (BIPs) that work to reintegrate offenders into society;[69] any jurisdictions that lack such programs should pass them prior to, or in conjunction with, database laws.

To maximize effectiveness and minimize overbreadth, databases should compile lists of offenders who have three or more domestic violence convictions. The Texas bill (HB 100) and the New York bill (S3819) both preface listings on the database/registry with the requirement of at least one conviction of family or domestic violence.[70] The Texas and New York definitions of domestic violence are similar.[71] However, HB 100 and S3819 differ in the number of offenses that one must be found guilty of before being subjected to a listing on the database. HB 100 requires three or more findings of family violence before an offender will be listed.[72] S3819, on the other hand, requires any individual who is convicted of any domestic violence offense to be listed.[73] The HB 100 approach appears to be the more

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68. This is the approach of the proposed Texas bill. Tex. H.B. 100, 82d Leg., R.S., § 3 (2011).

69. *See infra* notes 122–27 and accompanying text.

70. Tex. H.B. 100, § 3; S. 3819, 2011 Leg., Reg. Sess., § 3 (N.Y. 2011).

71. The Texas Family Code defines *family violence* as follows:

> (1) [A]n act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
>
> (2) abuse . . . by a member of a family or household toward a child of the family or household; or
>
> (3) dating violence . . . .

TEX. FAM. CODE ANN. § 71.004 (West 2008). S3819 defines *domestic violence offense* as "the conviction of any felony offense defined in the penal law when the victim of such crime or offense is a family or household member." N.Y. S. 3819, § 3.

72. Tex. H.B. 100, § 3.

73. *See* N.Y. S. 3819, § 2 (defining *domestic violence offender* for purposes of the registration act as a person convicted of any domestic violence offense).

prudent one, as a commonly voiced concern in the debate over these registries is the chance that a wrongful accusation could land an innocent person on the list. Another concern is that a one-time domestic spat could land a normally peaceful person on a list of supposedly violent individuals, damaging that individual's reputation as well as future employment and relationship prospects. These worries can be resolved by HB 100's three-strike requirement, which ensures that only those who are actually guilty, and repeatedly so, suffer the consequences of being listed on the database.

Creating a database rather than a registry is crucial to maintaining victims' privacy while minimizing the costs of administering the program. Texas's HB 100 is structured to create a database, whereas New York's S3819 is written to create a registry. The difference lies in the additional requirements imposed by the S3819 registry. S3819 compels every abuser to affirmatively register and update his information in the registry.[74] In addition, S3819 has a notification component that requires local law enforcement to be alerted when a registered abuser moves into the neighborhood.[75] Though this notification requirement is not as expansive as the community-notification components of sex offender statutes,[76] it could still be harmful to victims of domestic violence. Many victim-support groups worry that a listing on the registry would "out" the abuser's partner as a victim of domestic violence, which could cause pain, shame, and suffering.[77] As such, less notification is more when it comes to protecting victims. Because the database is primarily meant to be used by potential victims of domestic violence in researching their prospective partners, there is no need for widespread notification, and indeed, widespread notification could be damaging to individuals already harmed by domestic violence. In addition, leaving out registration and notification requirements means spending less, as discussed in subpart III(B). In this respect, the sparser requirements of HB 100 make it a more ideal proposal than S3819.

HB 100 is a better model for states that are interested in crafting domestic violence databases. HB 100 contains more safeguards for individuals accused of and prosecuted for domestic violence, while simultaneously providing increased confidentiality for victims of domestic violence.

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74. *Id.*

75. *Id.*

76. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3825 (Supp. 2010) (requiring notification of local authorities within seventy-two hours of the offender's release from prison and community notification within forty-five days); N.J. STAT. ANN. § 2C:7-6 (West 2005) (requiring community notification within forty-five days of release); WASH. REV. CODE ANN. § 4.24.550(1), (5) (West Supp. 2011) (requiring authorities to create and maintain a statewide publicly available sex offender website); *see also* Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49 (2005) (discussing the impact of and responses to community-notification laws).

77. *N.Y. Domestic Violence Registry Proposal Met with Big Concerns*, CBS N.Y. (April 18, 2011), http://newyork.cbslocal.com/2011/04/18/n-y-domestic-violence-registry-proposal-met-with-big-concerns/.

Because it is the better archetype, the following discussion assumes a database structured in the same way as HB 100: a publicly searchable database that compiles information about repeat domestic violence offenders, without the cumbersome registration and notification requirements of S3819.

III. Possible Criticisms of the Database

A. *Ineffectiveness at Reducing Crime and Recidivism*

Thus far, no state has implemented a domestic violence database. As such, there is no empirical evidence on the effects of such a bill that can be analyzed. Therefore, my examination of critiques leveled against the bill takes place in the hypothetical realm, drawing largely on the most similar legal scheme in our current system: the system of state-run sex offender registries mandated by Megan's Law. The similarities between the two are so apparent that nearly every news source reporting on the Texas bill has made a reference to the sex offender registry.[78]

By federal mandate, every state has implemented a registry that publicly lists the name and information of individuals who have committed sex-related crimes.[79] The details and administration of these registries vary from state to state, but all require sex offenders to inform local authorities of their addresses and update them each time they move.[80] The sex offender laws have been hugely controversial. They have been attacked as ineffective,[81] as products of public misconceptions about sex offenders,[82] and as unconstitutional.[83]

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78. *See, e.g.*, Jay Gormley, *Proposed Bill Would Create Domestic Violence Registry*, CBS DFW (Jan. 21, 2011), http://dfw.cbslocal.com/2011/01/21/proposed-bill-would-create-domestic-violence-registry (remarking that the proposed database would be "much like the one used to track sex offenders"); Chase Thomason, *Legislator Pushes Domestic Violence Registry*, FOX 34 NEWS (Jan. 18, 2011), http://www.myfoxlubbock.com/news/local/story/domestic-violence-house-bill-100-texas/WG6OLMD8gEKsTAgVyITP6w.cspx (calling the domestic violence registry "similar to the current sex offender registry"); Mark Whittington, *Texas Domestic Violence Registry Proposed*, YAHOO! NEWS (Jan. 21, 2011), http://news.yahoo.com/s/ac/20110121/tr_ac/7667862_texas_domestic_violence_registry_proposed (noting that the Texas bill would create a domestic violence registry "similar" to sex offender registries).

79. 42 U.S.C. §§ 16902, 16912 (2006).

80. *Id.* § 16914(a)(3).

81. Adrienne Lu, *Megan's Law Ineffective, Study Says*, PHILA. INQUIRER, Feb. 7, 2009, *available at* http://www.correctionsone.com/news/1843686-Megans-Law-ineffective-study-says.

82. *See* Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENT'G REP. 64, 64–65 (1997) ("The belief that sex offenders reoffend repeatedly fuels the rush toward community notification. . . . Scholarly research does not support these claims.").

83. *See* Catherine A. Trinkle, Note, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299, 333 (1995) (arguing that the Federal Registration Act violates the right to privacy and is unconstitutional because it "fails to meet the narrow tailoring requirement of the strict scrutiny test"). This Note will not discuss the constitutionality of sex offender registries, or the related constitutionality of the HB 100 database because sex offender registries have withstood virtually every constitutional challenge that has been raised against them. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 105 (2003) (rejecting an ex post facto

To some extent, the comparisons made by news reports make sense. The proposed domestic violence database and the various mutations of the sex offender registry across the United States have several characteristics in common.[84] Both keep a public record of individuals who have committed a certain morally distasteful crime. Both (ideally, at least) perform the public service of informing the members of a community about the danger among them.

Because of their similarities, it is likely that the domestic violence database will be susceptible to the arguments against the sex offender registries—namely, that these programs fall short of their deterrent and reintegrative goals and are excessively expensive. However, the database is in many respects a milder measure than the various Megan's Law registries, and this allows it to steer clear of some of the registries' faults. Furthermore, the nature of the crime at issue and the framework of state law in which the database falls make a stronger case for the domestic violence database than for the sex offender registry.

Although sex offender registries have been criticized for their inability to deter further crime, these arguments are less persuasive in the context of domestic violence. A primary argument against the sex offender registries is that they are ineffective at deterring sex crimes and, therefore, that their growing costs are not justified.[85] Some commentators claim that the registries make convicted individuals *more* likely to reoffend because being listed on a public registry isolates the offenders and cuts them off from the social support that they need to reintegrate into the community.[86] Related to the claim of ineffectiveness is the claim of public misunderstanding. Opponents claim that individuals convicted of sex offenses in fact rarely reoffend and that the popularity of the registries is based on the public's

challenge to the Alaska registry); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7–8 (2003) (rejecting a due process challenge to the Connecticut registry); *In re* Alva, 92 P.3d 311, 313 (Cal. 2004) (rejecting a claim that the California registry constituted cruel and unusual punishment); Commonwealth v. Becker, 879 N.E.2d 691, 702 (Mass. App. Ct. 2008) (rejecting a claim that the Massachusetts registry constituted cruel and unusual punishment); Coronado v. State, 148 S.W.3d 607, 610–11 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (rejecting due process and ex post facto challenges to the Texas registry); Dean v. State, 60 S.W.3d 217, 225 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (rejecting an ex post facto challenge to the Texas registry); *In re* M.A.H., 20 S.W.3d 860, 865–67 (Tex. App.—Fort Worth 2000, no pet.) (rejecting due process and equal protection challenges to the Texas registry).

84. *Compare* Tex. H.B. 100, 82d Leg., R.S., § 3 (2011), *with* TEX. CODE CRIM. PROC. ANN. art. 62.005 (West Supp. 2010).

85. KRISTEN ZGOBA ET AL., N.J. DEP'T CORR., MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2 (2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf.

86. *See* Levenson & Cotter, *supra* note 76, at 52 (reporting that notification laws created despair and hopelessness in some sex offenders, blocking their efforts to change); *see also* ERIC A. POSNER, LAW AND SOCIAL NORMS 100–03 (2000) (asserting that shaming punishments create "deviant and hostile subcommunities" of shamed individuals where undesirable behavior is encouraged).

misconception of all sex offenders as repeat offenders.[87] Opponents of the databases have analogized these arguments to the domestic violence context.

There are several ways of addressing these arguments. First, some arguments, such as the argument that the registries actually increase recidivism, are simply unsupported by empirical evidence.[88] In other cases, the crimes are too different for arguments against sex offender registries to be applied equally to domestic violence databases. The argument about low rates of recidivism cannot be made with regard to domestic violence.[89] Others are somewhat more complicated.

The assertion that the registries are ineffective is interesting because, in theory, shaming punishments as a category are effective[90] (though this statement is not without its own controversy).[91] Punishment in the criminal justice world is thought to be useful not just because it incapacitates offenders but also because it expresses moral condemnation.[92] Individuals are influenced by the beliefs and values of their fellow human beings, and people are reluctant to engage in activities that others refrain from and denounce.[93] Shaming punishments publicly showcase the moral disapproval of the community through a highly visible "stamp" of the offender's guilt.[94] Furthermore, shaming fulfills both retributivist and deterrence goals. A public demonstration of an individual's wrongdoing satisfies the viewer's sense of justice by reaffirming her values and humiliating the one who has disregarded them.[95] At the same time, the viewer feels a sense of aversion to the

87. *See* Lotke, *supra* note 82, at 64 (citing multiple studies that place the rate of recidivism for sex offenders between 10% and 19%).

88. *See* Levenson & Cotter, *supra* note 76, at 53 (asserting that no research has looked into how different notification strategies affect offenders and that the more general effects of such programs on offenders and communities are largely unknown).

89. A multistate study showed that 32% of men reassaulted within a fifteen-month period and 70% of men committed acts of "verbal abuse." Edward W. Gondolf, *Patterns of Reassault in Batterer Programs*, 12 VIOLENCE & VICTIMS 373, 379 tbl.2 (1997). In any event, HB 100 intrinsically cabins its effect to recidivist offenders with its three-conviction prerequisite. *See supra* note 72 and accompanying text.

90. *See* Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 675 (1999) ("[T]here *is* evidence that shaming is an effective and creative means of keeping some offenders out of the prison system while simultaneously giving them a chance at rehabilitation.").

91. *See, e.g.*, Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2164 (2001) (arguing that shaming punishments do not serve the criminal justice goal of retribution); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1922 (1991) (arguing that shaming sanctions would be useless in the United States because of the way American society is structured).

92. Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

93. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997).

94. *See id.* at 384 ("Shaming penalties . . . convey condemnation in dramatic and unequivocal terms.").

95. Kahan, *supra* note 92, at 602.

wrongdoing committed by the individual because she wishes to avoid that kind of humiliation.[96] Finally, shame is psychologically more effective at rehabilitating offenders than incarceration, the traditional form of punishment.[97] Shame connotes a sense of disappointment in the offender by the community, and with it comes a concomitant expectation that the offender can, in some way, make up for his wrongdoing.[98]

Nevertheless, the evidence indicates that the sex offender registries do not have an effect on recidivism. One study on rearrest rates for sex offenders in Washington found no significant differences between offenders subject to the community notification statutes often contained in sex offender registries and offenders who were not.[99] A similar study conducted in New Jersey similarly showed that the registry had no effect on reducing recidivism.[100] The research suggesting the ineffectiveness of the registries is by no means thorough, but it is persuasive, especially considering the complete lack of studies indicating that the registries are effective.[101]

Empirical studies on the reasons behind the registries' ineffectiveness are lacking, but the detractors of shaming punishments offer many theories. A major critique of shaming punishments is that they can prevent the offender from becoming a productive member of his community, thus driving him out of mainstream society into miscreant subcultures.[102] Opponents posit that shaming punishments do not work in our society because they do not provide a way for the shamed individual to become reintegrated into the community.[103] Failing to give the offender an opportunity to redeem himself renders the shaming, at best, meaningless, and, at worst, a gateway into more crime.

There exists some research that tangentially supports this theory, finding that registered sex offenders experienced isolation and loss of relationships,

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96. *Id.* at 603; *see also* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 81 (1989) ("Shame not only specifically deters the shamed offender, it also generally deters many others who also wish to avoid shame and who participate in or become aware of the incident of shaming.").

97. *See* Book, *supra* note 90, at 677 (citing BRAITHWAITE, *supra* note 96, at 72) (noting that shame punishment has the most potential to rehabilitate because it reminds offenders of their own morality).

98. *Id.* (citing BRAITHWAITE, *supra* note 96, at 72–73).

99. DONNA D. SCHRAM & CHERYL DARLING MILLOY, WASH. STATE INST. FOR PUB. POLICY, COMMUNITY NOTIFICATION: A STUDY OF OFFENDER CHARACTERISTICS AND RECIDIVISM 3 (1995).

100. ZGOBA ET AL., *supra* note 85, at 41.

101. *See* Levenson & Cotter, *supra* note 76, at 52 ("Little empirical evidence exists to support conclusions that Megan's Law leads to the above-mentioned benefits [namely, increased safety and community awareness] . . . .").

102. *See* POSNER, *supra* note 86, at 102 ("Having lost legitimate opportunities for gain, the offender must turn to a life of crime . . . .").

103. *See* Massaro, *supra* note 91, at 1917, 1922 (arguing that a crucial element of an effective shaming system is a means "for reclaiming the shamed one, should she prove herself worthy" and that criminal justice systems in the United States lack this element because the cultural foundations of the shaming tradition "have eroded").

jobs, and homes[104]—all signs that the offenders had lost their place in their communities. Though no study has been conducted on the subject, it is possible that rehabilitative treatment, coupled with the shaming punishment of a database or registry, could redeem the offender's bad behavior[105] and thus restore the offender's sense of belonging to his community. Having experienced the negative consequences of his behavior through shaming, the offender would value his recovered place in society more than he did before the shaming and have greater incentive not to repeat the condemned behavior.[106] Indeed, Dan Kahan, one of the major proponents of shaming punishments in the debate over alternative sanctions, has supported restorative justice programs, which focus on reintegrating the offender into the community, as a response to the criticisms of shaming.[107]

Notwithstanding concerns about the effect of shaming punishments on sexual criminals, this type of remedy can nevertheless have positive effects on the domestic violence problems our society faces. If the domestic violence offender registry is susceptible to the same criticisms as the sex offender registry, and if the problem with the sex offender registry is that it lacks reintegrative processes, then the solution to the argument that these registries are ineffective is a rehabilitative scheme that reintegrates offenders into society. Nearly every state already has such a scheme in place: the Batterer Intervention Program (BIP).[108]

The essence of the reintegrative program is redemption. Shaming and redemption are mutually strengthening concepts. As Toni Massaro concluded after a study on shaming techniques in various time periods and cultures, shaming is effective when it is based on "optimism" toward the offender's responsiveness to reintegrative programs.[109] Some commentators have even described shaming punishments as inherently redemptive.[110] Furthermore, redemption is most effective when one is being given the

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104. Levenson & Cotter, *supra* note 76, at 52.

105. *See* Lotke, *supra* note 82, at 65 (summarizing the results of several studies that cautiously concluded that sex offender therapy could have a positive effect).

106. *See* Massaro, *supra* note 91, at 1910, 1917 (concluding that shaming punishments are most effective when the offender has an opportunity to be "reintegrated into the social fabric").

107. Dan Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEXAS L. REV. 2075, 2090–95 (2006).

108. *See State Standards Listings by State*, BATTERER INTERVENTION SERVS. COALITION MICH., http://www.biscmi.org/other_resources/state_standards.html (stating that, as of 2008, forty-three states had BIPs in place and listing sources for each state's standards). For further discussion of the BIP of one state—Texas—see *infra* notes 122–27 and accompanying text.

109. Massaro, *supra* note 91, at 1924.

110. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 742 (1998) (proposing an educating model for shaming, which does more than "convey moral disapprobation and disapproval" by attempting to show the offender "why what he has done was wrong in the hope of getting him to repent"); Book, *supra* note 90, at 677 (explaining that shaming punishes at the same time as it reaffirms the morality of the offender by conveying that the offender's wrongdoing is out of character).

chance to win back his position in society.[111] Shaming is a particularly forceful condemnation, and the redeeming effect of a reintegration program is therefore likely to be particularly salient in the shaming context. The two are flip sides of the same coin—the shame is necessary to teach the offender that his conduct was wrong, and the reintegration is necessary to show the offender why it was wrong, to influence him to experience guilt, and ultimately to convince him to repent and seek amends.[112] While "restorative justice" is a major component of many reintegration programs, strong educational components—of the type offered by the various states' BIPs—will offer domestic violence offenders better prospects for batterer reintegration.

Restorative justice is a process by which the individuals affected by the wrongdoing participate and communicate about the consequences of the wrong and how it can be corrected.[113] However, it is not the most effective way of reintegrating domestic violence offenders because the victim–offender relationship is unique in the domestic violence context. For one, restorative justice techniques are typically used for crimes in which no prior relationship existed between victim and offender and where the crime consisted of a single act.[114] In contrast, domestic violence by definition occurs between two individuals who have a preexisting, often serious, relationship. Furthermore, domestic violence usually occurs as a series of repeated and manipulative events over time[115] and can cause damaging psychological issues for its victims.[116] As a result, victims who have broken free of the abusive cycle generally value their own safety and the safety of their children much more than they value punishing the offender or obtaining an apology.[117] Therefore, restorative justice may not be the best model of reintegration for domestic violence offenders.

Instead, an education program would be an effective way of reintegrating domestic violence offenders. Domestic violence is a social problem that is rooted in the way individuals are taught to conceptualize gender and power.[118] For batterers, "violence is a resource for constructing

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111. *See, e.g.*, Massaro, *supra* note 91, at 1910 (noting that because stakes are high when one risks a shaming punishment, subsequent "ceremonies of repentance and reacceptance" are particularly effective).

112. *See* Garvey, *supra* note 110, at 765 (describing how the sequence of punishment and moral education is an effective model for preventing future wrongdoing).

113. John Braithwaite & Heather Strang, *Restorative Justice and Family Violence*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 1, 4 (Heather Strang & John Braithwaite eds., 2002).

114. Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 113, at 42, 43.

115. *Id.*

116. *See* BLACKMAN, *supra* note 15, at 49 (discussing the psychology of battered women, including the phenomenon of "learned helplessness").

117. Stubbs, *supra* note 114, at 51.

118. *See* Kristin L. Anderson, *Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches*, 59 J. MARRIAGE & FAM. 655, 658 (1997) ("[M]en and

masculinity."[119] Most commentators agree[120] that violence in intimate relationships is a form of controlling the victim and that a need to maintain power informs the thinking that causes a batterer to batter.[121] What is needed is a way for batterers to reform their beliefs about male dominance and their need to control their partners. This education strategy is already being implemented through BIPs in forty-three of the fifty states.[122] Take, for example, Texas. The Texas Batterer Intervention and Prevention Program Accreditation Guidelines recommend training that teaches that battering is intentional behavior with the aim of maintaining dominance in a relationship.[123] Recommended staff training also includes instruction that battering is a form of oppression, as well as education on male privilege and the gendered nature of domestic violence.[124] The Texas Council on Family Violence (TCFV)—the nonprofit organization that assists the Texas Department of Criminal Justice's Community Justice Assistance Division (TDCJ-CJAD) in accrediting BIPs[125]—has also set forth goals for BIPs that try to address the problem of domestic violence at its social roots. In a brochure published for partners of batterers going through a program, TCFV states that one of the goals of such a program is correcting harmful beliefs, such as, "men are superior, women are possessions of men, and aggression is an acceptable way to resolve conflicts."[126] TCFV also emphasizes the reintegrative aspect of BIPs by characterizing the offense of domestic violence as a "crime against the community" for which the batterer should

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women actively construct gender through social practices designed to differentiate men from women .... These social practices construct and maintain the notion that men and women are different and reinforce men's dominance in both a real (e.g., greater economic resources) and a symbolic fashion.").

119. *Id.*

120. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 963 (2004) (characterizing the understanding as "remarkably uncontroversial").

121. *See, e.g.*, Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 567 (2007) ("Qualitatively, the intention of the [batterer] is not solely to engage in the violent conduct with which he is charged. Rather, his intention is to exercise power over and restrict the autonomy of his victim."); Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetrating Violence*, 28 WM. & MARY L. REV. 263, 280 (1987) ("The most common 'fruit' of domestic violence appears to be power—the power to control the persons and lives of one's fellow family members."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991) ("Recent feminist work on battering points to the struggle for power and control—the *batterer's quest for control* of the woman—as the heart of the battering process.").

122. *See supra* note 108 and accompanying text.

123. CMTY. JUSTICE ASSISTANCE DIV., TEX. DEP'T OF CRIMINAL JUSTICE, BATTERING INTERVENTION AND PREVENTION PROGRAM ACCREDITATION GUIDELINES 9 (2009).

124. *Id.* at 11.

125. *BIPP Accreditation*, TEX. COUNCIL ON FAM. VIOLENCE, http://www.tcfv.org/our-work/information-for-batterers/bipp-accred.

126. TEX. COUNCIL ON FAMILY VIOLENCE, IS HE REALLY GOING TO CHANGE THIS TIME?, *available at* http://www.tcfv.org/pdf/Is he Really Going To Change.pdf.

seek to redeem himself by communicating with others in his community and by participating in community programs.[127]

Studies have been conducted on the effectiveness of BIPs in reducing domestic violence recidivism. A study in 1989 found that batterers who actually completed abuser-treatment programs were less likely to recidivate.[128] A more recent study found that batterer programs have a significant effect on reducing recidivism but concluded that a program on its own was not enough.[129] The data indicated that a major problem with batterer programs was attrition and suggested that a stronger community response to noncompletion was required.[130] The domestic violence offender database could be the solution to this problem. A listing on the database could serve as the community shaming response that is needed to encourage batterers to stay in their programs, rewarding a successful completion and subsequent demonstrations of reform with a removal of the listing. A study has shown that being on the sex offender registry motivated offenders to seek help for their problems.[131] The similarities between those registries and the domestic violence database suggest that the database could also have a correspondingly motivating effect on batterers to follow through with BIPs.

No proposed bill for a domestic violence database makes any mention of reintegration programs or BIPs. However, given the doubts about the effectiveness of sex offender registries, it would be wise to have both a shaming component and a redemptive education component to the domestic violence database. Having a method for reintegrating domestic violence offenders back into society could increase the database's effectiveness while serving the important sociocultural goal of reeducating batterers from their patriarchal and dominance-centered beliefs and values. Additionally, using the database in conjunction with the states' currently existing BIPs could increase the success that BIPs have achieved so far.

B. Cost-Effectiveness of the Database

As many states are facing budget shortfalls in a sluggish economy,[132] any new piece of legislation will be critically evaluated for the costs it may

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127. *Id.*

128. Huey-tsyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J. FAM. VIOLENCE 309, 320 (1989).

129. Larry Bennett & Oliver Williams, *Controversies and Recent Studies of Batterer Intervention Program Effectiveness*, NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 8–9 (Aug. 2001), http://www.vawnet.org/Assoc_Files_VAWnet/AR_bip.pdf.

130. *Id.* at 2.

131. *See* Levenson & Cotter, *supra* note 76, at 59 tbl.4 (reporting that two-thirds of the offenders surveyed agreed or strongly agreed with the statement, "I am more motivated to prevent reoffense so that I can prove to others that I am not a bad person").

132. *See, e.g.*, ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 1, 9–11 tbls.3–5 (2011) (documenting budget shortfalls on a state-by-state basis for fiscal years 2009, 2010, and 2011); Peter Applebome, *Budget Shortfalls Put States in Same Gloomy Straits*, N.Y. TIMES, Jan. 8, 2009, at A25 (discussing the economic

impose. In this respect, the ground beneath the domestic violence database initially appears to be shaky. The creation of a new database will certainly impose costs—though the costs will be relatively low in relation to the benefit added. In addition, the database's counterpart, the sex offender registry, has come under fire in recent years for being costly and ineffective. Despite the current economic climate, domestic violence databases would be worth implementing despite their cost, as those costs will be greatly outweighed by their benefits. Thus, they are an overall cost-effective solution to the domestic violence problem. First, the cost of the database, if it is structured correctly, should be drastically lower than the price tag of the sex offender registries. Moreover, the cost of implementing the database is extremely low compared to the costs imposed on the national economy by domestic violence. In addition, the costs associated with the database are low compared to the overall expenditures of state governments. Finally, the database could be a cost-effective alternative to repeated incarceration of offenders.

Domestic violence imposes an immense cost on the national economy. A study by the Centers for Disease Control and Prevention estimated the costs of intimate-partner rape, physical assault, and stalking to be $5.8 billion annually,[133] and the report's authors caution that this figure is probably conservative.[134] These costs include the medical and mental health care services required by victims of domestic violence, lost productivity in paid work and household tasks, and lost lifetime earnings for victims killed by an intimate partner.[135] Importantly, the report's authors stress that in order to reduce the toll that domestic violence takes on the nation, efforts should shift in focus from post-violence rehabilitation to pre-violence prevention.[136]

Unfortunately, because no state has implemented a domestic violence database, no quantitative figures are available for a cost–benefit analysis of such a database. However, there are some available data that can be used as a starting point. The most obvious cost comparison would be to the sex offender registries. If this were an apples-to-apples comparison, the prospects for the domestic violence database would be quite dim. One DOJ-funded study based out of New Jersey concluded that the growing costs of the sex offender registry were unjustified.[137] Many states are questioning the

decline and the resulting budget shortfalls in New York, Connecticut, and New Jersey); Sara Murray, *States Face Budget Shortfalls of $26.7 Billion*, WALL ST. J., Dec. 8, 2010, *available at* http://online.wsj.com/article/SB10001424052748704250704576005683169980902.html (arguing that states' fiscal woes are likely to continue for several years).

133. CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf.

134. *Id.*

135. *Id.*

136. *Id.*

137. ZGOBA ET AL., *supra* note 85, at 2.

amount of money that is directed toward the registries as state budgets get tighter.[138]

However, if HB 100 is to be the model for the many states' databases, and I believe that it should be, the implementation of a domestic violence database should be considerably cheaper than the costs of the sex offender registry. Because the tool proposed by HB 100 is a *database* rather than a *registry*, a host of costly measures that accompany registries can be avoided in creating the database. A registry imposes an affirmative burden on the offender to input and update the information about himself that is maintained in the registry. In Texas, for example, a registered offender is required to report changes to his registration authority whenever he changes his address or status and to report employment or enrollment at an institution of higher education.[139] In addition, the offender may be required to verify the accuracy of his information as frequently as every thirty days.[140] These requirements mean that registration authorities have to pay for personnel to staff the locations to which the offenders report and to input changes into the registries. Another common feature of the registries is the community-notification requirement.[141] Each of the fifty states has enacted statutes to require governmental bodies to act in some way to notify the community of a sex offender living among its citizens.[142] Methods of notification include press releases, flyers, phone calls, door-to-door visits, and neighborhood meetings.[143] Obviously, all of these measures cost money.

The model database proposed by HB 100 requires neither continual updates and verifications nor community notification. Nor should it require such measures. Community notification might actually be harmful to victims of domestic violence.[144] Neither registration nor periodic reports of a domestic abuser's status are necessary to the goal of the domestic violence database, which is to allow individual people to equip themselves with information about their prospective partners before becoming involved in potentially dangerous and inescapable relationships. To this end, users of the

138. Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NAT'L PUB. RADIO (May 28, 2010), http://www.npr.org/templates/story/story.php?storyId=127220896.

139. *See* TEX. CODE CRIM. PROC. ANN. art. 62.055(a) (West Supp. 2010) (requiring registered offenders to notify their designated primary registration authorities when intending to change addresses); *Id.* art. 62.057(b) (requiring registered offenders to notify their designated primary registration authorities of any changes in name, physical health, or job or educational status); TEX. CODE CRIM. PROC. ANN. art. 62.153(a) (West 2006) (requiring registered offenders who work or attend school at a higher education institution to report to the campus-security authority or local law enforcement authority).

140. *See* TEX. CODE. CRIM. PROC. ANN. art. 62.202(a) (West 2006) (requiring registered offenders civilly committed as sexual predators to report to their designated primary registration authorities not less than once every 30-day period to verify information contained in their individual registrations).

141. Levenson & Cotter, *supra* note 76, at 50.

142. *Id.*

143. *Id.*

144. *See supra* notes 76–77 and accompanying text.

database need only to be able to type their prospective partners' names and birthdays into a search form to put it to effective use. Since the domestic violence database's protective purpose is different from the sex offender registry's purpose of putting an entire community on alert to a possible danger, it need not implement costly aspects such as registration, periodic verification, and community notification. As such, the database is likely to be much cheaper than the average sex offender registry.

Pared down to the basics, then, some data can be found that might reflect the potential cost of a state's domestic violence database. In evaluating the viability of utilizing a database as part of its sex offender registration program, Ohio estimated a cost of $475,000 in the first year to install and implement the database software, along with $85,000 in each subsequent year to maintain it.[145] Virginia projected an initial cost of $986,000 to design and develop a proposed domestic violence registry, with an additional $126,411 each year for maintenance.[146] The cost for each state will obviously vary depending on the size of its population and the frequency with which domestic violence is reported and successfully prosecuted. However, even using the higher estimate of initial implementation by Virginia, passing a domestic violence database in each of the fifty states and two territories would only amount to about one percent of the annual cost of domestic violence nationwide.[147]

One million dollars to implement a database may seem expensive at first glance. However, when compared to other costs in state expenditures, this amount begins to look very small. For example, Texas appropriated $10.8 billion to public safety and criminal justice in the 2010–2011 biennium.[148] Similarly, New York budgeted $4.5 billion for public safety in the 2011–2012 fiscal year, with nearly $3 billion of that total allotted to its Department of Corrections and Community Supervision.[149] The cost of initiating a domestic violence database would only be a tiny fraction of each

145. *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?*, JUST. POL'Y INST., http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf. I note that this is an extremely loose and informal analysis, as the states' evaluations of how much they expect a database to cost are wildly disparate—ranging from under $1 million in Wyoming to nearly $60 million in California. *Id.*

146. VA. DEP'T OF PLANNING & BUDGET, 2011 FISCAL IMPACT STATEMENT (2011), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+HB1932F122+PDF.

147. If all fifty states and two territories each spent $986,000, the total cost nationwide would be $51,272,000. Taking the Centers for Disease Control's figure of $5.8 billion seriously, *see supra* note 133 and accompanying text, the cost of all the states implementing the database would be about 0.9% of the cost of domestic violence nationwide.

148. LEGISLATIVE BUDGET BD., 81ST TEX. LEGISLATURE, FISCAL SIZE-UP: 2010–11 BIENNIUM 305 fig.256 (2009), *available at* http://www.lbb.state.tx.us/Fiscal_Size-up/Fiscal%20Size-up%202010-11.pdf.

149. GOVERNOR ANDREW CUOMO, STATE OF NEW YORK 2011–12 EXECUTIVE BUDGET BRIEFING BOOK 65 (2011).

state's general allocations for public safety, and the yearly maintenance cost thereafter would be even lower.

In addition, the database and its concomitant BIP present a cost-effective alternative to the expensive and wasteful process of cycling repeat offenders in and out of state prisons.[150] Robert Perkinson posits that though prisons exist for retributive and rehabilitative reasons, they are most successful at "manufactur[ing] convicts."[151] The characteristics of prisons make them intrinsically self-defeating in terms of rehabilitation. Confining society's least favored individuals and allowing them to interact solely with each other ultimately leads to "more criminogenesis than moral regeneration, more debasement than redemption, more scandal than success."[152] Considering that most prisons also suffer from poor oversight and unqualified and underpaid staff,[153] it seems only logical that those who go to prison will not be rehabilitated but will instead end up reincarcerated, thus increasing state expenditures. It is a system that continually imposes more costs on itself. The domestic violence database, in tandem with a BIP, provides a solution to this ineffective cycle. One of the benefits touted by proponents of shaming punishments is their cost-effectiveness—it is much cheaper to embarrass someone than it is to lock them up.[154] Furthermore, if the goal is to prevent prisoners from going back to prison, shaming provides a form of punishment that is much more likely to allow offenders to return to normal, functioning roles in society.[155] The powerful combination of a listing on the database and participation in a BIP is especially likely to prevent individuals from reoffending and imposing costs on the criminal justice system. While the creation and maintenance of the database will not be cost-free, it is unlikely to cost $42 per offender per day, which is the price the state would pay to hold reoffenders in custody.[156]

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150. A 2002 study indicated that 21.8% of offenders serving time in local jails for violent crimes had victimized members of their families. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 61 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf.

151. ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 368 (2010).

152. *Id.* at 369.

153. *Id.* at 367.

154. *See, e.g.*, Kahan, *supra* note 92, at 641 ("[A]dding shame to the conventional punishments allows society to reduce its total reliance on imprisonment and thereby realize substantial savings in resources."); Book, *supra* note 90, at 657 ("[S]haming constitutes an efficient, fiscally sound . . . form of sentencing . . . .").

155. *Cf.* Book, *supra* note 90, at 656–57 (noting that released prisoners are "disenfranchised, [and] deemed inferior citizens by their peers and potential employers," making it difficult for them to lead normal, law-abiding lives).

156. *See* JJ Hensley, *Ariz. Aims to Cut Prison Costs; In Texas, a New Approach*, ARIZ. REPUBLIC, Apr. 18, 2010, *available at* http://www.azcentral.com/news/articles/2010/04/18/20100418arizona-prison-costs.html ("Texas spent about $3 billion in 2009 on its criminal-justice system, which included about $42 per day to house the 172,000 prisoners in state custody.").

IV. Conclusion

The law of domestic violence has been troubled by the unique, recurring nature of the crime and by conflicts with victims' autonomy. The database is a state-provided solution that does not arrive at too late a point in the relationship and does not interfere with the would-be victim's right to make personal choices. The database is one answer to the law's struggles with crafting an appropriate response to domestic violence, and states that have an interest in battling this costly and demeaning phenomenon should take steps to create a database like the one proposed in Texas's HB 100.

The database is also a cost-effective way of reducing domestic violence. The combination of the domestic violence database with already existing BIPs would constitute a powerful tool to combat domestic violence recidivism. In addition, the database could prevent domestic violence from occurring in the first instance by equipping potential victims with information that would allow them to avoid violent relationships. Though the database would not come without a price tag, its cost would only be a fraction of the economic toll that domestic violence takes on the nation. Furthermore, in light of the budget shortfalls that many states are currently facing, the database presents an efficient alternative to repeatedly imprisoning abusers. States interested in saving money should incorporate a domestic violence database into their public safety programs.

—Joyce Y. Young

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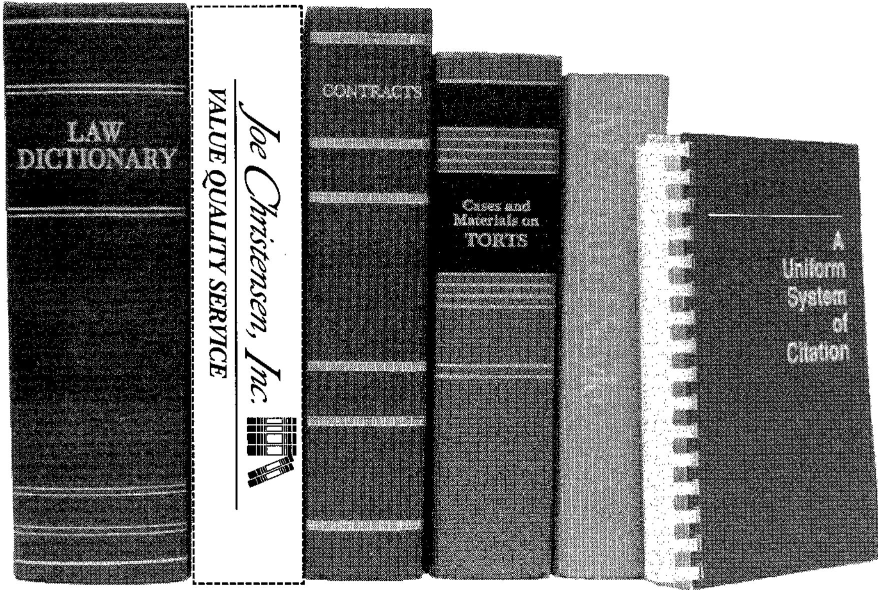

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