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Regulatory Arbitrage

Victor Fleischer*

Regulatory gamesmanship typically relies on a planning technique known as regulatory arbitrage, which occurs when parties take advantage of a gap between the economics of a deal and its regulatory treatment, restructuring the deal to reduce or avoid regulatory costs without unduly altering the underlying economics of the deal. This Article provides the first comprehensive theory of regulatory arbitrage, identifying the conditions under which arbitrage takes place and the various legal, business, professional, ethical, and political constraints on arbitrage. This theoretical framework reveals how regulatory arbitrage distorts regulatory competition, shifts the incidence of regulatory costs, and fosters a lack of transparency and accountability that undermines the rule of law.

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"These new regulations will fundamentally change the way we get around them."
—*New Yorker* Cartoon, March 9, 2009

I. Introduction

In a speech announcing a new tax on banks aimed at recovering taxpayer money for the bailout, President Obama cajoled the banks to simply pay the tax rather than try to avoid it. "Instead of sending a phalanx of lobbyists to fight this proposal or employing an army of lawyers and accountants to help evade the fee," the President urged bank executives, "I suggest you might want to consider simply meeting your responsibilities."[1] Not likely.[2] Obama is not the first President to resort to moral suasion to address regulatory gamesmanship. Theodore Roosevelt did so in a speech at Harvard University in 1905. The speech is best remembered for Roosevelt's plea for fair play in college football, where brutality and unsportsmanlike conduct had led to dozens of deaths on the field.[3] But Roosevelt also had a few words about sportsmanship for the Harvard men heading off to law school. "[M]any of the most influential and most highly remunerated members of the bar," he explained, "make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individuals or corporate, can evade the laws which are made to regulate in the interest of

1. Remarks on the Financial Crisis Responsibility Fee, 2010 DAILY COMP. PRES. DOC. 20 (Jan. 14, 2010).

2. *See* Dan Wilchins, *Banks, Experts Eye Possible Ways Around Obama Fee*, REUTERS (Jan. 14, 2010), http://www.reuters.com/article/idUSTRE60D6D120100114 (describing potential ways to work around bank fees).

3. *See* John S. Watterson III, *Political Football: Theodore Roosevelt, Woodrow Wilson and the Gridiron Reform Movement*, 25 PRESIDENTIAL STUD. Q. 555, 559–60 (1995).

the public the use of great wealth."[4] Harvard graduates should do better, he implored. "Surely Harvard has the right to expect from her sons a high standard of applied morality . . . ."[5]

This sort of regulatory gamesmanship typically relies on *regulatory arbitrage*, a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs. Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision.[6] This Article provides the first comprehensive theory of regulatory arbitrage, identifying the conditions under which arbitrage takes place and the various legal, business, professional, ethical, and political constraints on arbitrage. This theoretical framework reveals how regulatory arbitrage undermines the efficiency of regulatory competition, shifts the incidence of regulatory costs, and fosters a lack of transparency and accountability that undermines the rule of law.

Some arbitrage techniques are pervasive and grudgingly accepted as part of the system, like harvesting tax losses at year-end by holding the winners in one's stock portfolio while selling the losers and replacing them with similar stocks.[7] But the most effective techniques are more pernicious, crafted by lawyers to meet the letter of the law while undermining its spirit, successful only until the government discovers and closes the loophole. While the use of derivatives and the development of new financial products have facilitated new regulatory-arbitrage techniques,[8] the phenomenon dates back thousands of years.[9] Regulatory arbitrage is an intrinsic part of our

4. Theodore Roosevelt, At the Alumni Dinner of Harvard University (June 28, 1905), *in* MESSAGES AND PAPERS OF THE PRESIDENTS: A COMPILATION OF THE MESSAGES AND SPEECHES OF THEODORE ROOSEVELT 646–47 (Alfred Henry Lewis ed., 1906).

5. *Id.* at 647.

6. Frank Partnoy uses a narrower definition: "Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws." Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997).

7. The wash-sale rules prevent tax loss harvesting only if the replacement stock is "substantially identical" to the stock sold. I.R.C. § 1091(a) (2006).

8. *See* Partnoy, *supra* note 6, at 238 (explaining that derivatives trading and financial transactions can give rise to regulatory-arbitrage opportunities).

9. Bruce Bartlett cites an example from Ancient Rome where small landowners burdened by heavy taxation would sell themselves into slavery (slaves were exempt from taxes) and place themselves under the protection of a landlord, continuing to farm the lands as before. Bruce Bartlett, *How Excessive Government Killed Ancient Rome*, 14 CATO J. 287, 300–01 (1994). Emperor Flavius Julius Valens shut down the technique in 368 A.D., declaring it illegal to renounce one's liberty in order to place oneself under the fiscal protection of a landlord. *Id.* at 301; Aurelio Bernardi, *The Economic Problems of the Roman Empire at the Time of Its Decline*, *in* THE ECONOMIC DECLINE OF EMPIRES 16, 49 (Carlo M. Cipolla ed., 1970); *see also id.* at 57 ("[T]he revenue of the State shrivelled because the big men resorted to evasion or enjoyed immunity, which is legalized evasion, while the small men in many cases had nothing with which to pay . . . ."); *id.* at

legal system and cannot be eliminated, although we could do a better job of constraining the planning techniques that undermine the intent of Congress.

Regulatory arbitrage is too easily shrugged off as the inevitable byproduct of high-priced lawyering.[10] For those concerned with the effects of arbitrage on the integrity of the legal system, moral suasion is obviously not enough. By paying close attention to how regulatory arbitrage occurs in real-world deals, we can find patterns that explain more precisely how and why arbitrage occurs, what its effects are, and what should be done about it. Much of the empirical data conforms with common intuition. For example, well-established companies with strong governance structures engage in more aggressive regulatory planning than start-ups or closely held firms.[11] Large companies that can afford elite law firms employ more aggressive deal structures that push the regulatory frontier.[12] And the politically well-connected can bargain more effectively with congressional staffers and agency lawyers over the regulatory treatment of a deal.[13] By examining these phenomena more closely, this Article helps explain *how* the rich, sophisticated, well-advised, and politically connected avoid regulatory burdens the rest of us comply with. And while the populist intuition that the rich get away with murder is hardly new, a more precise understanding of when and how gamesmanship occurs allows us to address the problem in a targeted fashion that avoids sweeping, overbroad reforms that do more harm than good.

Briefly, the theoretical framework is as follows. I define regulatory arbitrage as the manipulation of the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory treatment.[14] Regulatory arbitrage opportunities, under this broad definition, are pervasive. But the arbitrage only works if the lawyers involved can successfully navigate a series of planning constraints: (1) legal constraints, (2) Coasean transaction costs, (3) professional constraints, (4) ethical constraints, and (5) political constraints.[15]

This theory of regulatory arbitrage provides the missing link in our understanding of why deals are structured the way that they are. The

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59 ("Neither was there lack of legal expedients to evade taxes. One consisted in paying the taxes for property that was situated in diverse provinces in the lump in the district of one's own choosing, obviously in that district in which an obliging collector was in office."); Michael S. Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 93, 97 (2008) (tracing the roots of put–call parity, a specific regulatory-arbitrage technique, to ancient Israel and Medieval England).

10. *See* Remarks on the Financial Crisis Responsibility Fee, *supra* note 1 (condemning financial institutions' reckless behavior); Roosevelt, *supra* note 4, at 646–47 (recognizing that helping clients evade regulatory law is a "highly remunerative task" for attorneys).

11. *See infra* subsection II(C)(2)(a).

12. *See infra* section II(C)(3).

13. *See infra* section II(C)(5).

14. *See infra* subpart II(B).

15. *See infra* subpart II(C).

cornerstone of academic analysis of the legal infrastructure of transactions is the principle that contracts are designed to minimize Coasean transaction costs.[16] These costs include search costs, information costs and adverse selection; negotiation and drafting costs; behavioral costs like agency costs, moral hazard, and shirking; and monitoring and enforcement costs. This transaction-cost-economics framework is analytically useful but incomplete. The problem is that it doesn't fit comfortably with what we observe in real-world deals: Many sophisticated deals exhibit high levels of Coasean transaction costs and seemingly puzzling structures. Cognitive bias, risk aversion, and poor lawyering are sometimes identified as factors,[17] but such explanations rarely hold up in the context of highly sophisticated parties interacting with large amounts of money at stake.[18] As I show in detail below, these deals look the way that they do because sophisticated lawyers at elite law firms consciously tweaked the structure of the deal to minimize regulatory costs.

The critical analytic insight is that deal lawyers face a tension between reducing regulatory costs on the one hand and increasing Coasean transaction costs on the other. Deal lawyers routinely depart from the optimal transaction-cost-minimizing structure even though restructuring the deal reduces its (nonregulatory) efficiency. A corporation that needs cash might minimize transaction costs by entering into a secured loan but instead decides that, in order to improve the cosmetics of the balance sheet, it will enter into an economically similar transaction to securitize the assets.[19] A company that would minimize agency costs by incorporating in Delaware decides that, to save on taxes, it will instead incorporate in Bermuda. So long as the regulatory savings outweigh the increase in transaction costs, such planning is perfectly rational. As a result, the conventional view that deals are

16. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984) ("I suggest that the tie between legal skills and transaction value is the business lawyer's ability to create a transactional structure which reduces transaction costs and therefore results in more accurate asset pricing.").

17. Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1, 42 (2008) ("[C]onfusing credit card disclosures about these costs to consumers appear to be designed to prey on consumers' cognitive biases by not explaining the billing practices that affect the potential cost of card usage."); Kimberly D. Krawiec, *Derivatives, Corporate Hedging, and Shareholder Wealth: Modigliani and Miller Forty Years Later*, 1998 U. ILL. L. REV. 1039, 1062 (identifying costs of transacting with a firm's risk-averse shareholders as an explanation for costly hedging transactions); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1222–23 (2005) (identifying opacity of legal disclosure in Enron SPE transactions as a troublesome sign that should alert ethical lawyers that "something is fishy").

18. Victor P. Goldberg, *Aversion to Risk Aversion in the New Institutional Economics*, 146 J. INST. & THEOR. ECON. 216, 223 (1990).

19. *See, e.g.*, Floyd Norris, *Confronting High Risk and Banks*, N.Y. TIMES, Dec. 11, 2009, at B1 (discussing banks' use of trust-preferred securities as "capital arbitrage" and off-balance-sheet structured investment vehicles as a manipulation of the accounting rules).

efficiently structured to minimize transaction costs is incorrect, or at least a little misleading.

I am not the first to recognize a trade-off between regulatory costs and ordinary transaction costs. Indeed, in his seminal *Yale Law Journal* article, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, Professor Gilson identified regulation as the reason why lawyers, not bankers, serve the role of "transaction cost engineer[]."[20] Because the lawyer plays an important role in regulatory structuring, Gilson explained, "economies of scope should cause the nonregulatory aspects of transactional structuring to gravitate to the lawyer as well."[21] The lawyer's facility at both tasks—engineering transaction costs and regulatory costs—"should result in more optimal trade-offs between them."[22] Gilson thus identified the trade-off between regulatory costs and transaction costs. But since that trade-off was merely an aside and not the focus of Gilson's article, this important insight—one that is well understood by practitioners[23]—has been largely overlooked by the legal academy. The academic literature generally assumes that deals are structured to minimize Coasean transaction costs,[24] treating regulatory costs as exogenous and fixed rather than engineered.

The one exception is the tax-planning literature, which brings the interaction of tax costs and nontax business considerations—known as frictions—into the spotlight. Myron Scholes and Mark Wolfson's business-school textbook *Taxes and Business Strategy* first emphasized the notion of frictions as a constraint on tax planning.[25] David Schizer, Dan Shaviro, Alex

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20. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 296–97 (1984).

21. *Id.* at 298.

22. *Id.*

23. *See, e.g.*, Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 55 (2001) ("The choice of form may involve balancing business, legal, and financial constraints (including the desire for simple structures) against tax benefits.").

24. *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 22 (1996) (arguing that the ability to minimize transaction costs determines whether organizational forms survive); R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 396 (1937) (using transaction costs to explain the boundaries of the firm); Richard A. Epstein, *Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1304 (2002) (noting how legal scholarship has incorporated Coase's insight that we can understand the structure of firms, partnerships, and other voluntary associations by understanding the devices they use to minimize transaction costs); Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323, 363 ("Understanding the purposeful desire of parties to minimize transaction costs permits legal decision-makers to understand why parties would structure their economic dealings and trades in particular ways and how parties would react to certain legal interventions."); Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEXAS L. REV. 261, 269 (2001) ("The goal of transaction-cost economics is easily stated: align transactions with governance structures in a manner that minimizes transaction costs.").

25. MYRON S. SCHOLES ET AL., TAXES AND BUSINESS STRATEGY: A PLANNING APPROACH 9 (3d ed. 2005).

Raskolnikov, Mitchell Kane, Michael Knoll, and other legal scholars have since examined different ways in which frictions affect tax planning, tax avoidance, and tax evasion.[26] Mihir Desai, Dhammika Dharmapala, and other finance and accounting scholars have generated theoretical models and empirical evidence that dovetail with the approach of legal scholars.[27]

The thrust of this tax-planning literature is that frictions can be a powerful constraint and should be used as a regulatory tool to combat wasteful tax planning. A less-noticed finding from this literature is that aggressive tax planning is profitable—that is, it increases firm value—only for firms that have low agency costs and strong governance structures.[28] It follows that firms that can best manage these transaction costs can effectively engage in more aggressive planning. By analyzing frictions as Coasean transaction costs, this Article is able to synthesize these two strands of literature—the traditional transaction-cost economics literature on deal structuring and the newer tax-planning literature—to provide a comprehensive theory of regulatory arbitrage. The Article then uses this framework to offer three additional contributions to the academic literature.

First, the trade-off between regulatory costs and transaction costs undermines the usual assumption in the corporate law literature that regulatory competition creates legal forms that reflect efficient, transaction-cost-minimizing goals.[29] I discuss charter competition, choice of entity, and

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26. *See* Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1254 (2008) (comparing frictions that increase social value with those that incur social costs); Michael Knoll, *Regulatory Arbitrage Using Put-Call Parity*, 15 J. APPLIED CORP. FIN. 64, 73 (2005) (describing frictions as a hindrance to tax arbitrage); Alex Raskolnikov, *The Cost of Norms: Tax Effects of Tacit Understandings*, 74 U. CHI. L. REV. 601, 639–41 (2007) [hereinafter Raskolnikov, *Cost of Norms*] (discussing how frictions may increase reliance on social or contractual norms to facilitate preferred tax treatment); Alex Raskolnikov, *Relational Tax Planning Under Risk-Based Rules*, 156 U. PA. L. REV. 1181, 1239 (2008) [hereinafter Raskolnikov, *Relational Tax Planning*] (observing that changing the type of friction might be more effective than defending the current friction type); David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312, 1315–16 (2001) (contributing a methodology for determining whether frictions exist that could prevent or inhibit end runs around tax reforms); Daniel Shaviro, *Risk-Based Rules and the Taxation of Capital Income*, 50 TAX L. REV. 643, 681–83 (1995) (noting that tax rules that attach significance to economic risk—"risk-based rules"—may create nontax frictions that inhibit taxpayers from choosing a tax-favored course). Michael Knoll cleverly frames the inquiry by turning the classic theorem of Modigliani and Miller upside down, explaining that if capital structure is irrelevant under four assumptions, the failure of one of those assumptions is the only way capital structure might create value: "the only ways that capital structure can increase value are by lowering taxes, providing access to cheaper borrowing, releasing valuable information, or improving cash flow." Peter H. Huang & Michael S. Knoll, *Corporate Finance, Corporate Law and Finance Theory*, 74 S. CAL. L. REV. 175, 179 (2000).

27. *See infra* section II(C)(2).

28. Schizer, *supra* note 26, at 1329–30 ("[P]ursuit of the tax reducing strategy may require an organizational form that is less effective at constraining agency costs . . . .").

29. *See, e.g.*, Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1163 (2000) ("Individuals and firms who have an incentive to minimize

executive compensation to show how regulatory arbitrage can distort the choice of legal form in a way that increases, rather than minimizes, transaction costs.

Second, the trade-off between regulatory costs and transaction costs reveals a new insight about the incidence of regulatory costs. Regulatory arbitrage makes many regulatory schemes—broad swaths of antitrust, banking, securities, and tax law—effectively optional for sophisticated clients. Well-governed firms, because they manage transaction costs effectively, engage in more aggressive regulatory planning and thus bear a lower incidence of regulatory costs than firms that face high transaction-cost barriers, such as entrepreneurial firms, family-owned businesses with outside financing, and small business generally.

Third, the regulatory-arbitrage framework reveals the importance of managing political costs. Regulatory costs are fluid, not fixed; firms that can manage political costs effectively have more freedom to exercise the "planning option" and avoid regulatory costs other firms must bear. Recent case studies reveal that the regulatory treatment of a deal is often a negotiated point. Institutional analysis helps explain why this is the case. Two groups within the administrative state, congressional staff members and agency lawyers, together provide another constraint on gamesmanship by interpreting ambiguous statutes and conveying the unwritten rules to interested parties. Because the interpretation of new deal structures is not fixed *ex ante*, staffers and agency lawyers often consult with deal lawyers, and such meetings are not immune from the usual political force of interest groups and their lobbyists. Increasingly, as other constraints have proven ineffective, more discretion has come to rest with congressional staff members and agency lawyers drawing regulatory lines on a deal-by-deal basis, subject to pressures more characteristic of politics than the rule of law.

This Article focuses on how regulatory arbitrage works and what constrains it. I do not make a prescriptive claim about what should be done, although I do suggest what reforms might be more effective if policy makers are so inclined. Any normative claim I might make about regulatory arbitrage necessarily depends on broader theories of regulation and public choice that go beyond the scope of this Article. While regulatory arbitrage is often privately beneficial and socially wasteful, the optimal amount of regulatory arbitrage is not zero. Whether a particular regulatory arbitrage technique is good or bad necessarily depends on a prior question of whether a particular regulation enhances social welfare. Regulation driven by interest-group

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their transaction and information costs and an ability to choose legal regimes that accomplish this goal over time may cause the law to move toward efficiency, if only because inefficient regimes end up governing fewer and fewer people and transactions.").

lobbyists[30] or rent-seeking politicians[31] may reduce overall social welfare, in which case the welfare effects of regulatory arbitrage are likely to be positive,[32] or at least indeterminate.[33] While I make no secret of my view that several specific examples in this paper shift regulatory burdens in unjust ways, one could easily summon innocuous examples. In sum, there is a spectrum of arbitrage techniques, some good, some bad, and drawing the line between them is beyond the scope of this Article. Instead, what this Article provides to scholars and policy makers is a framework that identifies the conditions under which arbitrage occurs and what constraints, if employed, are likely to be effective.

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This Article is organized in two main parts. Following this Introduction, Part II synthesizes theoretical and empirical findings from the finance and tax-planning literatures to set forth a theory of regulatory arbitrage. Subpart II(A) draws on interviews I conducted with lawyers to provide a richer description of the lawyer's role in regulatory arbitrage. Subpart II(B) describes the necessary conditions for regulatory arbitrage. Subpart II(C) describes the various constraints on arbitrage: (1) legal constraints, (2) Coasean transaction costs, (3) professional constraints, (4) personal ethical constraints, and (5) political constraints.

Part III explores three implications of this framework. Subpart III(A) examines how regulatory arbitrage can distort regulatory competition. Subpart III(B) examines the effect of regulatory arbitrage on the incidence of regulatory costs. Subpart III(C) examines how sophisticated parties manage political constraints on arbitrage.

I draw extensively on examples from tax planning, case studies from my Deals course,[34] interviews with tax lawyers,[35] and from my previous tax

30. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971) (arguing that an industry will support regulation that excludes others from entering).

31. *See, e.g.*, Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL STUD. 73, 81 (1991) (contending that politicians can extract contributions by pursuing regulation); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102 (1987) (contending that politicians can extract contributions by pursuing regulation).

32. For a general discussion of the positive effects of avoiding regulation through the choice of law, see ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009). O'Hara and Ribstein argue, "[Choice-of-law] clauses enable parties to protect themselves from state regulation that imposes costs in excess of its benefits to society." *Id.* at 8.

33. An avoidance strategy may have a positive effect on social welfare, standing alone, but in the aggregate, these strategies tend to have a corrosive effect on the rule of law.

34. My *Deals* course, which I have taught at Columbia, UCLA, Georgetown, Colorado, and NYU, is modeled on the course "Deals: The Economic Structure of Transactions and Contracting," pioneered by Ron Gilson and Vic Goldberg at Columbia. I served as the Director of the Transactional Studies Program at Columbia from 2001–2003, co-teaching the Deals course with

scholarship.[36] But the theory I present here also helps explain why, when, and how regulatory planning occurs in other doctrinal subject areas, such as securities law, accounting, antitrust, and banking law.[37]

II. A Theory of Regulatory Arbitrage

A. The Lawyer as Regulatory Arbitrageur

In Professor Gilson's model of the deal lawyer as transaction-cost engineer, lawyers create value by identifying barriers to contracting, such as asymmetric information, agency costs, and strategic behavior and by designing contractual solutions to help their clients overcome those barriers.[38] This Article's attention to regulatory arbitrage suggests a friendly amendment to this model: deal lawyers engineer regulatory costs as well as Coasean transaction costs, balancing the two against the shifting backdrop of legal, business, ethical, professional, and political concerns. I doubt that Professor Gilson would disagree with this assessment, although we might

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David Schizer. For a discussion of the Columbia program, see Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475.

35. I interviewed about a dozen tax and corporate lawyers for this Article. Rather than seek a random sample, I chose to interview lawyers at top firms in New York with whom I had a preexisting relationship and who were willing to speak freely. The interviews are not intended as empirical data but merely to add a touch of real-world flavor to the theoretical framework of this Article and to show that the framework is consistent with the views of at least some New York practitioners.

36. *See* Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440 (2009) (examining how tax exemption for sovereign-wealth funds affects sovereign investment in U.S. financial institutions); Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1 (2008) (examining how tax treatment of carried interest differs from that of other forms of compensation); Victor Fleischer, *The Missing Preferred Return*, 31 J. CORP. L. 77 (2005) [hereinafter Fleischer, *Missing Preferred Return*] (examining how tax treatment of carried interest partially explains the absence of preferred-return hurdles in venture capital funds); Victor Fleischer, *Options Backdating, Tax Shelters, and Corporate Culture*, 26 VA. TAX REV. 1031 (2007) [hereinafter Fleischer, *Options Backdating*] (exploring the relationship between weak internal controls and regulatory noncompliance); Victor Fleischer, *The Rational Exuberance of Structuring Venture Capital Start-ups*, 57 TAX L. REV. 137 (2004) [hereinafter Fleischer, *Rational Exuberance*] (discussing how legal and business constraints explain the seemingly tax-inefficient structure of start-ups); David I. Walker & Victor Fleischer, *Book/Tax Conformity and Equity Compensation*, 62 TAX L. REV. 399 (2009) (examining how tax and accounting rules affect executive compensation design).

37. For a nontax example explaining the structure of the MasterCard IPO as an example of regulatory arbitrage in the antitrust context, see Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, 12 HARV. NEGOT. L. REV. 137, 148–49 (2007).

38. *See* Gilson, *supra* note 20, at 243–44 (advancing the theory that business lawyers increase the value of their clients' transactions); *see also* Nestor M. Davidson, *Values and Value Creation in Public–Private Transactions*, 94 IOWA L. REV. 937, 942 (2009) (examining how transactional lawyers involved in public–private partnerships create value by advancing public policy goals in addition to minimizing transaction costs); George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 281 (2009) (evaluating the value-creating activities business lawyers perform outside of the mergers and acquisitions context); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487–88 (2007) (suggesting that transactional lawyers create value in ways other than simply reducing transaction costs).

disagree about the relative importance of regulatory costs.[39] Just as Gilson's views were shaped by his experience as a corporate lawyer, my own pattern recognition skews to that of a tax lawyer and scholar, like a computer discovering whatever it was programmed to find.[40] But there is also some reason to think that regulatory arbitrage is more important than it used to be. In the twenty-five years since Gilson wrote his article, the administrative state has increased substantially, and the amount of time lawyers devote to regulatory matters has grown apace.[41] The complexity of the modern administrative state provides more opportunities for regulatory arbitrage—another form of value creation for the client—than ever before.[42]

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39. In an underappreciated essay, Professors Gilson, Scholes, and Wolfson explored the trade-off between transaction costs and tax costs in the context of corporate acquisitions, finding that transaction costs typically dominate. *See* Ronald J. Gilson, Myron S. Scholes & Mark A. Wolfson, *Taxation and the Dynamics of Corporate Control: The Uncertain Case for Tax-Motivated Acquisitions*, *in* KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 271, 272–74 (John C. Coffee, Jr. et al. eds., 1988). Professors Gilson, Scholes, and Wolfson argued,

> Any tax gain that would result from an acquisition must be reduced by the transaction and information costs associated with effecting the acquisition. And here we have in mind more than just the legal and investment banking fees, however substantial, associated with making the deal. Additionally, and more significantly, there are substantial costs to becoming informed that result in information asymmetries and create the potential for problems of moral hazard and adverse selection.

Id. at 272. They continued,

> Empirically, we observe that far less than all potential tax gains are achieved, thus providing support for our conclusion that transaction and information costs are pervasive and have first-order effects on the choice among alternative ways to achieve tax gains, including the choice of "standing pat," rationally leaving apparent gains on the table.

Id. at 273–74.

40. *See* THE HUNT FOR RED OCTOBER (Paramount Pictures 1990) ("Seaman Jones: When I asked the computer to identify it, what I got was magma displacement. You see, sir, the SAPS software was originally written to look for seismic events. I think when it gets confused, it kind of runs home to Mama.").

41. The increased importance of regulatory expertise helps explain various institutional details about the legal profession, such as what gives large law firms a comparative advantage over in-house counsel or cheaper law firms and why legal work at the regulatory frontier commands a price premium. It also helps explain why certain law firms—specifically, the elite law firms that compensate their partners in lockstep fashion—appear to be less likely to shirk their professional duty to serve as gatekeepers in favor of aggressive regulatory gamesmanship. Conversely, the decline of the lockstep compensation model helps explain the decline of professional constraints on arbitrage.

42. A note on terminology: Lawyers who help their clients engage in regulatory arbitrage do not often use the word "arbitrage." Tax lawyers prefer the term "planning," presumably because arbitrage can carry the connotation of unseemly or improper gamesmanship—something which only fairly applies to more aggressive structures and which in any event is rarely present in the eyes of the lawyers involved. To sidestep this semantic quagmire, I sometimes used the value-neutral terms "regulatory engineering" or "regulatory craftsmanship" when discussing this planning process with the lawyers involved, reserving the term arbitrage (which I also view as value-neutral on its face although sometimes socially undesirable as applied) for detached evaluation of the techniques. In most cases, lawyers engaging in regulatory arbitrage are simply fulfilling their professional and ethical obligations to the client.

1. Three Parties at the Table.—On the surface, a typical business deal has only two parties: the buyer and the seller. But conceptually there are three parties, not two, at the negotiating table: the buyer, the seller, and the government—typically acting through statutes and regulations written in advance of the deal. The government imposes regulatory costs on transactions in the form of taxes, securities-law disclosure requirements, antitrust constraints, environmental-compliance obligations, and so on. As the buyer and seller conduct deal negotiations, the government is hindered by the fact that it has no actual seat at the negotiating table. Rather, the government is normally bound to specific courses of action based on the language of the statutes, regulations, administrative rulings, and how it has treated previous transactions with similar formal structures. Private parties can plan the form of the transaction to minimize regulatory costs, and the government cannot normally respond by changing the rules in the middle of the game. If a formal change to the structure of the deal reduces regulatory costs—the government's share of the transaction—the new surplus can be divided between the buyer and seller. Restructuring the deal to reduce regulatory costs does not create new value; it merely shifts value from the government to the private parties.

This sort of restructuring is sometimes called exercising the "planning option."[43] Parties have the option of complying with regulatory mandates and bearing the costs, or they may plan around the regulatory mandate by restructuring the deal. Like any option, there are costs associated with exercising the planning option, including an increase in transaction costs associated with the deal.[44]

The structuring of the transaction occurs early in the life of a deal but may be revisited as facts change. The process typically begins with a phone call. A client calls her lawyer with a business deal in mind and often with the basic economic terms of the deal already sketched out. Investment bankers, accountants, rating agencies, and other outside consultants weigh in. The client may even have a pretty good idea of the information and documents that will need to be produced to execute the deal. But outside legal counsel still plays a critical role in designing and implementing the structure of the deal. The lawyers will consider alternative structures that may produce regulatory-cost savings, and they may suggest modifications to the deal structure.[45] If those modifications increase transaction costs, the lawyers may suggest further changes to manage those costs.

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43. *E.g.*, David M. Schizer, *Sticks and Snakes: Derivatives and Curtailing Aggressive Tax Planning*, 73 S. CAL. L. REV. 1339, 1350 (2000) (summarizing the conditions under which the planning option is valuable to taxpayers).

44. *See id.* at 1349–50 (referencing the costs associated with tax avoidance).

45. One lawyer explained,

> The client will come in and will have concocted some structure which only by randomness might achieve the result they want. So I stop them and say, "There's something you are trying to achieve. What is it? What deal did you cut with the other

Lawyers don't have to press clients to recognize the value of this activity. As one corporate lawyer explained, "It's the instinct of every business person to minimize the harmful impact of regulation."[46] Lawyers often describe the process of structuring or planning as guiding their clients through the regulatory maze or "morass."[47] But there is also an opportunity to extend the lawyer's professional comparative advantage over bankers, accountants, and consultants by exploring new ways to change the legal structure of the deal.

These regulatory-planning opportunities arise when lawyers identify gaps between legal form and economic substance. Business deals are primarily motivated by economic relationships between parties or their assets—the economic substance of the deal.[48] The economic relationship between the parties may or may not fit neatly into the "little boxes" that the legal rules have in mind.[49] And there may be multiple legal forms that accomplish similar economic objectives, making some regulatory treatment elective. Some elections are explicit: a closely held partnership or LLC may simply check a box to elect whether to be taxed as a partnership or a corporation.[50] Other elections are implicit: by incorporating offshore, a business may effectively opt out of many domestic regulations. A party interested in the economic cash flow associated with an asset may be more or less indifferent among owning the asset outright, leasing the asset for a long period of time, entering into a forward contract to buy the asset, or buying a call option and writing a put option on the asset. Financial engineering allows the economic cash flow associated with assets to be carved up in any way imaginable to suit the particular preferences of investors, including risk preference, time preference, control preference, and so on.[51] As a result, any business transaction of significant size presents deal lawyers and their clients with a menu of planning options to choose from.

Nowhere is this more obvious than in tax. The importance of tax planning suggests—at least to many tax lawyers—that Gilson's bilateral-

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guy?" I take what he wants to do and try to come up with the most tax-efficient structure.

Interview with Lawyer 1, in N.Y.C. (Sept. 12, 2007).

46. Interview with Lawyer 2, in N.Y.C. (Sept. 12, 2007).

47. Interview with Lawyer 3, in N.Y.C. (Sept. 12, 2007).

48. *See generally* Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5 (2000) (describing a common law doctrine that requires nontax economic substance to qualify for favorable tax treatment).

49. *Cf.* Herwig J. Schlunk, *Little Boxes: Can Optimal Commodity Tax Methodology Save the Debt-Equity Distinction?*, 80 TEXAS L. REV. 859, 863–73 (2002) (analogizing tax treatment for commodities to grouping dissimilar types of fruit into a finite number of "little boxes").

50. Treas. Reg. § 301.7701-3 (as amended in 2006).

51. *See* Peter H. Huang, *A Normative Analysis of New Financially Engineered Derivatives*, 73 S. CAL. L. REV. 471, 477 (2000) (discussing the benefits of financial engineering).

negotiation model is fundamentally flawed.[52] Practitioners familiar with Professor Gilson's model found it wanting. "The negotiation aspect," explained one former tax partner, "doesn't feel like it's very creative. Gilson's theory is based on a somewhat impoverished model."[53] Through a tax lawyer's eyes, value is created by shifting value away from the government (in the form of taxes) so that more money can be divided amongst the other parties. The goal, as one lawyer put it, is to close the transaction while minimizing the "tax leakage."[54]

Regulatory arbitrage is a professional skill specific to lawyers, as it involves the exercise of professional lawyerly judgment under conditions of uncertainty.[55] At times, lawyers are simply helping their clients navigate the complex regulatory schemes that may apply to the transaction and explaining how they apply. But where guidance is less clear, the law must be discerned by analogy to precedent.[56] Lawyers must have the ability not just to identify possible analogies but also to distinguish good analogies from bad ones.[57]

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52. One lawyer explained, "There are three parties at the table, the buyer, the seller, and the IRS." Interview with Lawyer 1, *supra* note 45. Another stated, "Gilson's bilateral negotiation model is flawed. Regulatory state is the third person at the table. In a cross-border deal, another government is the fourth player." Interview with Lawyer 4, in N.Y.C. (Sept. 12, 2007).

53. Interview with Lawyer 4, *supra* note 52. The negotiation part of being a deal lawyer, he explained, was like the joke where an old man and his two friends are enjoying their daily lunch at their favorite deli. To save time, they tell each other jokes by simply calling out numbers. "Five!" says the old man, and the other two laugh. "Sixteen!" says another, and they laugh uproariously. A tourist walking by decides to join in. "Thirty-two!" he says. Silence follows. "You didn't tell it right," explains the old man. *Id.* The joke rings true because so many of the arguments about which party should bear a particular business risk are old hat. *See* JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 269–72 (1975) (discussing representations and warranties); Gilson, *supra* note 20, at 250–51 ("*In a world in which assets are valued according to any version of capital asset pricing theory, there is little role for business lawyers.* Because capital assets will be priced correctly as a result of market forces, business lawyers cannot increase the value of a transaction."). Once the purchase price has been set, negotiating the scope of representations and warranties, indemnities, and other contractual provisions becomes a tiresome zero-sum game. *See* FREUND, *supra*, at 229 (positing that such provisions tend to become a "nit-picker's delight, a forum for expending prodigious amounts of energy in debating the merits of what sometimes seem to be relatively insignificant items").

54. Interview with Lawyer 3, *supra* note 47 ("A big percentage of what I do is guiding the client to structure operations and transactions to minimize the tax leakage.").

55. Several practitioners mentioned judgment as a critical skill. It comes with experience, and it helps to have "self-awareness." One lawyer explained,

> I was generally more conservative at first. But clients don't pay you $900 an hour to tell them that they can do what it says in the regulations. When you start out, you want cases and regulations to rely on. But you come to realize that absence of authority isn't a bad thing. You can analogize to different situations. And then you apply your judgment about how a code section was intended to work. You get better at that as you gain more and more experience. You get more comfortable at giving that kind of advice.

Id.

56. The lawyer further stated,

> There are still lots of situations where the black letter law is so complex that that's what you're doing for your client. Guiding them through the regulatory morass. But

2. Quarterbacking the Deal.—Deal structuring is just the beginning of the process. After the lawyers have settled on a structure, they shift back into Gilson's transaction-cost-engineering mode—negotiating who will bear various risks, ranging from disclosure obligations and indemnities to regulatory risks.[58] Business considerations might introduce new changes to the structure of the deal—say, a new source of financing, a new promise to guarantee another party's debt obligation, or a shift in the mix of debt and equity used to finance the deal. This often requires the lawyers to shift back into regulatory-arbitrage mode on the fly and make further changes to the structure or reassess whether the structure still "works" from a regulatory perspective. The activities of regulatory engineering and transaction-cost engineering are thus intertwined.[59] Lawyers don't consciously separate out the two roles; indeed, doing so would do their clients a disservice. The lawyer's role is to synthesize information from a wide variety of sources and figure out how to keep the deal progressing towards closing.[60]

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in situations that aren't covered by direct authority, it's "what's the analogy." This is like x, or this is like y.

Id.

57. One tax lawyer explained,

> There's a two step process. First, I get it to a tax-efficient structure. Show me the economic deal, and I'll come up with an efficient structure. Second, how do I feel about it. This is where judgment comes in. Reasoning by analogy, even if you don't realize you are doing it. Let me think about the court cases, look at the code and regs, and come up with my best judgment about what you can do.

Interview with Lawyer 1, *supra* note 45.

58. In addition to managing transaction costs, lawyers act as information hubs, assembling massive amounts of documentation from the various parties involved in the deal. *See generally* Manuel A. Utset, *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer*, 74 OR. L. REV. 275, 305–06 (1995) (highlighting attorneys' role in gathering, assembling, and interpreting data that becomes the "informational bundle" used to value a company).

59. Regulatory expertise, standing alone, is not what clients are looking for. Rather, the "value comes from synthesizing issues related to different disciplines." Interview with Lawyer 5, in N.Y.C. (Sept. 11, 2007). Lawyers have an "information transmission" role. *Id.* The firm provides a coordinated team effort that cannot be supplied by multiple firms. *Id.* The deal lawyer acts as "a conduit between the business guy and all the various legal specialties, from tax to '40 Act to IP to ERISA." *Id.* Another added,

> We provide value through an international network of lawyers, seamless advice in multiple practice areas, experience of deal flow, the number of different transactions we do—we're aware of the issues that come up. We know what the market standard rep or covenant is, how much you put in escrow. There's normally no mismatch of advisors—but there's an intangible element of advantage on deals where there's a mismatch and we're up against a second-tier firm.

Interview with Lawyer 3, *supra* note 47.

60. One lawyer, echoing Gilson, explained the lawyer's role in terms of economies of scope:

> Lawyers have a comparative advantage here over investment bankers and accountants not just because they have regulatory expertise, but also because they are in charge of the documents that implement the transaction. Clients take comfort in knowing there's no disconnect between the structure and the documents that implement the structure.

Interview with Lawyer 3, *supra* note 47.

Corporate lawyers tend to emphasize deal management as the reason that clients hire them. "We provide turnkey service," one partner explained.[61] "Bring this transaction here and it will close. Whatever issues there are, it will close."[62] The corporate lawyer running the deal is at the center of the hub of activity, calling on others for whatever expertise might be needed.[63] Other lawyers emphasize the sheer size of the large firms, which allows for a greater number of specialists.[64] Deal flow allows the lawyers to develop human capital in the form of knowing market practice, and it also provides the understanding of the process that leads up to the closing and understanding how to bring all of the necessary expertise to the deal, in what order, and in what time frame to allow the deal to close.[65] Elite law firms also provide an intangible value to the deal through the traditional role of having a calm and rational, "lawyerly" demeanor.[66]

Empirical comparison of the value created for the client through each of these lawyerly functions—regulatory arbitrage, transaction-cost engineering, and quarterbacking the deal—is difficult.[67] Professor Steven Schwarcz has looked to survey data to support the view that regulatory arbitrage drives value creation,[68] but further empirical research would be helpful. The

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61. Interview with Lawyer 1, *supra* note 45.

62. *Id.*

63. One lawyer underscored the advantage of being a lockstep firm in this respect: "You get the guy who will do it better, whether it's your HSR, your environmental person, your ERISA person, instead of doing it yourself." *Id.*

64. *E.g.*, Interview with Lawyer 2, *supra* note 46; Interview with Lawyer 4, *supra* note 52.

65. Interview with Lawyer 1, *supra* note 45.

66. Several lawyers pointed to personality traits associated with lawyers that clients appreciate. "Clients look to us," explained one tax lawyer, "for things that have nothing to do with risk management and risk assessment." Interview with Lawyer 6, in N.Y.C. (Sept. 11, 2007). "Sometimes it's the lawyer's traditional role of being the calm and rational one." *Id.* Clients do not look to the lawyers for the structuring so much as the "sophisticated conversation" about the nuances of the deal and sophisticated, careful implementation of the deal. *Id.* While others could, in theory, provide this service, it continues to be lawyers who provide it. He pointed to the "crisis of talent in this country," suggesting that, for whatever reason, some of our most talented minds continue to become lawyers, and they are quite good at performing these roles, which do not necessarily require a law degree. *Id.*

67. Anecdotally, one can identify several law firms that seem to have leveraged regulatory expertise to bolster their transactional practice. McKee Nelson, which started out as a tax boutique in Washington, D.C., leveraged its regulatory expertise into a thriving capital markets practice. Nathan Carlile, *McKee Nelson: The Richest Guys in Town*, LEGAL TIMES (Aug. 13, 2007), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005488500&slreturn=1&hbxlogin=1 (describing how McKee built its capital markets practice in New York). Before the market crash in 2008, it competed with the heavyweights in New York, and its profits-per-partner and revenue-per-lawyer exceeded that of any other D.C.-based firm. *Id.* Schulte Roth & Zabel, never known as an elite firm, leveraged its expertise in hedge funds and mutual funds to become a major player in New York and London. *See Schulte Roth & Zabel*, EXCITE, http://www1.excite.com/home/careers/company_profile/0,15623,1149,00.html (summarizing the growth of the firm). Below, I discuss Skadden Arps, which uses an extensive network of contacts in D.C. to complement its always-strong transactional practice in New York. *See infra* subpart III(C).

68. *See* Steven L. Schwarcz, *To Make or Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 561 (2008) (disclosing survey data tending to indicate increasing reliance on in-house

problem is that measuring the activity is exceedingly difficult.[69] Billing rates and lateral moves provide some indirect evidence of the importance of regulatory expertise, but even tax and securities lawyers spend a lot of time managing ordinary transaction costs. Teasing out the marginal value attributable to each activity is challenging, like asking a cancer patient whether his life was saved by the radiologist who found the tumor, the surgeon who cut it out, or the oncologist who kept the cancer from returning.[70] Whatever the relative value of the various activities, it suffices for present purposes to have established that regulatory arbitrage is a part of what business lawyers do.

B. Necessary Conditions

1. Defining Regulatory Arbitrage Opportunities.—Regulatory arbitrage is a consequence of a legal system with generally applicable laws that purport to define, in advance, how the legal system will treat transactions that fit within defined legal forms. Because the legal definition cannot precisely track the underlying economic relationship between the parties, gaps arise, and these gaps create opportunities.

The phenomenon is analogous to inefficiencies in the capital markets. Financial arbitrage is defined as "[t]he simultaneous purchase and sale of the same, or essentially similar, security in two different markets for advantageously different prices."[71] In informal terms, financial arbitrage is possible when any of three conditions is met:

- The same asset trades at different prices on different markets;
- Two assets with identical cash flows trade at different prices; or
- An asset with a known price in the future trades at a price that differs from its future price discounted to present value.[72]

In each case, simple arbitrage techniques may be employed to take advantage of the pricing inefficiencies; in efficient markets, these pricing anomalies often become vanishingly small.[73]

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counsel for their superior knowledge of "regulatory, organizational, and operational issues that impact the company's transactions").

69. *Cf.* Raskolnikov, *Relational Tax Planning*, *supra* note 26, at 1230 ("Yet casual empiricism may be the best we can do in this area. I suspect that no database contains detailed quantifiable evidence of informal regulatory avoidance, so econometric analysis is likely to be out of the question.").

70. The empirical challenge is especially daunting where the radiologist, surgeon, and oncologist are all the same person.

71. WILLIAM SHARPE & GORDON J. ALEXANDER, INVESTMENTS 795 (4th ed. 1990).

72. *See* ZVI BODIE ET AL., INVESTMENTS 325 (8th ed. 2009) (explaining the law of one price).

73. *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 554–55 (1984) (observing that arbitrage opportunities disappear when prices fully reflect all available information, as is the case in efficient markets). Briefly, when the law of one price is violated, the arbitrageur can buy the asset on the market where the asset is cheap, short the

Regulatory-arbitrage opportunities can be framed in a similar fashion as financial arbitrage, taking place when one of three conditions are met:

- Regulatory-regime inconsistency: the same transaction receives different regulatory treatment under different regulatory regimes.
- Economic-substance inconsistency: two transactions with identical cash flows receive different regulatory treatment under the same regulatory regime.
- Time inconsistency: the same transaction receives different regulatory treatment in the future than it does today.

As with financial arbitrage, each regulatory-arbitrage opportunity can be exploited by simple planning techniques. And, as with financial arbitrage, the real world introduces a number of complexities that limit regulatory arbitrage.[74]

a. Regulatory Regime Inconsistency.—Regulatory regime inconsistency creates value for the client by using a single transaction to exploit the difference between the way two different regulatory regimes treat that transaction. The inconsistency can arise through variations in the way that different doctrinal areas cover subject matters relevant to the same transaction, such as tax and financial accounting or corporate law and bank regulatory rules. Or the inconsistency can arise when regulators in different jurisdictions address the same subject matter. Inconsistency among regulators often gives parties the ability to effectively choose which regulator has governing authority, such as banking regulators with overlapping jurisdiction or when different sovereigns share jurisdiction over the transaction.

Doctrinal inconsistency is not always a mistake caused by inept legislative drafting. Different regulators may have different policy goals in mind. It may be important for securities regulators, who seek to protect investors, to define the meaning of "security," "dealer," or "sale" in a way that differs from the taxing authorities, who seek to raise money for the public fisc. Other times, however, doctrinal inconsistency arises when laws

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asset on the market where the asset is expensive, deliver the cheap asset to the expensive buyer, and pocket the difference. Similarly, when assets with identical cash flows trade at different prices, the arbitrageur can buy the cheap asset, short the expensive asset, and pocket the difference; by assumption, the cash flows going forward will perfectly offset. Finally, if an asset with a known future price is mispriced, the arbitrageur may enter into a short or long forward contract to deliver or receive the mispriced asset in the future. *See* Roberta Romano, *A Thumbnail Sketch of Derivative Securities and Their Regulation*, 55 MD. L. REV. 1, 13–14 (1996) (explaining how a futures contract holder may profit from a difference between the spot-market price and the futures-contract price at the time that the contract expires).

74. *See, e.g.*, Andrei Shleifer & Robert W. Vishny, *The Limits of Arbitrage*, 52 J. FIN. 35, 40 (1997) (identifying agency costs between portfolio managers and investors as a constraint on arbitrage).

become stale, failing to keep up with the development of new financial products and innovative financial techniques.[75]

New financial products are engineered to meet specific regulatory goals, often involving an arbitrage of two or more regimes. For example, many bank holding companies issue hybrid securities that are treated differently for tax purposes and bank regulatory purposes. In a typical structure, the bank issues securities that have enough debt-like attributes to qualify as debt for tax purposes while still qualifying as Tier 1 capital for bank regulatory purposes.[76] Because Tier 1 capital is supposed to represent a reliable source of equity capital for the banks, the debt-like features of "trust preferred" and other hybrid securities are arguably inconsistent with the stability sought by bank regulators.[77] Other examples include other debt–equity hybrid securities (debt for tax purposes versus equity for accounting purposes) and securitization vehicles (loan for tax purposes versus sale for bankruptcy purposes and accounting purposes).[78]

The 2007 IPO of the Blackstone Group, a private equity firm, provided a high-profile example of the arbitrage of two different regulatory regimes.[79] The Blackstone IPO used an innovative structure to go public, selling limited partnership units to investors rather than common stock.[80] The arbitrage involved an inconsistency between the tax code and the Investment Company Act of 1940.[81] For tax purposes, Blackstone retained partnership tax status, preserving the advantageous tax rate on carried interest and avoiding corporate-level tax.[82] Its tax status relied on a "passive income" exception to the publicly traded partnership rules, which normally treat public companies as corporations for tax purposes.[83] For tax purposes, then, Blackstone ensured that most of its income was passive investment income in the form of dividends, interest, and capital gains, setting up a blocker corporation to help

75. *See infra* text accompanying notes 79–87.

76. *See* Schizer, *supra* note 26, at 1338 n.85 (describing how banks lobbied the Federal Reserve to allow tax-deductible trust-preferred securities to qualify as Tier 1 Capital).

77. *See id.* at 1338 ("[T]ough regulatory treatment ensures the solvency of regulated institutions . . . .").

78. Jalal Soroosh & Jack T. Ciesielski, *Accounting for Special Purpose Entities Revised: FASB Interpretation 46(R)*, CPA J., July 2004, at 30, 30, *available at* http://www.nysscpa.org/printversions/cpaj/2004/704/p30.htm.

79. *See* Susan Beck, *The Transformers*, AM. LAW., Nov. 2007, at 94, 94 (describing Blackstone structure and similar structure first employed by Fortress Investment Group); Victor Fleischer, *Taxing Blackstone*, 61 TAX L. REV. 89, 99–101 (2008) (describing the regulatory arbitrage of Blackstone structure).

80. Fleischer, *supra* note 79, at 95.

81. *Id.* at 99–104.

82. *Id.* at 101.

83. *Id.*

transform its active fee income into passive dividends.[84] Meanwhile, in order to avoid the Investment Company Act of 1940, Blackstone held itself out as an active asset-management and financial-advisory services company, not a passive investment company that holds and trades securities like a mutual fund.[85] Thus, through careful structuring, Blackstone successfully held itself out as passive for tax purposes and active for securities law purposes, minimizing the costs of both regimes.[86]

The second form of regulatory-regime inconsistency arises when two different sovereigns apply different rules. Corporate lawyers, of course, are accustomed to choosing Delaware as a state of incorporation,[87] a decision that allows Delaware law to govern the internal affairs of the corporation.[88] For companies whose economic activity takes place outside of Delaware, the choice is a commonplace form of regulatory arbitrage, making use of the gap between the location of the corporation's economic activity and the location of its legal incorporation.

The ability to choose one's place of incorporation provides planning opportunities in the international context as well, of course. U.S. companies sometimes consider reincorporating in a tax-haven jurisdiction.[89] Incorporating abroad allows multinationals to pay U.S. tax only on U.S.-source income and offers other opportunities to shelter U.S. income through transfer pricing, income stripping, and other techniques.[90]

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84. *See id.* at 102 (describing a blocker entity as "an LLC that elects to be treated as a corporation and pays entity-level tax" and noting that Blackstone used such an entity as part of its regulatory arbitrage).

85. *Id.* at 102.

86. *See id.* at 104 ("Blackstone performs *active* services for 1940 Act purposes but remains *passive* for tax purposes."). Some political lobbying also helped. *See infra* section II(C)(5) (describing typical uses of lobbying). This sort of doctrinal inconsistency can be innocuous; it is helpful to break down the inconsistency further into one or more economic substance inconsistencies. In the case of the Blackstone IPO, its treatment as an active management company was appropriate in light of the actual services performed by Blackstone. Fleischer, *supra* note 79, at 100–01. The heart of the arbitrage was the treatment of the firm as a passive conduit for purposes of the publicly traded-partnership rules. Thus, while the doctrinal inconsistency flags a potential policy problem, further analysis of the economic substance of the deal is necessary before drawing any normative conclusions.

87. *See* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 42 (2006) ("Delaware is the leading supplier of corporate chargers for publicly traded companies in the United States.").

88. *See id.* at 39 ("The internal affairs doctrine is a choice of law rule . . . that selects the law of the incorporating state to govern disputes over the corporation's internal affairs.").

89. Companies are still free to reincorporate offshore, but new rules treat the firm as if it were a U.S. firm if 80% of the firm's ownership remains the same after the reincorporation. I.R.C. § 7874(b) (2006). Not surprisingly, bankers are now pitching reincorporation deals that would shift 21% ownership to a private equity fund, thereby avoiding the 2004 legislation. *See* Ryan J. Donmoyer, *IRS Moves to Keep Companies from Skirting Tax-Avoidance Law*, BLOOMBERG (Sept. 18, 2009), http://www.bloomberg.com/apps/news?pid=21070001&sid=aaWcVXTC4SLw (reporting that Treasury officials were aware of materials promoting such transactions).

90. Mihir A. Desai & James R. Hines, Jr., *Expectations and Expatriations: Tracing the Causes and Consequences of Corporate Inversions*, 55 NAT'L TAX J. 409, 416, 421–22 (2002).

Congress enacted legislation in 2004 to discourage reincorporations,[91] but numerous cross-border tax arbitrage techniques remain. In a transaction known as a "double-dip lease," the deal is structured so that two different jurisdictions each treat a different taxpayer as the owner of the asset.[92] For example, if Airbus, a French company, builds a plane and leases it to American Airlines for ninety-nine years, it may be possible for Airbus, relying on formalistic French law, to take depreciation deductions in France while American Airlines, relying on economic substance rules under U.S. tax law, takes depreciation deductions in the U.S. on the very same airplane.[93]

b. Economic Substance Inconsistency.—Economic substance inconsistency, unlike regulatory regime inconsistency, can take place within a single regulatory regime. The ability to carve up economic cash flows in a variety of ways creates opportunities to reduce regulatory costs by changing the formal structure of the transaction while actually changing the underlying business deal as little as possible.[94]

One common example is the use of total-return swaps to create a synthetic equity investment. When foreign investors receive dividends from a U.S. corporation, the dividend payments are subject to a 30% withholding tax.[95] To get around the tax, some foreign investors will instead enter into a total-return swap with an investment bank.[96] The total-return swap is designed to mirror the (pre-tax) cash flows that the investor would have received had it held the stock directly. Because the investor receives a payment under the swap rather than a "dividend," no withholding tax is

91. American Jobs Creation Act of 2004, Pub. L. No. 103-357, § 801(a), 118 Stat. 1418, 1562–63 (codified at I.R.C. § 7874 (2006)).

92. *See* Claire A. Hill, *Is Secured Debt Efficient?*, 80 TEXAS L. REV. 1117, 1128 n.46 (2002) (defining a "double dip transaction" in the leasing context).

93. Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV. 79, 112–13 (2002) (analyzing a similar hypothetical transaction).

94. For an example in the consumer context describing restructuring of two-to-four week payday loans into twenty-week "installment loans" to avoid state regulation, see Nathalie Martin, Payday Lending Legislation From the Ground Up: A Customer's View of What Works and What Doesn't 20–21 (Jan. 24, 2010) (unpublished manuscript) (on file with Texas Law Review). There are, of course, numerous examples of changing the structure of transactions to fall just outside a regulatory regime's arbitrary line. *See, e.g.*, Paul Rose, *Sovereign Wealth Fund Investment in the Shadow of Regulation and Politics*, 40 GEO. J. INT'L L. 1207, 1232 (2009) (noting that sovereign wealth fund investments do not exceed 9.9% of the total stock outstanding to avoid filing requirements for 10% shareholders under Section 16 of the Exchange Act of 1934 and to stay below informal 10% threshold that increases likelihood of CFIUS investigation).

95. I.R.C. § 871(a) (2006).

96. *See* Jeffrey M. Colón, *Financial Products and Source Basis Taxation: U.S. International Tax Policy at the Crossroads*, 1999 U. ILL. L. REV. 775, 823 (discussing the popularity of total-return swaps as a tool for foreign investors to avoid withholding tax).

applied.[97] Similarly, hedge funds have used swaps to avoid disclosure obligations under the Williams Act or to hijack corporate proxy voting.[98]

Investor Sam Zell's acquisition of the Chicago Tribune provides a more elaborate example of economic substance inconsistency. Rather than use a traditional leveraged-buyout structure, Zell restructured the Tribune as an S Corporation controlled by an employee stock ownership plan, or ESOP.[99] Because the ESOP held the equity of the Tribune, Zell needed another way to ensure the potential for economic gain in the transaction, which he acquired through a call option to acquire 40% of the equity in the Tribune.[100] Finally, because Zell would not hold common stock in the Tribune until he exercised the options, he instead entered into a voting agreement that effectively gave him control over the company and its board.[101] When the dust settled, the economics of the deal resembled an ordinary buyout, but, under the ESOP rules, neither the Tribune nor its shareholders would pay income tax on corporate earnings.[102]

c. Time Inconsistency.—The last type of regulatory arbitrage relies on an inconsistency in the regulatory treatment of a transaction across time. Legislative changes often provide planning opportunities, as parties can effectively elect whether to be covered under new or old law.

The recent sunset of the estate tax provides a somewhat gruesome example of a time inconsistency opportunity. Under legislation enacted in 2001, the estate tax, which normally taxes estates at rates up to 45%, disappeared in 2010, and is scheduled to spring back in 2011.[103] While

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97. *See* Anita Raghavan, *Happy Returns: How Lehman Sold Plan to Sidestep Tax Man: Hedge Funds Use Swaps to Avoid Dividend Hit; IRS Seeks Information*, WALL ST. J., Sept. 17, 2007, at A1 (detailing why no withholding tax is applied).

98. *See, e.g.*, Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 640–42 (2008) [hereinafter Hu & Black, *Empty Voting II*] (describing how hedge funds use swaps); Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 816–17 (2006) [hereinafter Hu & Black, *Empty Voting I*] (giving an example of how swaps enable empty voting).

99. Michael S. Knoll, *Samuel Zell, The Chicago Tribune, and the Emergence of the S ESOP: Understanding the Tax Advantages and Disadvantages of S ESOPs*, 70 OHIO ST. L.J. 519, 551–52 (2009).

100. *Id.* at 552.

101. *See* Richard Siklos, *For Zell, More Tribune Hell*, CNNMONEY.COM (Sept. 22, 2008), http://money.cnn.com/2008/09/19/magazines/fortune/zell_suit_siklos.fortune/index.htm (stating that the transaction put Zell in "effective control" of the company).

102. *See* Knoll, *supra* note 99, at 554 ("[T]he S ESOP blocks the Tribune's tax consequences from being passed through to the participants until they withdraw their assets."). The Tribune filed for bankruptcy in 2008. Michael J. de la Merced, *Tribune Files for Bankruptcy*, DEALBOOK (Dec. 8, 2008), http://dealbook.blogs.nytimes.com/2008/12/08/tribune-files-for-bankruptcy/. The problem was not that it paid too much income tax but rather that it didn't have any income. Regulatory arbitrage can save taxes, but it can't save the newspaper industry.

103. Marshall Loeb, *Estate-tax Uncertainty Will Drag for a While*, MARKETWATCH (Sept. 13, 2010), http://www.marketwatch.com/story/estate-tax-uncertainty-will-drag-for-a-while-2010-09-13.

legislators have pledged to reenact the tax retroactively to the beginning of 2010,[104] there is considerable uncertainty about whether this will occur, what exemption levels might be, and what rates would apply.[105] From a planning perspective, it would be convenient to die in 2010.[106] Of course, on the surface, death would appear to be a powerful friction for this planning technique to overcome. But empirical data shows otherwise. While it is said that death and taxes are inevitable, the timing of each can be manipulated on the margins.

In an infamous paper, Joel Slemrod and Wojciech Kopczuk illustrated that death is elastic; it responds to incentives.[107] Slemrod and Kopczuk examine the death rate before and after changes in the estate tax rate, finding that, for individuals dying within two weeks of a tax change, tax savings slightly increases the possibility of dying in the period with lower taxes.[108] The precise cause is uncertain. Some people appear to will themselves to hang on a bit longer.[109] Heirs may shape life support decisions to minimize taxes.[110] It is also possible that the results demonstrate "not a real death elasticity, but instead ex post doctoring of the reported date of death to save on taxes."[111]

The options-backdating scandal provides another example of time inconsistency arbitrage. In the dot-com bubble of the late 1990s, tax and accounting rules still incentivized firms to issue at-the-money stock options.[112] In a typical backdating scenario, imagine that a CFO verbally

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104. *Id.*

105. *Id.*

106. For example, it has been reported that former New York Yankees owner George Steinbrenner saved his heirs an estimated $500 million by dying in 2010. Brad Hamilton & Jeane Macintosh, *Death'$ Perfect Timing: Saves Kin Half-Bil in Taxes*, N.Y. POST (July 14, 2010), http://www.nypost.com/p/news/local/death_perfect_timing_NusLyGlMu8cn8kyepprVJP.

107. Wojciech Kopczuk & Joel Slemron, *Dying to Save Taxes: Evidence from Estate Tax Returns on the Death Elasticity*, 85 REV. ECON. & STAT. 256 (2003).

108. *Id.* at 264 (finding that "for individuals dying within two weeks of a tax reform, a $10,000 potential tax saving (using 2000 dollars) increases the probability of dying in the lower-tax regime by 1.6%").

109. *Id.* at 257 ("Altruistic individuals should consider adjusting the timing of their death if by so doing it will benefit their heirs.").

110. *Id.* ("Decisions about prolonging the life of a critically ill person (e.g., regarding whether to continue with life support) are often made not by the dying person but by others, including the potential heirs themselves.").

111. *Id.* at 264.

112. Prior to 2005, GAAP allowed companies to report only the intrinsic value of options as compensation expense; at-the-money options have no intrinsic value thus allowing companies to maximize reported earnings. *See* David I. Walker, *Unpacking Backdating*, 87 B.U. L. REV. 561, 568 (2007) (explaining pre-2005 GAAP rules). "Section 162(m) limits the corporate deduction for non-performance-based compensation paid to certain senior executives to $1 million per year" but counts at-the-money stock options (but not in-the-money options) as performance-based pay. *Id.* at 569; *see also, e.g.*, I.R.C. § 162(m)(1) (2006); Fleischer, *Options Backdating*, *supra* note 36 at 1039–42 (discussing the tax consequences of options backdating).

accepted a job with an Internet company on January 1, 1999, when the stock price was $100. On March 1, 1999, when the board approves the CFO's employment contract and authorizes a grant of stock options, the stock is trading at $150. By backdating the options to January 1, with a strike price of $100, the options appear to be at-the-money (and were typically reported as such to ensure favorable tax and accounting treatment[113]), when in fact they were $50 in-the-money. While this time inconsistency arbitrage did not actually "work"—several companies and executives were indicted for the practice, and the SEC investigated dozens more[114]—in-house counsel must have viewed it as a legitimate regulatory arbitrage at the time.

Finally, time inconsistency opportunities arise through discount-rate arbitrage when regulatory regimes do not properly account for the time value of money. Tax deferral provides an obvious example. In a typical corporate acquisition, the selling shareholders would pay capital gains on the transaction if it were treated as a sale for tax purposes. If the transaction is structured as a tax-free reorganization, however, the selling shareholders receive stock of the buyer as acquisition currency, taking a carryover basis in the stock received. Gain, if any, is not recognized; instead, it is deferred until the new stock is sold. The present value of the tax liability is, of course, lower if the gain is deferred until a future year.

2. Close Economic Substitutes.—With this taxonomy of arbitrage opportunities in mind, we can now delve more deeply to explore the conditions under which arbitrage occurs. As should already be apparent, a regulatory-arbitrage opportunity does not require economically identical transactions to work. In most cases, it is sufficient to have two transactions that are close economic substitutes for one another. Restructuring works only in situations where the modifications to the economics of the deal are minor, or at least small enough to be less than whatever regulatory-cost savings the strategy may provide.

Original Issue Discount (OID) bonds provide a clear example. Investors who buy a ten-year bond paying 8% interest for $100 will receive $8 in interest payments per year. The interest is taxable, reducing the after-tax return to $4 for a taxpayer in a 50% bracket. Investment banks developed

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113. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former Chairman and CEO of Brooks Automation in Stock Option Fraud (July 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-146.htm (accusing the CEO of Brooks Automation of approving "the issuance to company executives and employees of stock options that were backdated to earlier dates on which the stock's market price was lower").

114. *See Spotlight on Stock Options Backdating*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/spotlight/optionsbackdating.htm (July 19, 2010) (collecting press releases, criminal complaints, speeches, testimony, and letters related to options backdating going back to 2006); *see also, e.g.*, Press Release, Dep't of Justice: U.S. Attorney S. Dist. of N.Y., Former Chief Financial Officer of Safenet, Inc. Charged in Connection with Backdating of Stock Options (July 25, 2007), *available at* http://www.justice.gov/usao/nys/pressreleases/July07/argosafenetindictmentpr.pdf (describing a particular indictment in the options-backdating enforcement).

a financial product—an OID bond—that paid no nominal interest.[115] Instead, the issue price was lower than the redemption price; instead of an 8% bond, an investor might buy a $100 bond that would be redeemed, ten years later, for $200. Cash-method taxpayers would not recognize the interest until redemption, while accrual-method issuers would deduct the interest all along the way. The two bonds are not perfect economic substitutes; the first provides more liquidity. But the present value of the pre-tax cash flows is, by assumption, identical. In practice, the two products were nearly perfect substitutes for many investors, forcing Congress to enact the OID rules[116] in the tax code.[117]

In fact, even deals that are carefully engineered with arbitrage in mind involve costs that make them close, but not perfect, substitutes. Consider again the example of the total-return swap substituting for an investment in common stock. Recall that foreign investors are subject to a 30% withholding tax on dividends. If the foreign investor instead enters into a swap with an investment bank, the swap entitles the investor to a stream of dividend-equivalent payments and an additional payment (or obligation) equal to the gains (or losses) of market value of the firm.[118] But there are some subtle differences in the economics of the two investments. The swap will require a fee to be paid to the investment bank. The investor must spend time and money to understand the financial product, how it works, and how it should be accounted for and to monitor the security. The swap introduces new counterparty credit risk to the transaction—the risk that the investment bank will default on its obligation to the investor. But so long as the two investments are close economic substitutes—meaning that the regulatory savings outweigh the additional costs—investors will replace the common stock with a swap, notwithstanding the small differences in the economics of the transaction.

3. Close Strategic Substitutes.—It is not enough for two transactions to be close economic substitutes for one another; they must also be close strategic substitutes. The holder of an asset is often interested in more than cash flows. Investors may be interested in control rights, information rights, or synergistic benefits with other assets they hold.

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115. *See* SCOTT BESLEY & EUGENE F. BRIGHAM, ESSENTIALS OF MANAGERIAL FINANCE 226 & n.7 (14th ed. 2008) (describing OID bonds, equating them with zero coupon bonds, and noting their development by Salomon Brothers in the early 1980s).

116. I.R.C. §§ 1271–75 (2006).

117. *See* Peter C. Canellos & Edward D. Kleinbard, *The Miracle of Compound Interest: Interest Deferral and Discount After 1982*, 38 TAX. L. REV. 565, 568–70 (1983) (comparing the 1982 changes to earlier regulation of OID bonds).

118. *See* Gunter Dufey & Florian Rehm, *An Introduction to Credit Derivatives* 4 (Univ. of Mich. Bus. Sch., Working Paper No. 00-013, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=249155 (describing a total-return swap).

The total-return swap example again illustrates the point. Assume that an investor can manage the additional transaction costs associated with the swap and that the regulatory savings outweigh the transaction costs. Why might some investors still prefer holding common stock? Because common stock, unlike a swap, typically carries voting rights that may be meaningful to certain investors, like activist investors or corporations making a strategic investment.

Different legal forms alter the strategic value of an asset by altering control rights, voting rights, information rights, and oversight and accountability mechanisms. Because economic cash flows can easily be separated from legal ownership of an asset,[119] many planning techniques are variations on a theme: move nominal ownership of the asset in the hands of the party that can incur the lowest regulatory costs and move economic ownership of the asset to the party that values it most highly. At times, however, legal ownership may be necessary to protect the economic cash flows that the acquirer seeks. Furthermore, at times, an asset may be sought for its strategic value—to enhance the value of the buyer's other assets—such as when a trade buyer wants to integrate a start-up's technology or brand into its legacy assets.

The value of the strategic rights associated with different forms will obviously vary depending on the buyer. Many buyers—financial buyers—will be indifferent to the strategic rights, thus allowing more flexibility in planning.

C. Constraints on Regulatory Arbitrage

The necessary conditions for regulatory arbitrage—two transactions that are close economic and strategic substitutes but generate different regulatory outcomes—are not necessarily sufficient for arbitrage to take place. As with financial arbitrage, where availability of credit, agency costs, and other constraints limit arbitrage strategies, a variety of constraints limit regulatory arbitrage.

What follows is a taxonomy of regulatory arbitrage constraints: legal constraints, transaction costs, professional constraints, ethical constraints, and political costs. The list is not intended to convey a rank ordering of importance; indeed, two of the constraints (professional constraints and ethical constraints) have become almost trivial. Rather, the order reflects the process that deal lawyers go through when evaluating whether a proposed change in the deal structure "works."

1. Legal Constraints.—Lawyers who identify regulatory arbitrage opportunities engage in a second level of legal analysis before considering

119. *See* Hu & Black, *Empty Voting I*, *supra* note 98, at 823–24 (explaining how ownership of the economic returns from stock shares can easily be decoupled from full ownership, which includes voting rights, through the use of derivatives).

transaction costs and other constraints. Many statutory schemes have anti-planning rules intended to backstop the policy goals of the statutory scheme. These rules range from specific prohibitions that make certain types of planning strategies ineffective to broad "antiabuse" rules intended to reach strategies that lawmakers cannot yet envision. Because these legal constraints are imperfect, they are often underappreciated as a method of constraining arbitrage.

a. Rifleshot Antiavoidance Rules.—Many regulatory statutes have "rifleshot" antiavoidance rules in the statutory text.[120] When lawmakers can anticipate specific avoidance strategies that might render a regulatory provision ineffective, they write constraints into the statute. Where planning is unforeseen but deemed abusive once discovered, Congress will often amend the statute to shut down the planning.

For example, consider proposed Section 710 of the tax code, which would change the tax treatment of carried interest from capital gain to ordinary income.[121] Section 710 would not change the tax treatment of a general partner's actual financial investment in the partnership; such investments could still generate capital gains or losses.[122] Congress was concerned about an obvious planning technique: rather than receive carried interest, general partners could borrow 20% of the capital of the fund from the limited partners and invest directly in the fund.[123] Absent a special rule, the two structures (carried interest and nonrecourse-debt-financed capital interest) would be close economic and strategic substitutes but would generate different tax outcomes. Section 710 thus includes a provision that would treat debt-financed investments in the partnership by general partners as if it were carried interest.[124]

Many corporate tax sections have a familiar structure designed to both grant relief to appropriate transactions and curb abusive transactions. Against the backdrop of a broad realization rule that defines any "sale or other disposition" as a taxable event,[125] several Subchapter C provisions grant relief from the broad rule by designating transactions as nonrecognition

120. *See, e.g.*, I.R.C. § 1(g) (2006) (providing that the unearned income of certain children is taxed as if it was their parents' income in order to prevent families from shifting unearned income to their children and lowering the total amount of tax paid by the family); I.R.C. § 102(c) (2006) (providing that amounts given to employees by employers cannot be excluded from gross income as gifts so as to prevent employers from characterizing employee compensation as gifts).

121. H.R. 1935, 111th Cong. § 2 (2009) (proposed § 710(a)(1)(A)).

122. *Id.* (proposed § 710(c)(2)(A)).

123. David J. Herzig, *Carried Interests: Can They Effectively Be Taxed?*, 4 ENTREPRENUERIAL BUS. L.J. 21, 26–27 (2009) (explaining the congressional intent behind § 710 as wanting to prevent individuals from using the capital gains tax rate on the functional equivalent of carried interest).

124. H.R. 1935 § 2 (proposed § 710(c)(2)(D)).

125. I.R.C. § 1001 (2006).

events.[126] These nonrecognition rules, however, can lead to creative tax planning that goes beyond what Congress intended.[127] And so Congress has enacted additional rules that limit planning techniques.

Section 351(a), for example, allows for nonrecognition when a shareholder contributes property to a corporation, if the shareholder receives only stock in exchange and controls the corporation immediately after the exchange.[128] Section 351(b) provides limited relief for boot received in the exchange.[129] The obvious goal of the section is to provide relief from the realization rule when the transaction represents a mere change in form of the shareholder's investment.[130] If a shareholder contributes property in exchange for cash or debt rather than stock, the nonrecognition rules should not apply, at least to the extent of the boot. A planning opportunity then arises: is there a form of stock that is a close economic substitute for debt, thereby allowing the shareholder to effectively cash out of the investment? Section 351(g) then steps in to provide an antiplanning constraint on the use of redeemable debt-like "nonqualified preferred stock."[131] Similar rifleshot rules can be found in the reorganization rules, spin-off rules, and distribution rules.[132]

In the securities context, statutory look-through rules often constrain obvious planning techniques. The Investment Company Act, for example, provides an exception to the definition of investment company for any issuer whose securities are held by fewer than 100 persons.[133] Absent additional limitations, one could shoehorn an infinite number of investors through this exception by stacking partnerships on top of one another, each with fewer than 100 owners. The statute shuts down this technique by "looking through" entities to the beneficial owners of the securities in situations where the vehicle is likely constructed merely to evade the 100-person limitation.[134] Similarly, Rule 506 of Regulation D under the Securities Act of 1933 establishes safe harbor rules for a private-offering exemption. Rule 506 limits

126. *See, e.g.*, I.R.C. §§ 351, 354 (2006) (granting certain exceptions to the broad rules governing realization events).

127. *See* Raskolnikov, *Relational Tax Planning*, *supra* note 26, at 1194–95 (discussing the "drop-and-sell" sequence many taxpayers use to avoid taxation).

128. I.R.C. § 351(a).

129. *Id.* § 351(b).

130. Rev. Rul. 2003-51, 2003-21 C.B. 938.

131. I.R.C. § 351(g) (preventing the application of the § 351(a) nonrecognition provision if the transferor receives nonqualified preferred stock).

132. *See, e.g.*, *id.* § 306 (dictating the tax treatment of the disposition of certain kinds of stock); *id.* § 355 (controlling the distribution of stock and securities of a controlled corporation); *id.* § 368 (setting out narrowly tailored definitions related to the tax treatment of corporate reorganizations).

133. 15 U.S.C. § 80a-3(c)(1) (2006).

134. *See* 15 U.S.C. § 80a-3(c)(1)(A) (providing the general rule that a company is normally treated as a single person but also providing exceptions if a company owns 10% or more of the voting securities of an investment company and the 10% owner is an investment company or would be but for the 3(c)(1) or 3(c)(7) exceptions to the Investment Company Act).

such offerings to thirty-five nonaccredited investors but looks through entities that were formed for the specific purpose of purchasing the securities offered.[135]

b. Shotgun Antiabuse Rules.—Broader "shotgun" antiabuse rules discourage regulatory arbitrage by targeting a class of transactions or disallowing transactions that are motivated by regulatory avoidance. Many such rules rely on frictions, market risk, holding periods, or other secondary factors to enforce the objective of the primary rule.[136] Other rules use sweeping antiabuse language to prevent arbitrage.[137]

The passive-loss rules provide an example of a frictions-based approach. In the 1970s and early 1980s, increasing numbers of individual taxpayers entered into tax shelters.[138] In the typical tax shelter, a wealthy doctor, dentist, lawyer, or small-business owner would invest in a partnership that borrowed money and purchased depreciable property, like an alpaca farm.[139] Because the interest expense and tax depreciation far exceeded the economic depreciation of the assets, the investment generated phantom tax losses, which were then allocated to the individual investors and used to shelter other income.[140] To combat such shelters, Section 469 limits losses generated from passive activities to the amount of passive income; excess passive activity losses are trapped until the investment is disposed of.[141]

Section 469 is effective because it introduces a new friction, active participation in the venture, that changes the attractiveness of the investment. The basic individual tax shelter is to take two economically similar transactions—doing nothing versus investing in a tax shelter—and exploit the different tax treatment (nothing versus phantom tax losses). Introducing the requirement of active participation means that the two are no longer economic close substitutes. Spending ten hours a month at an alpaca farm is not costless to a busy doctor or lawyer.

What makes the rule "broad" is that it is not targeted at a specific deal structure or type of investment. Rather, it targets all passive-activity losses,

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135. 17 C.F.R. § 230.506 (2010).

136. *See, e.g.*, I.R.C. § 469 (2006) (limiting passive-activity losses and credits); I.R.C. § 1091(a) (2006) (disallowing a loss deduction for a wash sale of stock of securities); I.R.C. § 1260 (2006) (governing the treatment of gains from constructive-ownership transactions).

137. *See, e.g.*, I.R.C. § 269(a) (2006) (empowering the Secretary of the Treasury to disallow deductions, credits, or other allowances from certain transactions by any person or corporation where the "principal purpose" of the transaction was "avoidance of Federal income tax").

138. C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA 33 (1992).

139. *See, e.g.*, Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Government Expenditures*, 84 HARV. L. REV. 352, 404–05 (1970) (describing a similar tax-shelter transaction in the real-estate context).

140. *Id.* at 405.

141. I.R.C. § 469.

however generated. Marvin Chirelstein and Lawrence Zelenak have proposed a similar approach to the corporate-tax area: their rule would disallow all noneconomic losses not clearly contemplated by Congress.[142] Similarly, code provisions that basket together certain types of income and deductions can be highly effective at reducing arbitrage.[143] It might seem easier to simply focus on the taxpayer's motive. But experience shows that code sections that focus on an avoidance motive are often ineffective[144] and fall into disuse.[145]

c. General Antiabuse Rules.—General statutory antiabuse rules are statutory rules designed to curb regulatory arbitrage without any particular transaction or strategy in mind. Countries and regions as diverse as Canada, Australia, Sweden, Hong Kong, and Germany employ a general antiavoidance rule (sometimes known as a GAAR), which provides that when a transaction is an avoidance transaction, the tax consequences will be redetermined to deny the tax benefit that would otherwise result from the transaction.[146] General antiavoidance rules are thought by many to be a useful tool to combat abusive transactions but, because of challenges in interpreting and applying the rules, are hardly a panacea.[147]

Neither the United States nor the United Kingdom has a general statutory antiabuse rule.[148] The U.S. partnership tax rules, which are notoriously complex, contain an antiabuse regulation promulgated by the Treasury that targets tax shelters and other transactions which abuse the partnership form.[149] The regulation is narrower than it first appears, however,

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142. Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1951–61 (2005).

143. *E.g.*, I.R.C. § 163(d) (2006) (limiting the interest deduction allowed for investment interest); *id.* § 183 (2006) (limiting the deductions allowed for activities "not engaged in for profit"); *see* Leandra Lederman, *A Tisket, A Tasket: Basketing and Corporate Tax Shelters*, 88 WASH. U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639557 (describing "'basketing'" as occurring in code provisions in which "particular types of deductions are grouped with the same type of income and are only allowed to be deducted to the extent of that income").

144. *See* Robert J. Peroni, *A Policy Critique of the Section 469 Passive Loss Rules*, 62 S. CAL. L. REV. 1, 3–4 (1988) (arguing that section 469 generates "tremendous costs to the federal income tax system in terms of economic inefficiency, inequity, and complexity").

145. *See* Charles I. Kingson, *The Foreign Tax Credit and its Critics*, 9 AM. J. TAX POL'Y 1, 6 n.14 (1991) (noting that section 269 is "becoming senile with disuse").

146. Graeme S. Cooper, *International Experience with General Anti-Avoidance Rules*, 54 SMU L. REV. 83, 84 (2001); Tim Edgar, *Building a Better GAAR*, 27 VA. TAX REV. 833, 836 (2008); Benjamin Alarie, *Trebilcock on Tax Avoidance*, 60 U. TORONTO L.J. 623, 624–25 (2010).

147. Cooper, *supra* note 146, at 85 ("[A] GAAR will usually become just another part of the tax landscape . . . . What is abundantly clear is that a GAAR does not suddenly embolden a reluctant judiciary to become highly interventionist. It neither unleashes a nuclear winter for advisors, nor serves as a panacea for tax authorities.").

148. The United Kingdom, like the United States, relies on existing judicial antiavoidance doctrines. Cooper, *supra* note 146, at 89.

149. Treas. Reg. § 1.701-2(b) (1995).

and is widely viewed as having failed in its goal of curbing tax shelters that use the partnership vehicle.[150]

While the United States has no general antiavoidance rule, it does have a well-developed (if confusing) body of common law constraints on tax avoidance. These constraints include the related tax doctrines of substance over form, economic-substance doctrine, business-purpose doctrine, and the step-transaction doctrine.[151] Congress recently codified the economic-substance doctrine, which reduces some of the uncertainty associated with unpredictable judicial application.[152] But practitioners question whether a codified economic-substance doctrine would reach the intended target; they express similar skepticism about whether an antiabuse rule would be effective.[153]

Scholarship on regulatory arbitrage—whether related to tax avoidance, derivatives regulation, or telecommunications—tends to focus on the limitations associated with legal constraints.[154] Rifleshot approaches are reactive and difficult to draft effectively. Shotgun approaches may be overinclusive. Broad antiabuse rules reduce certainty and may deter legitimate business transactions.

But the success stories are important too. Technocratic amendments that shut down abusive transactions are dull but usually effective. Tax rules that basket activities together are more effective than judicial tax-avoidance doctrines.[155] While legal constraints are not perfect, further attention to designing effective statutory constraints is a worthy endeavor.

2. Transaction Costs.—In 1981, economist Joseph Stiglitz identified four techniques that, assuming perfectly efficient capital markets, allowed investors to avoid not only all taxes on their investment income, but on their wage income as well.[156] The income tax, in other words, would be

150. Andrea Monroe, *What's in a Name: Can the Partnership Anti-Abuse Rule Really Stop Partnership Tax Abuse?*, 60 CASE W. RES. L. REV. 401, 407 (2010).

151. Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5, 5 (2000).

152. Health Care and Education Affordability Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029 (to be codified at I.R.C. § 7701(o)).

153. *See* Interview with Lawyer 1, *supra* note 45 ("An anti-abuse rule may not change things. If you are a responsible practitioner, you are applying it in your head anyway.").

154. *See, e.g.*, SCHOLES ET AL., *supra* note 25, at 137 (emphasizing rules and regulations applicable to arbitrage); *see generally* Knoll, *supra* note 26 (explaining how the put–call parity theorem has been used to circumvent legal restrictions); Howard E. Abrams, *Special Report: A Close Look at the Carried Interest Legislation*, 117 TAX NOTES 961 (2007) (exploring proposed code section 710 and the gaps in its coverage).

155. *See* Edgar, *supra* note 146, at 874 (noting the under inclusiveness of judicial antiavoidance doctrines with respect to transactional substitution techniques); Lederman, *supra* note 143 (accepting that basketing may be over inclusive but finding this preferable to the economic substance doctrine, which is subject to manipulable motive and purpose inquiries).

156. Joseph E. Stiglitz, *Some Aspects of the Taxation of Capital Gains*, 21 J. PUB. ECON. 257, 259 (1983).

optional—if it were not for the heroic assumption about perfect capital markets.[157] As every deal lawyer knows, countless brilliant plans that reduce regulatory costs on paper have been discarded because of some real-world problems related to transaction costs. In this context, I use transaction costs in the Coasean sense: the costs associated with market transactions, including search costs, asymmetric information between the buyer and the seller, bargaining costs, moral hazard and other instances of strategic behavior, and monitoring or enforcement costs. Thus, it is not strictly the explicit costs of the avoidance strategy, such as the fees to lawyers or investment bankers, that kill the deal. Rather, many arbitrage strategies increase other costs associated with the avoidance transaction by exacerbating agency costs between managers and shareholders, increasing information costs by creating more complexity in the corporate structure, or by creating new counterparty credit risk.

The framework here is derived from the concept of "frictions" in the tax-planning literature, first outlined in Scholes and Wolfson's *Taxes and Business Strategy*.[158] Scholes and Wolfson outline how market frictions impede taxpayers' ability to undertake tax arbitrage.[159] Such frictions most often arise because information is costly and not all taxpayers have the same information; such frictions include moral hazard, adverse selection, counterparty credit risk, search costs, risk aversion, concerns about organizational design, financial-reporting concerns, and other regulatory costs.[160] David Schizer imported these insights into the legal literature and elaborated on the Scholes and Wolfson framework in an article suggesting that lawmakers think consciously about frictions as a constraint on tax planning.[161]

While the tax-planning literature in both law and finance now includes a substantial body of work, there is still much to be gained by explicitly analyzing these frictions as Coasean transaction costs. Doing so allows us to better understand why many deal structures fail to minimize transaction costs

157. The point of Stiglitz's paper, of course, is that any analysis of the effects of capital taxation must focus on imperfect capital markets. *Id.* at 257.

158. SCHOLES ET AL., *supra* note 25, at 9 ("By *frictions*, we mean transaction costs incurred in the marketplace that make implementation of certain tax planning strategies costly."). The textbook, first published in 1992, synthesizes much of Scholes's and Watson's earlier scholarship on tax arbitrage. *See, e.g.*, Myron S. Scholes & Mark A. Wolfson, *The Effects of Changes in Tax Laws on Corporate Reorganization Activity*, 63 J. BUS. S141, S144 (1990) (finding evidence of increased reliance on management buyouts and going-private transactions designed to reduce transaction costs, thereby enabling tax benefits to be realized in a larger number of deals); Myron S. Scholes, G. Peter Wilson & Mark A. Wolfson, *Tax Planning, Regulatory Capital Planning, and Financial Reporting Strategy for Commercial Banks*, 3 REV. FIN. STUD. 625, 627 (1990) (finding that banks trade off costs of reducing regulatory capital and financial reporting income against tax advantages).

159. SCHOLES ET AL., *supra* note 25, at 138–39.

160. *Id.* at 155–76.

161. Schizer, *supra* note 26, at 1314–17.

and—because some firms are better positioned to manage transaction costs than others—allows us to draw some conclusions about the incidence of regulatory costs.

a. Agency Costs.—Recall that, in financial arbitrage, agency costs constrain the ability of portfolio managers to execute arbitrage strategies, as the investors whose money they manage get nervous while waiting for the price differential to correct.[162] A similar dynamic constrains regulatory arbitrage. Regulatory avoidance strategies typically involve more complex structures than had been used previously, and the addition of more complex structures makes the performance of management more difficult for shareholders to understand. Furthermore, the opacity associated with regulatory arbitrage provides opportunities for accounting fraud and can turn a sound investment into a "faith" stock.[163]

Recent contributions to the finance literature establish that agency costs influence whether tax-avoidance strategies will be employed.[164] The foundational papers in finance, such as the Modigliani and Miller capital structure irrelevance theorem,[165] treat taxes as an unavoidable exogenous environmental factor.[166] Tax liability, however, is optional in the sense that corporate managers may avoid tax liability by restructuring transactions. Such transactions often involve structures that obfuscate the underlying economic substance of the transaction from the taxing authorities, and such obfuscation simultaneously shields other rent-extraction activities managers might engage in, such as earnings management.[167]

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162. *See* ROGER LOWENSTEIN, WHEN GENIUS FAILED: THE RISE AND FALL OF LONG-TERM CAPITAL MANAGEMENT 144 (2000) (describing investor panic after the Russian debt default in 1998); Shleifer & Vishny, *supra* note 74, at 36–37 (describing the source of constraints in financial arbitrage).

163. Enron was the extreme example. Its use of off-balance sheet securitization vehicles, which arbitraged gaps between the accounting rules and the economics of the underlying transactions, ultimately led to a loss of faith by investors and a collapse of the stock price. Agency costs failed to constrain planning in the short run but worked in the long run, bankrupting the company before the accounting rules were changed.

164. For a recent literature review, see generally Mihir A. Desai & Dhammika Dharmapala, *Earnings Management, Corporate Tax Shelters, and Book-Tax Alignment*, 62 NAT'L TAX J. 169 (2009).

165. *See generally* Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958).

166. Desai & Dharmapala, *supra* note 164, at 169. More recent finance papers explore firm-level characteristics that explain varied responses to regulatory incentives. *See, e.g.*, Julie H. Collins et al., *Bank Differences in the Coordination of Regulatory Capital, Earnings, and Taxes*, 33 J. ACCT. RES. 263, 289 (1995) ("Evidence presented in this paper supports the proposition that, despite their common production functions, banks vary in their ability and/or willingness to respond to capital, earnings, and tax incentives. In our sample, bank homogeneity is rejected consistently for capital and earnings management and in some cases for tax management.").

167. Desai & Dharmapala, *supra* note 164, at 172; *see also* Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and High-Powered Incentives*, 79 J. FIN. ECON. 145, 146–47 (2006) [hereinafter Desai & Dharmapala, *Incentives*] (introducing a model to understand "what

Mihir Desai and Dhammika Dharmapala highlight this tension between agency costs and tax-avoidance strategies. Because managers can use complex transactions to simultaneously reduce taxes and extract rents from shareholders, they often capture a share of the tax savings—or all of it and then some—for themselves, rather than passing all the savings along to shareholders.[168] Tax-avoidance strategies, thus, can actually reduce firm value by allowing managers to manipulate the share price or otherwise extract rents. Where managers have high-powered, long-term equity incentives, better aligning their interests with shareholders, they tend to engage in fewer tax-avoidance strategies than managers without such incentives.[169] But in firms with strong corporate-governance characteristics—where agency costs are low—managers can engage in more aggressive tax-avoidance strategies without making shareholders nervous. High levels of institutional ownership, for example, predict an increase in firm value from tax-avoidance strategies, controlling for other effects.[170]

Other empirical work in the finance literature shows that agency costs affect the profitability of tax avoidance. Michelle Hanlon and Joel Slemrod, for example, find that the stock price decline associated with tax avoidance is smaller for firms that have good governance (consistent with the idea that for these firms tax avoidance is less likely to trigger concerns about managerial rent seeking).[171] They also find that the stock price decline is steeper for firms in the retail sector, suggesting a branding interaction.[172] Similarly, Mihir Desai and James Hines have demonstrated that stock prices sometimes drop on the news that companies are expatriating, even though such news presages a reduction in worldwide tax liability.[173]

While it is clear that agency costs should constrain regulatory arbitrage, the extent to which they actually do constrain arbitrage is unclear. Agency

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induces firms and managers to engage in transactions exclusively designed to minimize taxes"); Mihir A. Desai, *The Degradation of Corporate Profits*, 19 J. ECON. PERSP. 171, 179–82 (2005) (describing similar strategies at Tyco and Parmalat).

168. Desai & Dharmapala, *supra* note 164, at 183–84.

169. Desai & Dharmapala, *Incentives*, *supra* note 167, at 177.

170. *See* Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and Firm Value*, 91 REV. ECON. STAT. 537, 537–38 (2009) (using a regression analysis and instrumental-variables strategy based on check-the-box regulations to find a positive and statistically significant relationship between institutional ownership and tax avoidance).

171. Michelle Hanlon & Joel Slemrod, *What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News About Tax Shelter Involvement*, 93 J. PUB. ECON. 126, 135–36 (2009).

172. *Id.*; *see also* Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1591, 1616–20 (2006) (suggesting that although Steve Jobs's cash salary of one dollar has positive incentive-based corporate governance implications, the precise dollar amount of the salary is "best explained by its branding effect" as an example of the positive, symbolic branding effect of certain corporate-deal structures).

173. *See* Mihir A. Desai & James R. Hines, Jr., *Expectations and Expatriations: Tracing the Causes and Consequences of Corporate Inversions*, 55 NAT'L TAX J. 409, 423 (2002) (analyzing the drop in Stanley's stock price at the time of its expatriation announcement as an example of stock prices dropping on these announcements).

costs do constrain some arbitrage; empirical work has shown that privately held firms engage in more tax avoidance than public firms,[174] that family owned firms with minority shareholders engage in less tax avoidance than firms with lower agency-cost constraints,[175] and that private firms backed by private equity firms engage in more tax avoidance than management-owned private firms.[176] At the same time, many firms continue to engage in aggressive tax avoidance and other regulatory arbitrage even when it reduces firm value.[177] It may be the case that the manager's private gains from engaging in tax avoidance—say, by manipulating accounting income at the same time to increase the short-term value of executive pay—proves irresistible even when shareholders bid down the value of the stock in the long run.

b. Information Costs and Counterparty Risk.—Regulatory-arbitrage strategies increase information costs. Each party must invest the time and effort to understand the structure and communicate with relevant stakeholders, such as customers, employees, and shareholders. Structures that use derivatives introduce new counterparty credit risk to the transaction, and the parties must assess this risk by acquiring information about the counterparty and monitoring the creditworthiness of the counterparty.[178]

The effect of information costs on regulatory arbitrage is best observed in low-information-cost environments. Recent work by Alex Raskolnikov illuminates how social norms can facilitate tax planning.[179] Loan syndication is a useful example. When loans are syndicated, hedge funds often form part of the loan syndicate.[180] But the funds want to avoid being treated as originators of the loan for tax purposes; loan origination makes the source of the income taxable as income associated with a U.S. trade or business rather

174. *See, e.g.*, Kenneth J. Klassen, *The Impact of Inside Ownership Concentration on the Trade-Off Between Financial and Tax Reporting*, 72 ACCT. REV. 455, 456 (1997) (finding that firms with more concentrated ownership engage in more tax avoidance); Michael B. Mikhail, *Coordination of Earnings, Regulatory Capital and Taxes in Private and Public Companies* 1 (May 1999) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=165010 ("[P]ublic companies leave tax benefits on the table while private companies do not.").

175. Shuping Chen et al., *Are Family Firms More Tax Aggressive than Non-family Firms?*, 95 J. FIN. ECON. 41, 60 (2010).

176. Brad Badertscher, Sharon P. Katz & Sonja Olhoft Rego, *The Impact of Private Equity Ownership on Corporate Tax Avoidance* 3 (Harvard Bus. Sch. Acct. & Mgmt. Unit, Working Paper No. 1338282, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338282 ("[W]e find that PE-backed firms pay 14.2 percent less income tax per dollar of adjusted pre-tax income than non-PE-backed private firms. . . .").

177. *See* Hanlon & Slemrod, *supra* note 171 (reporting stock price declines associated with tax avoidance).

178. *See* Colleen M. Baker, *Regulating the Invisible: The Case of Over-the-Counter Derivatives*, 85 NOTRE DAME L. REV. 1287, 1306 (2010) (describing the importance of counterparty credit risk).

179. Raskolnikov, *Relational Tax Planning*, *supra* note 26, at 1202–04.

180. Jenny Anderson, *As Lenders, Hedge Funds Draw Insider Scrutiny*, N.Y. TIMES, Oct. 16, 2006, at A15.

than a secondary-market purchase that falls within the securities-trading safe harbor.[181] From a business perspective, the hedge funds would like to acquire the loan tranches as soon as the loan is made.[182] In order to reduce taxes, however, the funds wait a couple of days.[183] The hedge funds have no legally enforceable obligation to the bank originating the loan but an informal tax-driven norm developed between the banks and the hedge funds: "Unless something really catastrophic or unexpected happens in the intervening forty-eight hours, the hedge funds will buy, and the lead banks will sell, the loan participations on the same terms they would have accepted at the loan's origination."[184]

Raskolnikov describes similar tax-driven norms related to variable prepaid forward contracts[185] and equity swaps.[186] In each case, the development of the tax-driven norm relies on repeat play, easy dissemination of accurate information, and a credible threat of informal sanctions.[187] These features, commonly associated with social norms, support the broader point that an environment with lower transaction costs facilitates aggressive regulatory planning. An unknown hedge fund with no-name counsel would not be invited into the loan syndicate, or it would have to enter into a forward contract to acquire the loans.

In a related paper, Raskolnikov shows how risk-based tax rules can often be avoided by substituting counterparty risk for market risk.[188] The wash-sale rules, for example, prevent a taxpayer from taking a loss on securities that are repurchased within thirty days.[189] The idea is that the risk of a change in the market price of the security will serve as a friction to deter tax-motivated selling and repurchasing.[190] But a taxpayer might avoid this market risk by selling the securities to a friend with an unwritten and legally unenforceable understanding that the friend will sell the securities back at the same price thirty-one days later.[191] Obviously, this strategy can only be accomplished if you have a friend—someone unlikely to engage in strategic behavior towards you—willing to take the other side of the trade.

Raskolnikov considers under what conditions counterparty risk might serve as a more effective friction than market risk.[192] My point here is a

181. Raskolnikov, *Cost of Norms*, *supra* note 26, at 616–17.

182. *Id.* at 617.

183. *Id.*

184. *Id.* at 617–18.

185. *Id.* at 614–16.

186. *Id.* at 618–20.

187. *Id.* at 621.

188. Raskolnikov, *Relational Tax Planning*, *supra* note 26, at 1183.

189. *Id.* at 1184.

190. *See id.* at 1190 n.26 (recognizing that the waiting period in the wash-sale rule subjects investment decisions to market volatility).

191. *Id.* at 1184.

192. *Id.* at 1239–46.

smaller, descriptive one: These relational tax-planning strategies are most effective for those with the lowest counterparty risk. Counterparty risk, in turn, depends on Coasean transaction costs such as asymmetric information and the risk of opportunistic behavior.[193]

c. Opacity Costs.—Opacity costs are a subset of information costs associated with more complex avoidance strategies. Opacity costs generally limit the number of arbitrage techniques a company can employ. The horizontal double dummy structure, for example, is a commonly used merger structure that allows acquirers to offer more than 60% boot in a merger transaction without triggering gain recognition to target shareholders who receive stock.[194] But the structure requires the creation of a new holding company and corporate structure.[195] The changes are largely cosmetic, but implementing the changes can be time consuming for internal personnel and confusing to both internal and external constituents.[196] And so while the double dummy structure is popular, it is rarely used multiple times by the same acquirer.[197]

There is not always an economy of scale in engaging in multiple regulatory-avoidance strategies. Enron provides one example. As Enron repeatedly set up off-balance-sheet securitization vehicles to exploit a gap between the accounting rules and the underlying economics of the transactions, the company eventually collapsed under the weight of its own gamesmanship.[198] The accumulation of arbitrage strategies made it impossible for internal executives, let alone outside shareholders, to grasp the overall picture.[199]

Opacity costs should be a significant constraint against excessive arbitrage. At the same time, the empirical story here is less compelling than transaction-cost economics would predict. Shareholders do not seem to be as concerned about opacity as they probably should be. Enron had a long run

193. *Id.* at 1185; *see also* Thomas M. Palay, *Avoiding Regulatory Constraints: Contracting Safeguards and the Role of Informal Agreements*, 1 J.L. ECON. & ORG. 155, 157 (1985) (describing how informal contracting can be used to avoid regulatory frameworks).

194. Elizabeth MacDonald, *Double Dummy Beats IRS*, FORBES, Oct. 29, 2001, at 112, 114.

195. Lucian A. Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549, 1564 (2010).

196. *See* Igor Kirman & David M. Adlerstein, *Not For Dummies: Navigating the "Double Dummy" Merger Structure*, M&A LAWYER, Sept. 2008, *reprinted in* DOING DEALS 2010: UNDERSTANDING TRANSACTIONAL PRACTICE, at 36–41 (PLI Corp. Law and Practice, Course Handbook Series No. B-1797, 2010) (surveying the numerous considerations and complications attendant to the implementation of a double dummy merger, from the presigning phase through the postclosing phase).

197. *See id.* at 33 (noting that, while some of the most significant mergers in recent years have used the double dummy technique, it remains underutilized despite its attractive features).

198. *See* Geoffrey P. Miller, *Catastrophic Financial Failures: Enron and More*, 89 CORNELL L. REV. 423, 451 (2004) (postulating that the excessive complexity resulting from more than 3,000 off-balance-sheet arrangements at the time of Enron's collapse contributed to its downfall).

199. KURT EICHENWALD, CONSPIRACY OF FOOLS 559–63 (2005).

before it collapsed.[200] Similarly, the proliferation of mortgage-related securitizations and credit default swaps imposed enormous opacity costs, yet shareholders allowed financial institutions to stack derivative trades higher and higher, unaware of (or ignoring) the increased risk of bankruptcy.[201]

Still, for many small businesses, opacity costs appear to be a powerful constraint. Venture capital-backed start-ups, for example, are normally organized as corporations rather than as partnerships for tax purposes, even though partnerships would appear to minimize tax liability.[202] While much of the preference for the corporate form can be explained by legal constraints and institutional considerations that make the tax losses less valuable than they would appear on the surface,[203] another factor is the complexity associated with operating a new business in partnership form. If a start-up is organized as a partnership, every equity holder becomes a partner in the business.[204] One can replicate the economics of corporate stock options with partnership options or profits interests in the partnership, but maintaining capital accounts quickly becomes overwhelming for a small business, and the tax consequences can be murky.[205]

3. Professional Constraints.—Suppose now that a lawyer has identified an alternate method of achieving the business purpose of the deal that reduces regulatory costs. Assume the new structure is more aggressive and carries some risk that regulators will attack the transaction. The client, cognizant of the risk, prefers the more aggressive structure. The two alternatives are close substitutes economically and strategically, the transaction costs can be managed easily, and no additional statutory or antiabuse constraints apply. The aggressive structure is, in the judgment of the lawyer, legal; if challenged in court, it would most likely stand up. Are there still reasons why the aggressive structure might not be adopted?

The question almost seems quaint. But there are still reasons, under some circumstances, why "perfectly legal" planning strategies are not

200. *Id.* at 33–34.

201. *See* FINANCIAL CRISIS INQUIRY COMM'N, PRELIMINARY STAFF REPORT, SECURITIZATION AND THE MORTGAGE CRISIS 18–21 (2010) (discussing the potential roles that increase in securitization played in the financial crisis).

202. *See* Fleischer, *Rational Exuberance*, *supra* note 36, at 137–38 ("Because a start-up typically is organized as a corporation, . . . its tax losses get trapped at the entity level and only can be carried forward as a net operating loss (NOL), which is less valuable.").

203. *See id.* at 184 (concluding that the "key factors" contributing to the observed preference for the corporate form "are the limited ability of investors to use tax losses, agency costs, the tax treatment of gains, and the complexity of the pass-through structure").

204. *See id.* at 167 (explaining that "[p]artnership tax law treats any employee with an equity stake as a partner, complicating compensation issues and increasing tax liabilities for the employees").

205. *See* Raskolnikov, *Cost of Norms*, *supra* note 26, at 672 ("These uses of reputational capital are inefficient. Considerations that have nothing to do with maximizing the expected value of the contractual relationship skew the optimal allocation of formal and informal enforcement mechanisms. Apparently, the tax benefits exceed the costs of suboptimal contracting.").

executed. These constraints tend to blur together in the minds of the lawyers involved, but for ease of exposition, I separate these constraints into three categories: professional constraints, ethical constraints, and political constraints. Professional constraints are obligations specific to lawyers. These are not legal mandates or American Bar Association guidelines but rather institutional constraints that follow from being a member of the legal profession and a partner at a law firm. Ethical constraints, by contrast, are personal moral obligations specific to lawyers as individuals, separate from any professional or institutional pressures. Finally, political constraints are pressures not to proceed with the planning strategy separate from any legal, professional, ethical, or moral concern.

Professional constraints are primarily driven by law firms' desire to build and preserve reputational capital. As increasing amounts of legal work move to in-house legal teams, offshore legal-services providers, and outsourced temporary attorneys,[206] law firms compete vigorously for work at the regulatory frontier, where the relevant statutes and regulations provide no easy answers. To capture this lucrative work, a firm must have the reputation for providing the right answer, not just the answer that any one client wants to hear. Firms with reputational capital are more respected by regulators; when individual partners with especially strong reputations bless a structure, it can have the effect of sprinkling holy water on the transaction. Knowledgeable clients are willing to pay premium billing rates for this advice. Elite law firms are concerned with maintaining the firm's reputation and maximizing the firm's billable rates, and partners monitor each other to make sure that the firm's reputational capital isn't blown on a transaction that crosses the line.[207]

The economic rents derived from reputational capital are strongest where the law is most complex and uncertain—the regulatory frontier. As one lawyer put it, "Clients don't pay me $900 an hour to tell them that they can do what it says in the regulations."[208] Rather, sophisticated clients seek counsel and judgment when there is no published guidance. What matters is knowing the market practice, the industry lore, and having the ability to exercise sound professional judgment about whether a deal "works." Only large law firms that can call on a wide variety of specialized expertise can provide this service effectively. Knowledge of industry norms gives a lawyer an edge in negotiations, as it puts a party seeking to depart from those

206. *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760–61, 765–67 (listing the rise of in-house counsel and increased global competition from legal service providers in India and areas with lower labor costs among the pressures on the large law-firm model).

207. *See* Scott Baker & Kimberly D. Krawiec, *The Economics of Limited Liability: An Empirical Study of New York Law Firms*, 2005 U. ILL. L. REV. 107, 148 (discussing the concern with maintaining reputational capital).

208. Interview with Lawyer 3, *supra* note 47.

norms on the defensive.[209] Knowing market practice was also described, however, as a key element to regulatory planning. "Market practice is important in transactions that have something new," explained one tax lawyer.[210] He offered new financial instruments as an example: "You had no tax rules at first. Firms that had a lot of that practice would talk to each other, figure out the rules."[211] Only firms that practiced regularly in the gray area, where there was no published guidance, had the confidence and expertise to offer credible advice to clients.[212]

Preserving this reputational capital can deter firms from getting too aggressive.[213] But there are several reasons why these professional constraints have less bite today.

a. Opinion Shopping.—First, clients increasingly use multiple law firms as outside counsel, which can lead to "opinion shopping" and other pressures to take aggressive regulatory positions.[214] There is pressure on lawyers to read the relevant regulations in a manner that favors their client and will help the deal close.[215] Every lawyer I spoke with acknowledged

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209. *See* Interview with Lawyer 6, *supra* note 66 (stating that the primary value is "knowing market practice[,] [k]nowing the going rates for management fees, knowing how expenses are being whacked up, how people are thinking about industry terms").

210. Interview with Lawyer 1, *supra* note 45.

211. *Id.*

212. *Id.* Thus the emphasis in law firm marketing materials on "cutting-edge" deals. "The greater the uncertainty in the area," explained one tax lawyer, "the more important the market practice." *Id.* Firms that have extensive practices in areas where the law is less settled or exceedingly intricate or both—capital markets, banking, and telecommunications come to mind—can develop a comparative advantage over other law firms. Similarly, in-house counsel rarely sees enough deal flow to develop expertise. Practitioners point to having the expertise to structure deals in the "gray area" (i.e., without definitive written regulatory guidance, cases, or rulings) as a critical element of what they bring to the table. *See id.* ("Market practice is important in transactions that have something new . . . the greater the uncertainty in the area, the more important the market practice."). Closely related is the access to regulators and the power of persuasion that experts in the field can provide. This structuring savvy is sometimes offered as an anecdotal explanation for why clients are willing to pay lawyers higher and higher fees. Explained one lawyer:

> Here's one data point. In London, a few lawyers are billing £1,000 an hour [over $2,000 an hour at the time]. They are all tax lawyers. The premia flow to the specialists. It's not the negotiating skill, the identifying and allocating business risks that comes with experience. It's the structuring.

Interview with Lawyer 4, *supra* note 52.

213. *See* Canellos, *supra* note 23, at 56 ("Practitioners who have a reputation for knowledge and experience in real transactions are, needless to say, given a warmer reception [by the IRS] than those who are less well known or are known for participating in tax shelter or other aggressive transactions.").

214. *See* PATRICK SCHMIDT, LAWYERS AND REGULATION: THE POLITICS OF THE ADMINISTRATIVE PROCESS 195–96 (2005) (discussing the limited influence of lawyers on regulatory compliance culture); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 900–01 (1990) (hypothesizing that increased client sophistication will reduce information asymmetry and dissipate lawyers' power to act as gatekeepers).

215. *See* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1907–13 (2008) (describing the

some degree of pressure that made it difficult to exercise sound professional judgment, although no one admitted to crossing the line.[216] In the old days, clients tended to rely on a single firm as outside counsel for most deals.[217] This is less true today. "Clients now use 100 different law firms. You have to fight for every piece of business."[218] Clients sometimes exert pressure explicitly by threatening to take business elsewhere.[219] But other forms of pressure are more subtle. Clients also exert pressure by pointing to what other lawyers have advised.[220]

b. Internal Pressure.—Second, significant pressure can arise within the law firm. Corporate lawyers, focused on getting the deal done, are not always fascinated by the intricacies of the Internal Revenue Code or the Investment Company Act. Furthermore, deals develop momentum, and it can be daunting for a tax lawyer or securities lawyer to step in and halt a deal with dozens of people working on it.[221]

c. Decline of Lockstep.—Third, a shift away from lockstep compensation among law firm partners gives lawyers an increased financial

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elastic tournament, marked by lateral mobility, as straining ethical decisions by large law-firm partners).

216. Interview with Lawyer 3, *supra* note 47; Interview with Lawyer 4, *supra* note 52; Interview with Lawyer 6, *supra* note 66.

217. Gilson, *supra* note 214, at 901 n.69.

218. Interview with Lawyer 6, *supra* note 66.

219. More often the pressure is implicit. "You're not generally beholden to a client, but it can happen occasionally. Usually the pressure is much more subtle. It's wanting to make people happy—desire to please." Interview with Lawyer 4, *supra* note 52.

220. *Id.* This lawyer explained the Peter Canellos syndrome: "You give the advice, and the client responds, 'Well, I'm surprised, because X says it works,' even if Peter didn't say that. The client says, 'Peter is a smart guy. If he says it works, how can he be wrong?'" *Id.* (Canellos is a well-regarded tax lawyer at Wachtell, Lipton, Rosen & Katz.) *See* Interview with Lawyer 1, *supra* note 45 ("When that happens, I feel the squeeze, but I'm not going to give somebody an opinion I'm not comfortable with. It might give me some real pause—why can this guy give the opinion if I can't?").

221. "Pressure also comes from the desire to close the deal that you started. Sometimes the facts change as the deal progresses. The ownership structure may shift subtly, or a client may shed some of the economic risk associated with holding a security." Interview with Lawyer 4, *supra* note 52.

> Does it force people to cross the line? No. But there's more risk when they close the deal than when they started. A corporate lawyer will come in and say, "Are you really telling me that we can't close?" In a gray area, maybe it's hard to say that you can't close the deal.

Id.

> Do corporate lawyers pressure you? Absolutely. The first thing the corporate lawyers says is "Really? Is this a real problem or are you just being an old lady about this?" Corporate lawyers push to find out just how much better it is from a tax perspective. As a tax lawyer, to the extent you have to change the deal, you act with restraint. They're going to ask why. And you have to explain it in technical terms. And you need credibility.

Interview with Lawyer 1, *supra* note 45.

incentive to be aggressive. Financial incentives influence lawyers' willingness to take aggressive positions. The largest New York firms tend to be compensated lockstep or within a narrow band. This takes away "the greed incentive."[222] The elite firms focus on building and maintaining long-term reputational capital; there is no incentive to be aggressive because you don't want to "screw the golden goose."[223] Furthermore, a few firms are still general partnerships, which adds the possibility of putting partners' personal assets at risk.[224]

Most law firms, however, have evolved towards the Eat What You Kill model, where compensation is tied in significant ways to the amount of business a partner generates.[225] Even tax partners, who were traditionally thought of as service providers to the corporate partners, feel increasing pressure to create a book of business.[226] "There's an incentive to make more money," one lawyer explained, "to get into the grayer area."[227] The financial incentive isn't likely to turn good lawyers into scofflaws but may shape subconscious decisions and temperament.[228]

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222. Interview with Lawyer 5, *supra* note 59; *see also* Interview with Lawyer 7, in N.Y.C. (Sept. 12, 2007) ("Firms are more aggressive when they are not on lockstep. People are looking for the business.").

223. Interview with Lawyer 5, *supra* note 59.

224. Interview with Lawyer 2, *supra* note 46 ("We're also a general partnership. This keeps us more conservative in our advice. LLPs may have reputational capital, but there's a difference between reputational capital and putting your personal assets at risk.").

225. *See* MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 7 (2004) ("Partners continue to compete for compensation, status, and job stability on an ongoing basis, with their ability to generate revenues serving as the primary scorecard."); Galanter & Henderson, *supra* note 215, at 1910 (observing that firms evaluate partners' profitability primarily based on billed hours and fees). *See generally* Robert W. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. L. 1061, 1067 (2001) ("The most dramatic evidence of the changing times is the reallocation of a firm's income in favor of partners with loyal client bases, an event that often is combined with a consolidation of management in the hands of these same lawyers.").

226. One lawyer stated,

> The new law firm economic model puts pressure on tax partners. You're not just a service provider anymore. You have your own clients. To get to higher levels of compensation, you need a book of business. There's pressure to think about client relationships more. When you aren't in a lockstep system, and there's a lateral partner market out there, there's more incentive to be aggressive. On the other hand, a lot of us think long term. Why risk it?

Interview with Lawyer 3, *supra* note 47.

227. Interview with Lawyer 4, *supra* note 52.

228. *See* REGAN, *supra* note 225, at 7 ("Partners continue to compete for compensation, status, and job stability on an ongoing basis, with their ability to generate revenues serving as the primary scorecard."). One tax lawyer stated,

> It does help if you are lockstep, or modified lockstep with gates, where everyone makes the same amount for a few years, then you go up in lockstep provided you make the hurdle at ten years, fifteen years, and so on. Because then you are always doing what's in the best interest of the firm. Without lockstep, there is still personal integrity at work, but probably you are being swayed subconsciously by the economics.

Interview with Lawyer 1, *supra* note 45; *see also supra* text accompanying note 225.

d. Lateral Mobility.—Fourth, a robust lateral partner market increases financial incentives to be aggressive in order to build a portable book of business. Traditionally, elite law firms promoted from within.[229] As competitive pressures have increased, lateral mobility has increased, as firms seek to acquire lawyers or practice groups with expertise in lucrative fields.[230] Lawyers at the top of the game have a powerful economic incentive to move laterally and capture the economic benefits of their expertise.[231] On a darker note, law firms are more likely to fire underperforming partners.[232] Preserving the reputational capital of one's firm may appear less compelling if one's future with the firm is uncertain.

e. Changes in Legal Education.—Fifth, changes in legal education have affected how lawyers read statutes. Several tax lawyers felt that changes in legal education have made lawyers overly aggressive in how they interpret statutes.[233] It's difficult to overstate the importance of statutory interpretation to tax law. Transactions often fall into gaps where the Internal Revenue Code provides no clear guidance, and practitioners must do the best they can.[234] For many years, tax lawyers practiced purposive statutory interpretation.[235] But younger lawyers increasingly embrace literalism as a method of statutory interpretation, relying on the plain meaning of the words to justify a favorable result.[236] When combined with the heavy doses of legal

229. *See* William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms* 30–31 (Ind. Univ. Maurer Sch. of Law–Bloomington, Research Paper No. 136, 2009), *available at* http://ssrn.com/abstract=1407051 (discussing Cravath, Swaine & Moore's practice of promoting from within the firm).

230. REGAN, *supra* note 225, at 35 ("As one partner puts it, 'The market is changing quickly . . . . Firms can't develop resources organically fast enough to keep up. They have to go outside to get talent.' . . . In contrast to a generation ago, an increasingly large percentage of law firm partners are not associates who are promoted from within, but arrivals from other firms.").

231. The financial incentive to move laterally is muted at the most elite firms, which offer high compensation that is difficult to match even by high-producing lawyers at nonlockstep firms. *Cf.* Henderson & Bierman, *supra* note 229, at 12 (noting that single-tier firms have less partner lateral movement than two-tier firms); *id.* at 14 ("This observation suggests that highly profitable firms—most of them single-tier—are not dependent upon lateral mobility to generate high profits.").

232. *See id.* at 14–15 (finding empirical evidence of "deliberate shedding of partners who are in less lucrative practice areas or are perceived as underperforming" among firms in the middle of the profitability spectrum).

233. *See* Joseph Bankman, *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. REV. 149, 151–52 (2001) (postulating that law schools' renewed emphasis on textualism is partially responsible for young tax lawyers' text-based statutory interpretation, which conflicts with senior tax lawyers' standards-based statutory interpretation).

234. Interview with Lawyer 6, *supra* note 66 ("The only real constraint is what do you think Congress meant. What is the best account, using a theory of language. Otherwise it's nihilism.").

235. *See* Bankman, *supra* note 233, at 150–51 (observing that many tax lawyers who graduated from law school between 1936 and 1956 favored a nontextual method of interpreting tax statutes).

236. *See* Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 4 (2004) (voicing concern that tax lawyers are using the textualism movement to create tax shelters).

realism and critical legal theory received in law school, this creates a recipe for aggressive, self-serving statutory interpretation.[237] "Since there's no right answer anyway," one lawyer explained, "I might as well choose the most favorable meaning for my client."[238]

Many tax lawyers try to be conscientious about adhering to congressional intent. At the same time, their interpretation is focused on the language of the statute, ancillary evidence in the regulations, and legislative history, not deeper questions of public policy.[239] Furthermore, lawyers feel obligated to defer to the client's wishes, and they worry that clients may listen selectively. "Part of the problem is you just want the client to make an informed decision. You tell them, 'I'm giving you a should opinion, but it's got a lot of hair on it.'"[240] But clients focus on the bottom line—it's a "should" level opinion—rather than the risks detailed in the opinion.

f. Drinking the Kool-Aid.—Finally, specialized practice can lead to specialized norms that strike outsiders as absurd. Enron and the other corporate governance scandals of recent years have shown that lawyers can get too close to clients and lose perspective.[241] One tax lawyer was concerned about "excessive specialization."[242] There is an "element of drinking the Kool-Aid."[243] "If all you are doing is spouting market practice," he explained, "you lose touch with what may be a gap between market practice and the right answer."[244] Several lawyers explained the practice of options backdating in this way.[245] A lot of lawyers "go native," one noted.[246]

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237. *See supra* note 234 and accompanying text.

238. Interview with Lawyer 8, in N.Y.C. (Sept. 11, 2007); *see also* Interview with Lawyer 6, *supra* note 66 ("Excessive literalism, combined with nihilism, produces a result that's absurd. There's too much willingness to think that there's no best answer.").

239. *See* Interview with Lawyer 3, *supra* note 47 ("I do think about whether I'm comfortable that the spirit of the law is on our side. If I write a 'should' opinion, then I'm not comfortable unless the spirit of the law is there.").

240. Interview with Lawyer 4, *supra* note 52.

241. *See, e.g.*, Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 19–21 (2002) (discussing the conflict of interest inherent in the external review of Enron's transactions conducted by Vinson & Elkins, LLP, Enron's primary outside counsel).

242. Interview with Lawyer 6, *supra* note 66; *see also* REGAN, *supra* note 225, at 8 ("[L]egal work continues to require more refined specialization. As a result, lawyers are likely to draw many of their norms and much of their practice culture from colleagues working in the same specialty, rather than from the firm as a whole.").

243. Interview with Lawyer 6, *supra* note 66; *see also* REGAN, *supra* note 225, at 41 ("Both professional training and psychological tendencies incline many lawyers to identify strongly with their clients.").

244. Interview with Lawyer 6, *supra* note 66.

245. *See, e.g.*, Interview with Lawyer 4, *supra* note 52 ("The first question that people ask is who else has done it. Then they ask how big are they, and what's their reputation. The problem is that it can lead to something like option backdating. People act like lemmings. If everyone is doing it, it must be okay. And regulators are less likely to do something retroactively. Most clients do not want to be first. Others like to get out front.").

Firms are aware of the pressures to be overly aggressive, and elite law firms employ several strategies to avoid overly aggressive gamesmanship and preserve their long-term reputational capital. While the lateral market is obviously more robust, many firms continue to cultivate talent internally and promote from within.[247] Law firms continue to review legal opinions by committee, ensuring that multiple partners sign off on new structures.[248] Some firms retain lockstep (or modified lockstep) compensation.[249]

4. Ethical Constraints.—Practitioners and academics often speak of a golden age when Wall Street lawyers served as the moral conscience of business. A sense of *noblesse oblige* and an absence of competitive pressure combined to produce legal advice that was conservative, sound, and mindful of the public interest.[250] Other scholars question whether such a golden age ever existed.[251]

Few lawyers today feel any responsibility to consider ethical questions beyond delivering impartial advice to sophisticated, well-informed clients. Even if a lawyer feels ethical qualms about regulatory arbitrage—and I'm not sure I have ever met one who did—she likely views it as her responsibility to provide her clients with all the relevant legal options and to let them choose; her personal moral views are thought to be irrelevant.[252]

Most lawyers view themselves as ethically *obligated* to provide every legal alternative to their clients and to follow the client's lead. Clients, in turn, feel ethically obligated to minimize regulatory costs and maximize returns to shareholders. Expecting a lawyer to advise a client to forego

246. *Id.* ("A lot of lawyers 'go native.' Tax lawyers can get too close to the client. Corporate lawyers too, who pressure tax lawyers to toe the line. In the heat of the moment, you resolve issues in favor of the client.").

247. *See* Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515, 1517 (2006) (noting that a number of general counsels at large firms were promoted from within); Carolyn Kolker, *Making Partner Less Likely as Big Law Firms Face Cash Crunch*, BLOOMBERG BUSINESSWEEK (Feb. 17, 2010), http://www.businessweek.com/news/2010-02-17/making-partner-less-likely-as-big-law-firms-face-cash-crunch.html (indicating that although firms are less inclined to promote from within, firms have still promoted associates to partners).

248. *See* Norman Field et al., *Law Office Opinion Practices*, 60 BUS. LAW. 327, 330–31 (2004) (outlining the various roles that opinion committees play in law firms).

249. James D. Cotterman, *Lockstep Compensation. Does it Still Merit Consideration?*, LAW PRACTICE TODAY (Aug. 2007), http://www.abanet.org/lpm/lpt/articles/fin08071.shtml.

250. *See* REGAN, *supra* note 225, at 30 ("As one Chase official said of Milbank partner Roy Haberkern, if something was 'legally feasible but risky, he would tell his partner that it was a dumb thing to recommend.'").

251. *See* Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 284 (1998) ("If ever there was a true fall from grace, then it must have occurred quite early in the profession's history.").

252. Several lawyers emphasized that clients shared responsibility for aggressive regulatory stances. For example, one stated, "We're just advisors. It's like a criminal defendant's decision to take the stand—ultimately it's the client's decision. Our clients are very sophisticated consumers." Interview with Lawyer 3, *supra* note 47. He noted that many in-house tax departments are run by former New York tax partners. *Id.*

regulatory-cost savings because she feels a little queasy about it is naive. While political costs, branding costs, and other factors might counsel against an aggressive regulatory strategy, the lawyer's personal morality is neither here nor there.

The kind of moral suasion employed by President Obama is thus a particularly ineffective constraint on regulatory arbitrage.[253] This is not because lawyers are dishonest people but rather because they are honest professionals. Lawyers feel an overriding duty to their clients; their clients feel responsible to shareholders. Moreover, many lawyers feel that regulatory-arbitrage opportunities, if contrary to congressional intent, will be corrected by the political process in due course. "I don't spend a lot of time thinking about fairness and distributive justice," explained one tax lawyer.[254] "That's not the business that I'm in."[255]

5. Political Constraints.—While President Obama's entreaty to bank executives was couched in moral terms, it is better understood as a political gambit—a calculated move to stake out the ethical and political high ground. Regulatory arbitrage can be constrained by political costs. Even if a planning technique is legal, executives may be concerned about the "optics" of the deal and how it will be viewed by politicians, regulators, employees, shareholders, and customers.[256] If a regulatory-arbitrage technique goes too far, politicians may respond by enacting new legislation, regulators may focus more attention on the firm, and customers may take their business elsewhere. In theory, norms against retroactive legislation should minimize political constraints.[257] But executives find wrestling with the political branches tiresome and a distraction from the core business, and political

253. *See supra* notes 1–2 and accompanying text.

254. Interview with Lawyer 3, *supra* note 47.

255. *Id.*

256. *See generally* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1279–80 (2009) (describing how corporate attorneys manage legal public relations); *id.* at 1300 ("[A]t times, a lawyer may not be able to provide competent legal advice without taking into account the media ramifications."). Some have disputed whether engaging in tax-avoidance activity—even aggressive tax-shelter activity—is politically costly. *See* Joshua D. Blank, *What's Wrong With Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 541 (2009) ("[L]ittle evidence supports the claim that publicity of a corporation's tax shelter activity would lead to ostracism of the corporation. When the press has reported on high-profile public tax-shelter litigation in the past, the corporations involved have not suffered significant drops in stock price, consumer boycotts of their goods, or calls for management reform, even in cases where courts have issued resounding pronouncements in favor of the government.").

257. *See, e.g.*, David Frisch, *Rational Retroactivity in a Commercial Context*, 58 ALA. L. REV. 765, 765–66 (2007) (discussing the "traditional disrepute" in which retroactive legislation has been held); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1335 (2010) (noting common law attitudes and scrutiny of retroactive legislation).

enemies can use weakness on one regulatory issue to extract gains on other issues.[258]

Lawyers I spoke with noted a difference in risk tolerance between public and private deals. In public deals, one lawyer noted, "structures are usually vetted openly by several law firms," and disclosure serves as an ethical safety valve.[259] But perhaps more importantly, in private deals, the buyer is normally a financial buyer who is laser-focused on after-tax financial returns.[260] Furthermore, as one lawyer noted, private deals have fewer people involved, and "you can make them fully informed without providing a roadmap for the regulators."[261]

Political costs are best understood in the context of corporations' long-term involvement in the political process. As Jill Fisch has explained, "corporate participation in politics extends beyond the purchase of political favors in a spot market."[262] Firms build up political capital in a variety of ways, including soft-money campaign contributions, issue ads, and lobbying expenditures.[263]

Firms with high amounts of political capital can more easily engage in regulatory arbitrage. Lobbying takes place on a deal-by-deal basis, as I discuss in more detail below. Firms that already have relationships with relevant staffers and legislators are in a better position to manage political costs associated with the deal.

Political capital is not distributed uniformly across firms. Larger firms,[264] firms dependent on government policy,[265] diversified firms,[266] and

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258. *See* Matthew T. Bodie, *Mother Jones Meets Gordon Gekko: The Complicated Relationship Between Labor and Private Equity*, 79 U. COLO. L. REV. 1317, 1350 (2008) (acknowledging unions' ability to leverage support for their issues by "dangling [their] support (or opposition)" for issues the corporation deems a priority).

259. Interview with Lawyer 5, *supra* note 59; *see also* Interview with Lawyer 4, *supra* note 52 ("Is there a difference between public and private deals? Yes. The first reason is nefarious—the transparency issue. My advice is that you shouldn't do it if you wouldn't want the IRS to see it. Assume everything is known. But not everyone is like that. Second, in public deals, it's hard for a board to have a high risk tolerance. You have to talk to investors, and they don't like uncertainty. Confusion.").

260. Interview with Lawyer 2, *supra* note 46 ("Creative tax planning is more common in the less public deals, the private equity deals. Especially with financial buyers, who scrutinize the after-tax result. Private deals are more aggressive. They are financial buyers, and they don't have to follow a well-trodden path. In public deals, you are usually buying the entire company. In private deals where you are buying assets, or a division, you can get much more creative.").

261. Interview with Lawyer 4, *supra* note 52.

262. Jill E. Fisch, *How Do Corporations Play Politics? The FedEx Story*, 58 VAND. L. REV. 1495, 1499 (2005).

263. *See id.* at 1504 (highlighting FedEx's investment in political capital through soft money, PAC disbursements, and lobbying expenditures).

264. Amy J. Hillman et al., *Corporate Political Activity: A Review and Research Agenda*, 30 J. MGMT. 837, 839 (2004).

265. Amy J. Hillman & Michael A. Hitt, *Corporate Political Strategy Formulation: A Model of Approach, Participation, and Strategy Decisions*, 24 ACAD. MGMT. J. 825, 829 (1999).

266. *Id.* at 829–30.

firms with high levels of managerial slack[267] are more likely to engage in long-term, proactive political activity. At the same time, these firms with high levels of political capital may be reluctant to spend that capital to reduce regulatory costs on a particular deal.

Political costs are fluid, not fixed. One might think that regulatory agencies would be relatively immune from political pressure.[268] After all, the lawyers who interpret agency rules at the Treasury, SEC, IRS, and elsewhere often display attributes of nonpartisanship and allegiance to the integrity of the regulatory regime they are tasked with interpreting. At the same time though, regulated companies can lobby by dealing directly with agency lawyers, by having their lawyers talk to agency lawyers, and by lobbying the legislature or executive instead of the agency to produce a shift in regulatory policy.[269] I discuss this process in more detail in subpart III(C) below.

III. Implications

This Part III draws on the theoretical framework of regulatory arbitrage to make three additional contributions to the literature. First, in subpart A below, I show how the balancing of transaction costs against regulatory costs can distort regulatory competition. Counterintuitively, this effect should lead policy makers to consider decoupling regulatory regimes from one another. Second, in subpart B, I show how regulatory arbitrage shifts the incidence of regulatory costs away from firms that can best manage transaction costs. Third, in subpart C, I focus more closely on how political constraints can be manipulated.

A. Regulatory Competition

The literature on regulatory competition routinely assumes that parties choose regulatory regimes in order to minimize transaction costs,[270] which, in turn, is sometimes said to create a "race to the top" as regulators adopt more

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267. *See* Martin B. Menzar & Douglas Nigh, *Buffer or Bridge? Environmental and Organizational Determinants of Public Affairs Activities in American Firms*, 38 ACAD. MGMT. J. 975, 991 (1995) (discussing the role a firm's top management philosophy plays in political activity).

268. *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 790 (2007) ("[R]egulatory agencies were designed to weigh technical expertise over politics by insulating the agency from direct presidential control and ensuring that they were headed by persons representing both political parties."); *see also* Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1163–97 (2000) (summarizing internal agency procedures for independent agencies and discussing how this model should combat possible political pressures).

269. *See* Guy L. F. Holburn & Richard G. Vanden Bergh, *Influencing Agencies Through Pivotal Political Institutions*, 20 J.L. ECON. & ORG. 458, 478 (2004) (giving examples of situations where a company would choose to lobby the legislature or executive instead of an agency).

270. *E.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 249 (1985); *see also* William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 304 (1997) (assuming that entrepreneurs and existing firms will migrate to the least costly regulatory system available).

efficient laws.[271] But the presence of regulatory arbitrage distorts the process, leading to results that are inefficient in the short run and indeterminate in the long run.

Because parties may choose to adopt a legal form either because it minimizes transaction costs or because it minimizes regulatory costs, or some combination of both, it's difficult to know whether new legal forms increase or decrease the overall efficiency of the system. When new forms are chosen because they reduce transaction costs, legal innovation presumptively increases efficiency. But when new forms are chosen because they reduce regulatory costs and increase transaction costs compared to the old structure, we lose twice: efficiency is reduced by the increase in transaction costs, and the regulatory burden is shifted onto those who cannot engage in arbitrage. Worse yet, if everyone engages in the arbitrage, all we have done is increased transaction costs with no net change in the incidence of the regulatory burden. The proper response depends on the type of regulatory arbitrage taking place. In the case of economic-substance inconsistency, all that can be done is to write rules that more closely track economic substance.[272] In the case of doctrinal inconsistency, the way out of this dilemma is to decouple the regulatory regimes from each other. This is counterintuitive. Rather than link multiple regulatory outcomes to the choice of a single legal form, each regulatory regime should use rules that attempt, as closely as possible, to track the economic substance of deals in accordance with the policy goals of that regime. So, rather than seek conformity in the tax, securities, and accounting treatment of a given security, we might actually be better off by having each regime operate on a separate track.[273]

Regulatory convergence, in short, is no panacea. While it is helpful in reducing regulatory arbitrage opportunities based on jurisdictional inconsistency, it is actually harmful in the case of doctrinal inconsistency. International financial accounting standards, for example, reduce

271. *E.g.*, O'Hara & Ribstein, *supra* note 29, at 1162–63.

272. Consider the effect of the debt–equity distinction on takeovers. As noted by Robert Bartlett, corporate law has not properly accounted for the distorting effect that tax can have on acquisition financing. *See* Robert P. Bartlett III, *Taking Finance Seriously: How Debt Financing Distorts Bidding Outcomes in Corporate Takeovers*, 76 FORDHAM L. REV. 1975, 1999–2000 (2008) ("[H]aving a tax-efficient capital structure does not necessarily mean a bidder is capable of putting a target's assets to the most productive use."). Because financial buyers—such as private equity funds—typically include more debt in the acquisition financing than strategic buyers and enjoy larger tax deductions as a result, legal rules that encourage boards to sell to the highest bidder are not necessarily efficient. That is, the target's assets may not stand up in the hands of the buyer who would put those assets to their most productive use. The only plausible fix, I think, would be to eliminate the disparate tax treatment of debt and equity.

273. *See* Walker & Fleischer, *supra* note 36, at 443 (observing that increasing conformity may reduce the gaming of reported earnings but increase the gaming of corporate tax deductions).

jurisdictional inconsistency[274] and mitigate the incentive to relocate for accounting purposes.[275] Book/tax conformity, on the other hand, forces firms into trade-offs that can increase transaction costs.[276] The same frictions touted as beneficial in deterring wasteful planning manifest as increased transaction costs when the planning takes place nonetheless.

1. Charter Competition.—First, consider the race to the top said to occur when different jurisdictions compete to serve as the seat of incorporation.[277] Many legal systems, including the United States', define a corporation's location for internal affairs and other legal purposes according to a formalistic place of incorporation rule.[278] If managers choose a jurisdiction on the basis of the set of background legal rules that will best minimize transaction costs for the firm, then we can expect such "open access" competition to produce an efficient result. But managers do not necessarily choose a jurisdiction that minimizes Coasean transaction costs. In some circumstances, managers will opt to minimize taxes by choosing a tax haven or tax-friendly jurisdiction, even if that jurisdiction is suboptimal from the standpoint of corporate law.[279] To preserve the benefits of regulatory competition, Mitchell Kane and Ed Rock argue that we should decouple the rule that governs where a corporation is located for corporate law purposes from the rule that governs where a corporation is located for tax purposes.[280] Specifically, they argue that a corporation should be located by reference to its nominal place of incorporation for corporate law purposes but by reference to its real seat for tax purposes.[281] By decoupling the two inquiries, tax no longer distorts the choice of where to incorporate, allowing the benefits of regulatory competition to accrue and presumably allowing for the evolution of more efficient corporate law.[282]

More broadly, doctrinal consistency is often offered as a solution to aggressive regulatory gamesmanship. If tax and financial accounting conform, managers can game the tax system, or the accounting rules, but

274. *See* Janice Grant Brunner, *All Together Now? The Quest for International Accounting Standards*, 20 U. PA. J. INT'L ECON. L. 911, 912 (1999) (discussing the ability of international financial standards to reduce inconsistency between countries and thereby reduce transaction costs).

275. *See* Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1266–67 (2008) (discussing the incentive that the unique American taxation policy gives to firms to relocate to lower-tax jurisdictions).

276. *See* Walker & Fleischer, *supra* note 36, at 443 ("Any move might affect tax- and accounting-induced distortions in the selection of equity instruments.").

277. *See* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 919–20 (1982) (arguing that Delaware's preeminence in incorporations is due to a "climb to the top" that maximizes shareholder wealth); Romano, *supra* note 270, at 226.

278. Kane & Rock, *supra* note 275, at 1235.

279. *Id.* at 1230.

280. *Id.* at 1283.

281. *Id.* at 1256.

282. *Id.* at 1251–52.

they cannot do both at the same time.[283] But using one regulatory system as a friction against gaming another creates real transaction costs; in the absence of a compelling political-economy justification, we would be better off decoupling the two regimes and allowing each regulatory scheme to operate on its own track.

2. *Choice of Entity.*—The last thirty years has seen the creation of new business entities, including the Limited Liability Partnership (LLP), Limited Liability Company (LLC), and Low-Profit LLC (L3C),[284] and new financing entities, such as the Structured Investment Vehicle (SIV),[285] Collateralized Debt Obligation (CDO),[286] CDO-squared,[287] and CDO-cubed.[288] Scholars who focus on the efficiency gains from the evolution of legal forms sometimes dismiss the actual motivation for the new form, which is often a desire to reduce regulatory costs. Larry Ribstein, for example, focuses on the increased use of partnership-type forms as a method of reducing agency costs.[289] But the regulatory motive behind the choice of the partnership form (avoiding the corporate tax)[290] makes it difficult to know whether the shift increases or decreases agency costs. The structure of the Blackstone IPO, discussed above, can only be viewed as a method of reducing the tax owed by Blackstone on its carried-interest distributions. Its use of the partnership form increased agency costs between managers and shareholders; without Blackstone's strong governance record, the structure

283. *See* Mihir A. Desai, *The Degradation of Reported Corporate Profits*, 19 J. ECON. PERSP. 171, 189–90 (2005) ("[S]uch a system would also remove a distinction that has served to enable opportunism."); Daniel Shaviro, *The Optimal Relationship Between Taxable Income and Financial Accounting Income: Analysis and a Proposal*, 97 GEO. L.J. 423, 426–27 (2009) ("Absent our two-book system . . . [c]orporate executives would often be forced to choose between the earnings management goal of increasing reported income and the tax planning goal of reducing it, rather than being able, in many cases, to enjoy the best of both worlds.").

284. *See generally* Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010) (enumerating the common features and tax implications of L3C entities).

285. An SIV is frequently known as a Special Purpose Entity (SPE). *See* Frank A. Partnoy, *Shapeshifting Corporations*, 76 U. CHI. L. REV. 261, 268 (2009) (describing a structured investment vehicle as a "special purpose entity" that issues short- and medium-term debt to finance the purchase of long-term securities).

286. *See* Frank Partnoy & David A. Skeel, Jr., *The Promise and Perils of Credit Derivatives*, 75 U. CIN. L. REV. 1019, 1022 (2007) (defining a CDO as "a pool of debt contracts housed within [an SPE] whose capital structure is sliced and resold based on differences in credit quality").

287. *See id.* at 1044 (reporting that CDO-squared transactions include assets consisting of a portfolio of other CDOs and asset-backed securities).

288. *See id.* (characterizing CDO-cubed transactions as those involving a portfolio of CDO-squareds).

289. Larry E. Ribstein, *Partnership Governance of Large Firms*, 76 U. CHI. L. REV. 289, 309 (2009).

290. Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393, 394 (1997).

never would have worked.[291] Similarly, the S ESOP structure employed by Sam Zell in the Tribune buyout can only be explained by the projected tax savings and the fact that the principal owner and agent–manager were one and the same (Zell). In each case, it is inconceivable that the principals would have designed a similar structure in the absence of regulatory considerations.

Decoupling tax and corporate law again holds promise. In the case of unincorporated entities, the tax regulations have already partially decoupled tax from corporate law. Prior to 1996, the tax classification of an unincorporated entity turned on a multifactor test that included such corporate law attributes as limited liability, centralized management, unlimited life, and free transferability of interest.[292] Under the check-the-box regulations, most unincorporated entities may now elect whether to be treated as a partnership or a corporation for tax purposes.[293] We still have a corporate tax; its boundaries are now effectively enforced by the publicly traded partnership rules rather than corporate law attributes.[294] By making the tax classification of unincorporated entities elective, tax no longer distorts an entrepreneur's decision whether to organize as a limited partnership, an LLC, or whatever new entity comes next.

3. Executive Compensation.—Both the legal and finance literature generally assume that executive compensation is designed to minimize agency costs between managers and shareholders.[295] Compensation packages evolve to better meet the shifting needs of shareholders and the

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291. *See* Fleischer, *Taxing Blackstone*, *supra* note 79, at 99 ("The potential for conflicts of interest between public investors and other entities in the Blackstone structure is substantial."); Ribstein, *supra* note 289, at 305 ("Blackstone Group unit-holders get almost no formal control rights.").

292. Victor E. Fleischer, Note, *"If It Looks Like a Duck": Corporate Resemblance and the Check-the-Box Elective Tax Classification*, 96 COLUM. L. REV. 518, 521 (1996) (detailing the factors for classifying an unincorporated entity, before enactment of the current check-the-box classification).

293. Treas. Reg. § 301.7701-3(a) (as amended in 2006).

294. Section 7704 generally treats publicly traded partnerships as corporations for tax purposes. I.R.C. § 7704 (2006).

295. *See, e.g.*, Lucian Arye Bebchuck & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 71 (2003) (explaining that much of the research on executive compensation schemes in publicly traded companies has focused on how such schemes can alleviate the "agency problem"); *Developments—Corporations and Society*, 117 HARV. L. REV. 2205, 2208 (2004) (stating that the traditional view on executive compensation has been that, "if wielded effectively, [it] is a tool that can minimize agency costs and maximize shareholder value"). Some legal scholars argue that executive compensation is also designed to camouflage managerial rent extraction. *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 67–70 (2004) (illustrating the incentive to adopt compensation packages that obscure the total amount of compensation in order to limit outside criticism); Jesse M. Fried, *Share Repurchases, Equity Issuances, and the Optimal Design of Executive Pay*, 89 TEXAS L. REV. (forthcoming 2011) (asserting that standard equity-based pay provides incentives to managers to engage in inefficient share repurchases and equity issuances).

executives they employ through the firm.[296] But even accepting that general framework as correct, the regulatory treatment of different forms of compensation distorts the composition of packages offered to managers. Indeed, in the context of executive compensation design, regulatory costs appear to dominate transaction costs.

For many years, the accounting rules encouraged the use of stock options. Under the old rules, stock options were not treated as an expense on the income statement, unlike cash compensation.[297] As a result, the use of stock options increased.[298] In 2004, the accounting rules were revised to treat the current value of stock options as an expense, and the use of options has declined.[299] In this case, by focusing the accounting rules to match more closely the economics of the instruments offered to executives rather than the form, the regulatory-arbitrage opportunity was closed.

But other opportunities remain. In the private equity context, a disparity exists between the tax treatment of management fees and carried interest.[300] This creates two distortions. First, fund managers maximize the amount of compensation received in the form of carried interest, even at the expense of increasing agency costs.[301] In some cases, agency costs limit the ability of fund managers to take full advantage of the tax subsidy for carried interest.[302] In those cases, however, fund managers can still take advantage of the second technique. In a maneuver known as a management-fee conversion, fund managers who are contractually entitled to a management fee at year-end will voluntarily give up that payment in early December in exchange for a priority share of carried interest the following year.[303] While one could gin up a transaction-cost-minimizing explanation—carried interest better aligns the incentives of the manager and investor under some circumstances—it is well understood that the transaction is tax driven and would not take place in the absence of the tax subsidy.[304]

Most current distortions in executive compensation are caused by economic substance inconsistency, not doctrinal inconsistency. Decoupling

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296. *See* Sharon Hannes, *Compensating for Executive Compensation: The Case for Gatekeeper Incentive Pay*, 98 CALIF. L. REV. 385, 395 (2010) (describing the growth in executive pay and equity-based executive compensation since 1990).

297. 148 CONG. REC. 3,879 (2002) (statement of Rep. Staria).

298. Paul J. Carruth, *Accounting for Stock Options: A Historical Perspective*, J. BUS. & ECON. RES., May 2003, at 9, 9.

299. *See* Walker & Fleischer, *supra* note 36, at 403; David I. Walker, *Evolving Executive Compensation and the Limits of Optimal Contracting*, 63 VAND. L. REV. (forthcoming 2010).

300. Fleischer, *Missing Preferred Return*, *supra* note 36, at 109.

301. *See id.* at 79 (discussing how the disparate treatment of carry and management fees encourages fund managers to receive more compensation in the form of carry).

302. *Id.* at 114.

303. Gregg D. Polsky, *Private Equity Management Fee Conversions*, 122 TAX NOTES 743, 749 (2009).

304. *See id.* at 750 ("In fact, the odd design of the additional carried interest is entirely tax-driven.").

will not help. As with the move to expensing stock options, policy makers who want to encourage the evolution of executive compensation in a way that maximizes shareholder value should adopt regulatory rules that more closely track the underlying economics.

B. Incidence of Regulatory Costs

Others have observed that regulatory arbitrage is only available to the wealthy and sophisticated.[305] But it is not only the expensive lawyers and bankers that make regulatory arbitrage costly. Even among the well-heeled, firms and individuals vary in their ability to manage Coasean transaction costs. Firms that can better manage transaction costs can better manage regulatory costs, shifting the burden of those regulatory costs on to those that cannot.

1. Seasoned Firms Versus Start-ups.—Entrepreneurs and start-up firms operate in an environment with high transaction costs.[306] In the venture capital context, unique contract structures have developed to overcome the problems of extreme uncertainty, asymmetric information, and double-sided moral hazard.[307] While venture capital contract structures are reasonably effective in facilitating investment, the need to adhere to the industry standard limits the structuring choices available to entrepreneurs.[308] As I have noted elsewhere, venture capital-backed start-ups are almost always organized as corporations rather than as partnerships, even though partnerships would appear to be more tax efficient.[309] One reason is that, while it is technically feasible to organize a start-up as a partnership, it can be cumbersome to operate a business in this form, particularly if you want to compensate employees with options.[310] Venture capital-backed start-ups, therefore, bear a higher incidence of corporate tax than other similar ventures, such as retail franchises—often organized as sole proprietorships or LLCs—or larger, private equity-backed portfolio companies—often organized as LLCs.[311]

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305. *See* Knoll, *supra* note 26, at 65 ("Regulatory arbitrage is unfair because the less wealthy and less sophisticated often are unable to avail themselves of the arbitrage and so only they pay the higher regulatory cost.").

306. *See* Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 1010 (2006) (describing how angel investors pass along transaction costs to entrepreneurs in the form of investment terms).

307. Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1077 (2003).

308. *See* William A. Sahlman, *The Structure and Governance of Venture Capital Organizations*, 27 J. FIN. ECON. 473, 518 (1990) (exploring the constraints of venture capital industry standards).

309. Fleischer, *Rational Exuberance*, *supra* note 36, at 137; Joseph Bankman, *The Structure of Silicon Valley Start-Ups*, 41 UCLA L. REV. 1737, 1738 (1994).

310. *See* Fleischer, *Rational Exuberance*, *supra* note 36, at 171–72 (describing the complications surrounding employee options in partnerships).

311. Bankman, *supra* note 309, at 1756.

2. Rich Versus Poor.—Wealthy parties are often in a better position to plan around the rules, thus reducing their own regulatory burden at the expense of others. An entrepreneur with appreciated stock from the technology company she founded may defer paying tax on the gains by entering into a variable prepaid forward contract or making other end runs around the constructive-sale rules.[312] A corner grocer, by contrast, would find the legal and investment banking fees associated with these same strategies prohibitive. Beyond this relatively fixed cost of legal and investment banking advice, however, the advantage of the rich depends on whether they can better manage transaction costs. There is some reason to believe that they can. Relationships can often substitute for formal contractual obligations, and the rich are more likely to have relationships with the necessary counterparties.[313] On the other hand, the non-rich may have deep community-based relationships that can substitute for formal contract. And it's possible that the rich, as tempting political targets, simply have more need for the use of regulatory arbitrage techniques than other groups.

3. Country Mouse and City Mouse.—Sophisticated parties shift the incidence of regulatory costs on to the unsophisticated in several ways. First, sophisticated parties know the value of, and can easily find, elite law firms to facilitate regulatory planning.[314] Second, sophisticated parties bear lower information costs in trying to understand new strategies.[315] Third, they may

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312. *See* Dana L. Trier & Lucy W. Farr, *Constructive Sales Under Section 1259: The Best Is Yet to Come* (describing methods of reducing market risk associated with constructive sale rules), *in* 16 TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS 1217, 1223 (PLI Tax Law and Estate Planning: Tax Law and Practice, Course Handbook Ser. No. J-553, 2002); Raskolnikov, *Cost of Norms*, *supra* note 26, at 669–70 ("Large businesses and very wealthy individuals . . . should be expected to look for more complicated ways of reducing their tax liabilities."); Schizer, *supra* note 26, at 1319 (discussing how wealthy individuals are capable of planning around tax rules).

313. Having said that, it is somewhat speculative to argue that, absent regulatory arbitrage, the poor would be any better off. David Weisbach, for example, has argued that there is no relationship between tax avoidance and progressivity. David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 240 (2002). If tax shelters (or, presumably, tax avoidance generally) were reduced, he argues, "the extra revenue could be used to reduce other taxes on the rich." *Id.*; *see also id.* ("Therefore, the distributional consequences of shelters are basically independent of the efficiency consequences."). Weisbach notes, however, that attacks on tax shelters affect the elasticity of taxable income and thus the efficiency of the tax system overall. *Id.* If a regulatory arbitrage technique is shut down, the rich may be in a better position to lobby Congress to create a new exception to the rules. My only claim here is the more limited one that the rich are in a better position to engage in regulatory arbitrage.

314. *See, e.g.*, Raskolnikov, *Cost of Norms*, *supra* note 26, at 668–69 ("For instance, a tax lawyer without special training may be simply unable to recognize the requirement that an NPC must provide for multiple payments. . . . Thus, it will often take sophisticated tax experts merely to discern how a tax-driven norm works.").

315. *See id.* at 668 ("For instance, to rely on the confidentiality norm, one must be aware, at a minimum, of the disclosure requirement in the Treasury regulations. While the requirement is quite straightforward, we can hardly presume that all (or most) business-people have a working knowledge of these regulations.").

have relationships with counterparties that lower information costs and agency costs. This sort of regulatory planning shifts the incidence of costs to those who cannot engage in regulatory planning, as well as to "honest/irrational" actors that could engage in such planning but choose not to.[316]

4. The Politically Well-Connected.—As I discuss in more detail below, the interpretation of regulatory rules often falls to agency lawyers and congressional staffers. Individuals and companies that are politically well-connected can negotiate the regulatory treatment of a deal in a way that average Joes cannot.

5. Regulatory Nihilism.—Few would attempt to justify a distribution of the regulatory burden that favors the rich, sophisticated, and politically well-connected at the expense of everyone else. Having said that, two common arguments for a laissez-faire attitude toward regulatory arbitrage should be addressed.

The first is often made by public choice theorists, who note that whether regulatory arbitrage is unjust depends on one's prior beliefs about whether regulation serves the public interest.[317] Indeed, the question is even more complicated because the public sector doles out benefits as well as burdens.[318] The distributive consequences of regulatory arbitrage are best evaluated in light of the distribution of benefits as well as the burdens; the distribution of social security, housing, health, and welfare benefits; and the relative enjoyment of national security, parks, schools, and other public goods. The status quo, it might be argued, already reflects a political equilibrium that incorporates a high level of arbitrage by the firms most capable of employing those techniques. Shut down a tax loophole and another will arise in its place.

This view of the regulatory system is too nihilistic by half. Regulatory arbitrage techniques are often unknown to policy makers and the public, and, like roaches, there are dozens hidden in the walls for each one caught in the light. In a world where information is costly to obtain, it seems unlikely that political retribution would find its intended target or that, after the rules are

316. *Id.* at 643–44.

317. *See, e.g.*, O'HARA & RIBSTEIN, *supra* note 32, at 19–20 (advocating a "law market," maintained via contractual choice-of-law clauses, as a means of mitigating burdensome state regulations that at best "suit the *average* citizen, not each individual citizen" they govern); O'Hara & Ribstein, *supra* note 29, at 1154, 1157–61 (arguing that efficiency dictates regulatory arbitrage where legislators and courts are subject to influences that undermine the public interest).

318. *See* James M. Buchanan, *Externality in Tax Response*, 33 S. ECON. J. 35, 36 (1966) ("Implicitly, excess-burden analysis assumes that taxes are collected from the economy in complete independence from the financing of public service benefits. By contrast, I shall assume that taxes are collected solely for the purpose of financing public-service benefits that are enjoyed by the same set of persons as those who pay the taxes.").

changed, the political equilibrium settles in precisely the same spot as before. Market actors certainly do not behave as if they have nothing to hide.

The second argument is that, because regulatory arbitrage is inevitable, we shouldn't bother trying to prevent it.[319] The proposal to reform the tax treatment of carried interest, for example, has been met by the argument that tax lawyers will find a way around the new rules, whatever they are.[320] But legal constraints on arbitrage are, in fact, highly effective most of the time. It's just that the best rules, by effectively shutting down pointless restructuring, allow regulatory regimes to function, and shift the attention of the planners and regulators alike to the next battleground.

C. The Politics of the Deal

In the simple three-party model of regulatory arbitrage (buyer, seller, government), regulatory arbitrage techniques rely on the fact that the government moves first. The government has no seat at the negotiating table; the buyer and the seller plan around the statutes and regulations to minimize regulatory costs and divide the surplus. But what happens when the government moves second?

New deal structures raise novel questions of law. Statutory language is often ambiguous, and how a regulatory regime will treat a particular transaction is a question of interpretation for the lawyers and regulators involved. In such cases, the government can react to the transaction and interpret the law in such a way that denies the parties the regulatory treatment they sought. The government is still bound by precedent, of course, and it must determine the validity of a planning technique under accepted principles of statutory interpretation. Discretion is bounded, not limitless.

The government's process of interpretation is further constrained and shaped by the institutions in which the lawyers and regulators work. Agency lawyers, through their role in conveying the unwritten rules of agency

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319. *Cf.* Martin D. Ginsburg, *Making the Tax Law Through the Judicial Process*, 70 A.B.A. J. 74, 76 (1984) ("[E]very stick crafted to beat on the head of a taxpayer will, sooner or later, metamorphose into a large green snake and bite the Commissioner on the hind part."); David Reilly, *Closing Lehman's Legal Loophole*, WALL ST. J., Mar. 13, 2010, at B16 ("Give Wall Street a rule and it will find a loophole. . . . Regulators and legislators should keep this in mind as they pursue financial overhaul."). Professor Ginsburg was no regulatory nihilist. His point was that, when the government stretches tax policy to achieve a pro-government result, astute taxpayers will convert the rule into a pro-taxpayer strategy; the best government strategy is to stick to tax rules that more closely track underlying economics. I am indebted to Howard Abrams for this insight. *See also* Reilly, *supra* ("The lesson: Regulators should move toward a system where companies are judged by the substance of what they are trying to achieve, rather than meeting the definition of accounting rules.").

320. *See, e.g.*, David A. Weisbach, *The Taxation of Carried Interests in Private Equity*, 94 VA. L. REV. 715, 759 (2008) ("The exact avoidance strategies will depend on the precise legislation, if any, that is enacted, so it is difficult to make definite predictions. Nevertheless, it is clear that avoidance will be relatively easy because of the underlying theoretical problem: the difficulty of distinguishing labor and capital income.").

interpretation, constrain (or allow) arbitrage. And the agencies themselves are political institutions, sensitive to influence by congressional and White House staffers, private-sector lobbying, academic criticism, and media spin.[321]

Under these conditions, the success of a regulatory arbitrage technique depends in part on the parties' ability to persuade regulators to accept a proposed interpretation of the statute and regulations. While this persuasion may involve the expenditure of political capital, it differs from the traditional K Street interest-group lobbying or agency capture. Deal participants spend political capital in a more focused fashion, with an eye towards ensuring the successful completion of a particular deal. My focus here, in other words, is on what happens when the regulatory treatment of a transaction becomes a negotiated deal point.

In many complex transactions, there will be some uncertainty about how the law applies. And even in cases where the application seems straightforward, friendly regulators may bend the interpretation to accommodate a particular transaction. Agency lawyers are on the front lines of interpretation. If a deal involves the issuance of securities, a hostile SEC lawyer can delay the deal for days or weeks—and time kills deals. Some deals require advance tax rulings, and IRS lawyers can make that process smooth, or not.

Sophisticated parties can create new regulatory-arbitrage opportunities by influencing the interpretation of agency lawyers. This is not to say that agency lawyers are systematically captured by particular interest groups. Rather, clients employ deal counsel who can effectively use the power of persuasion, making sound and reasonable arguments to the agency lawyers involved. "The value comes from contacts," explained one securities lawyer.[322] "Educating staffers on behalf of clients named and unnamed."[323] When a transaction poses a new issue that staffers are not familiar with, they will call up the private-sector experts for a briefing.[324]

It helps to be known as an expert in the field. One tax lawyer explained, "Your reputation provides the credibility. Warmer reception, status. In order to properly serve your clients, you need credibility."[325] Another concurred: "Access matters—some regulators get starry-eyed. You want to have guys who can go over the wall."[326] The reputation of the law firm also carries weight. Regulators will at least stop and take a deep breath before shutting

321. *See generally* Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15 (2010) (discussing theories of agency capture and ways to insulate agencies from outside influence).

322. Interview with Lawyer 9, in N.Y.C. (Sept. 11, 2007).

323. *Id.*

324. *Id.*

325. Interview with Lawyer 1, *supra* note 45.

326. Interview with Lawyer 4, *supra* note 52.

down a transaction with the imprimatur of an elite firm. "Many regulators are most interested in not being criticized," explained one lawyer.[327]

Clients can exert pressure in other ways. The otherwise objective and reasonable analysis of agency lawyers can sometimes be constrained by political factors, whether from political appointees at high levels in the administration, or through congressional pressure.[328] Agency lawyers care about the objective, theoretical question of what the law is, but they must also accommodate their supervisors' views, and they act in the shadow of what various members of Congress and their staffs might think. Just as district court judges don't like to get reversed, agency lawyers don't like to have their opinions reversed by someone higher up in the administration or to have their views attacked by Congress, which can always change the law. Congressional staffers can shape the regulatory treatment of a deal if the deal concerns an area where the law is in flux. If a regulatory initiative would hamper a deal, having the ear of a critical Senator, such as Mr. Schumer[329] or Mr. Baucus,[330] can be essential.

The 2008 merger of Wachovia and Wells Fargo provides a paradigmatic example of deal-specific lobbying.[331] In the fall of 2008, as the credit crisis deepened, Wachovia sought out a merger partner to help it absorb staggering losses.[332] After initial discussions with Morgan Stanley faltered,[333] Wachovia courted Citigroup and Wells Fargo.[334] Citigroup and Wachovia reached an "agreement in principle" backed by loss protection provided by the FDIC.[335] The deal provided that Citigroup would acquire Wachovia's banking, investment banking, and wealth management businesses, leaving Wachovia as a publicly traded company with Wachovia Securities and

327. *Id.*

328. *See* Eric Lipton & Raymond Hernandez, *A Champion of Wall Street Reaps the Benefits*, N.Y. TIMES, Dec. 14, 2008, § 1, at 1 (discussing lawyers' successful lobbying of Senator Schumer to defeat an SEC initiative).

329. *See id.* ("Lee A. Pickard, a lawyer representing clients including the Bank of New York, whose employees have been significant donors to Mr. Schumer and other Senate Democrats, turned to Mr. Schumer last year to successfully beat back a regulatory initiative by the Securities and Exchange Commission. 'If you get Chuck Schumer on your side, you are O.K.,' he said.").

330. *See* Peter Lattman, Jenny Strasburg & Naftali Bendavid, *Congress Has Hedge Funds, Buyout Firms in Tax Sights*, WALL ST. J., Jan. 7, 2010, at C1 (discussing Senator Baucus's opposition to carried-interest reform).

331. I am indebted to three of my corporate tax students for their cogent analysis of this deal. *See* Brett Hudspeth, Jennifer Rhein & Kristen Spath, *Wells Fargo + Wachovia: Structure, Tax, and Politics* (Spring 2009) (unpublished student paper) (on file with author).

332. Ben White & Andrew Ross Sorkin, *Morgan Stanley Considers Merger with Wachovia*, N.Y. TIMES (Sept. 17, 2008), http://www.nytimes.com/2008/09/18/business/18morgan.html.

333. Charlie Gasparino & Mary Thompson, *Morgan-Wachovia Deal Is Off the Table*, CNBC (Sept. 21, 2008), http://www.cnbc.com/id/26827870.

334. David Enrich & Dan Fitzpatrick, *Wachovia Chooses Wells Fargo, Spurns Citi*, WALL ST. J., Oct. 4, 2008, at A1.

335. *Id.*

Evergreen Asset Management as its two main operating subsidiaries.[336] While Citigroup and Wachovia struggled to resolve merger issues, Wells Fargo returned to the bargaining table with an offer to buy all of Wachovia for $15 billion.[337]

Wells Fargo engineered its successful bid by lobbying the Treasury Department to issue a Notice changing its interpretation of Section 382, which places limits on an acquirer's ability to use a target's net operating losses, or NOLs.[338] Commentators noted that the Notice allowed Wells Fargo to shelter up to $74 billion in taxable income.[339] Citigroup, by contrast, had suffered massive losses of its own in the credit crisis, reducing its income tax liability to zero and thus reducing the potential value of Wachovia's NOLs.[340] Wells Fargo benefited from exquisite timing. On September 29, 2008, the House of Representatives rejected a proposed $700 billion bailout plan, sending the stock market into a nosedive.[341] Secretary Paulson directed the Treasury to issue Notice 2008-83 the next day, thus making banks more attractive merger targets.[342] The Wells Fargo deal was announced three days later.[343] Citigroup would later secure its own favorable treatment in the form of Notice 2010-2, which allows government to unwind its $25 billion common stock investment through the Troubled Asset Relief Program without triggering an ownership change under § 382.[344]

Once deals are completed, the advantageous tax treatment is rarely overturned, even in cases where the legal argument is weak. In the case of Notice 2008-83, congressional staffers noted that once parties have relied on a notice or similar guidance, it tends to have the effect of law.[345] Lawyers

336. Alistair Barr & John Spence, *Citi to Buy Wachovia Banking Business for $2.16 bln*, MARKETWATCH (Sept. 29, 2008), http://www.marketwatch.com/story/citi-to-buy-wachovias-bank-biz-in-latest-government-backed-deal.

337. *See* Enrich & Fitzpatrick, *supra* note 334.

338. *See* Amit R. Paley, *A Quiet Windfall for U.S. Banks*, WASH. POST, Nov. 10, 2008, at A1 (discussing lobbying efforts prior to the change in interpretation of section 382).

339. *E.g.*, Guhan Subramanian & Nithyasri Sharma, *Citigroup-Wachovia-Wells Fargo* 6 (Harvard Law Sch., Case No. 10-03, 2010), *available at* http://www.law.harvard.edu/faculty/faculty-workshops/subramanian.summer.2010.faculty.workshop.pdf (noting that Wells Fargo was one of the banks who had sufficient profits to capitalize on Wachovia's $75 billion in losses).

340. *See* Subramanian & Sharma, *supra* note 339, at 2, 6 (discussing Citigroup's losses and postulating that Wells Fargo was one of very few banks capable of capitalizing on Wachovia's estimated $75 billion in built-in losses).

341. Carl Hulse & David M. Herszenhorn, *Defiant House Rejects Huge Bailout; Stocks Plunge; Next Step Is Uncertain*, N.Y. TIMES, Sept. 29, 2008, at A1.

342. *See* Lawrence Zelenak, *Can Obama's IRS Retroactively Revoke Massive Bank Giveaway?*, 122 TAX NOTES 889, 890–93 (2009) (arguing that lack of apparent statutory authority for Notice 2008-83 would permit retroactive revocation of the notice).

343. Enrich & Fitzpatrick, *supra* note 334.

344. I.R.S. Notice 2010-2, 2010-2 I.R.B. 251 (Jan. 11, 2010).

345. *See* Jeremiah Coder, *Treasury Inspector General Reviewing Bank Loss Notice*, 121 TAX NOTES 884, 884–85 (2008) (quoting Mark Prater, House Finance Minority Chief Tax Counsel, as explaining that "[t]he ruling is out there. Folks have relied on that. Deals have been done," and quoting House Ways and Means Majority Chief Tax Counsel John Buckley as saying "[w]e all have

sometimes refer to the tax version of the Wall Street Rule, where the IRS is viewed as having acceded to the proffered tax treatment of a deal structure once several deals using that structure have been completed.[346] Revenue Ruling 2002-31, for example, which provides favorable tax treatment for contingent convertible debt, is somewhat difficult to square with the statutory language and policy but was consistent with Wall Street practice prior to the ruling.[347]

Deal-specific lobbying is not performed by traditional lobbyists or government-relations executives. Rather, the negotiation takes place lawyer-to-lawyer, and the private-sector lawyer primarily relies on the power of persuasion, not the power of the purse. Because the questions of legal interpretation often require a thorough understanding of the underlying business deal, agency lawyers often consult with deal lawyers. This offers deal lawyers an opportunity to explain their view of the regulatory treatment of the deal in a favorable light.

Deal-specific lobbying is thus quite different from general-industry-group or even client-specific lobbying of K Street lawyers. It is often performed by Wall Street lawyers or by the D.C. office of a New York firm. With so much at stake, clients value knowing how the deal will be received in D.C.[348] "Ninety percent of the work could be supplied by anyone," explained one M&A lawyer.[349] "But the last ten percent is key. Access to lawyers, contacts, [knowing] what's new, what's the big transaction, [having a] relationship with regulators."[350]

Access to regulators is a key element to practice on the regulatory frontier. The next element is knowing what to do with the access once you have it. Part of it is knowing the market practice and developing the ability to make the most compelling arguments to regulators.[351] Regulators can be persuaded, but it is not enough just to show up and ask for a meeting. Firms often call on former regulators to reach out and get a sense of how a deal will be treated. In the Blackstone IPO, explained one lawyer, "people like Fred Goldberg gave the IRS an advance look."[352] They "took the temperature" of

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personal views. It's somewhat irrelevant. I mean, they did it. . . . I really think you have to see those regulations as at least temporarily having the effect of law").

346. Emily Parker, Acting Chief Counsel, Internal Revenue Serv., Address at the TEI/LMSB Financial Services Industry Conference 1–2 (Sept. 22, 2003), *available at* http://www.irs.gov/pub/irs-utl/tei-92203.pdf. The Treasury and the IRS, of course, disclaim the existence of any such rule, noting the limited resources of the regulators to examine every deal. *Id.* at 2.

347. *See* Trier & Farr, *supra* note 312.

348. Interview with Lawyer 9, *supra* note 322.

349. Interview with Lawyer 5, *supra* note 59.

350. *Id.*

351. Interview with Lawyer 4, *supra* note 52 ("Part of it is experience. Knowing market practice. Sometimes it's the attraction of a key player, an expert in tax, antitrust. Sometimes it's access to regulators. Managing regulatory risk. Making the most compelling arguments to the regulators.").

352. *Id.*

the IRS before proceeding with the deal.[353] The tax department of Skadden's D.C. office is particularly well-known for its ability to play inside baseball.[354]

To address regulatory arbitrage, Congress may be tempted to expand the conditions in which the government gets to move second. Congress may write rules that give regulators broad discretion to interpret the law or may empower regulators to act retroactively to shut down transactions that are deemed abusive in hindsight. The problem is that administrative agencies are political institutions and are responsive to political influences as well as legal precedent. As the Wachovia–Wells Fargo transaction demonstrates, expanding the role of politics in deals hinders transparency and accountability. Furthermore, because seasoned, sophisticated, well-managed firms are savvy about managing political constraints, politicizing deals hardly ensures a just distribution of regulatory burdens.

IV. Conclusion

This Article has provided a theory of regulatory arbitrage that explains how regulatory arbitrage opportunities arise and what constraints firms face when considering those opportunities. As discussed above, these constraints do not affect firms uniformly. Firms that can more effectively manage the constraints can take advantage of more planning opportunities and therefore face a lower regulatory burden than other firms.

This Article is primarily positive, focused on describing the phenomenon of regulatory arbitrage and how it works. Because not all regulatory arbitrage reduces social welfare, the Article makes no normative claims. But, of course, some regulatory arbitrage is likely to reduce social welfare, and policy makers may be interested in curbing regulatory arbitrage. If so, what lessons does this framework provide? While the prescriptive implications of this Article deserve fuller treatment in a future paper, some preliminary observations may be useful to policy makers.

First, legal constraints are often effective. It is worthwhile for lawmakers to consider likely planning responses and address obvious avoidance techniques. But because it is difficult for policy makers to anticipate and address all possible responses, some of the most effective antiplanning techniques are the "silver bullet" responses that either introduce highly effective frictions (like the passive-loss rules or at-risk rules) or directly address the underlying economics, such as through rules that prohibit hedging to avoid risk-based rules.[355]

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353. *Id.*

354. *See* Marisa McQuilken, *Skadden Posts Huge Capital Gains*, LEGAL TIMES, May 5, 2008 (discussing Skadden's "insider access" across various regulatory agencies led by Fred Goldberg, Bob Bennett, and others).

355. *Cf.* Raskolnikov, *Relational Tax Planning*, *supra* note 26, at 1241–42 (noting that traditional market-risk-based backstops "actually used today are significantly more effective than relational ones").

Second, there is no obvious reason why firms that can manage Coasean transaction costs effectively should bear a lower incidence of regulatory costs. It follows that broad antiplanning rules are likely to disproportionately benefit firms that face high transaction-cost barriers, like new firms, entrepreneurial firms, and small business generally. By employing more effective antiavoidance rules, the regulatory burden can be spread more evenly.

Third, policy makers should not rely on moral suasion or ethical or professional constraints on arbitrage. Lawyers have a professional obligation to help their clients manage regulatory costs, and the idea that lawyers would discourage their clients from engaging in behavior that is legal and profitable would not likely be effective, even if all lawyers were saints, which we are not.

Fourth, political costs are increasingly important as a constraint on arbitrage, making political threats against firms that engage in regulatory arbitrage a tempting political tool. But in the long run, the firms that can best take advantage of regulatory-arbitrage opportunities are the very same firms that can best work the political system from the inside, lobbying legislators, staffers, and agency lawyers to preserve favorable outcomes on a deal-by-deal basis. Moreover, engaging regulatory arbitrage in the political arena rather than the legal arena undermines rule-of-law values such as transparency, accountability, and predictability.

In sum, enhancing legal antiavoidance constraints, while imperfect, is likely to be a more fruitful line of attack for policy makers. And while the staffs of congressional committees who draft legislation already do an admirable job of addressing regulatory arbitrage where they can, it may be useful from an institutional perspective to have a few lawyers—perhaps in the Office of Information and Regulatory Affairs, the Government Accountability Office, or another agency—who are specifically tasked with reviewing legislation, anticipating planning responses, and suggesting effective modifications. Because industry responses change over time, it would be especially helpful if public-service-minded, private-sector lawyers held this position for relatively short periods of time.

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Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory

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The crime of blackmail has risen to national media attention because of the David Letterman case, but this wonderfully curious offense has long been the favorite of clever criminal law theorists. It criminalizes the threat to do something that would not be criminal if one did it. There exists a rich literature on the issue, with many prominent legal scholars offering their accounts. Each theorist has his own explanation as to why the blackmail offense exists. Most theories seek to justify the position that blackmail is a moral wrong and claim to offer an account that reflects widely shared moral intuitions. But the theories make widely varying assertions about what those shared intuitions are, while also lacking any evidence to support the assertions.

This Article summarizes the results of an empirical study designed to test the competing theories of blackmail to see which best accords with prevailing sentiment. Using a variety of scenarios designed to isolate and test the various criteria different theorists have put forth as "the" key to blackmail, this study reveals which (if any) of the various theories of blackmail proposed to date truly reflects laypeople's moral judgment.

Blackmail is not only a common subject of scholarly theorizing but also a common object of criminal prohibition. Every American jurisdiction criminalizes blackmail, although there is considerable variation in its formulation. The Article reviews the American statutes and describes the three general approaches these provisions reflect. The empirical study of lay intuitions also allows an assessment of which of these statutory approaches

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(if any) captures the community's views, thereby illuminating the extent to which existing law generates results that resonate with, or deviate from, popular moral sentiment.

The analyses provide an opportunity to critique the existing theories of blackmail and to suggest a refined theory that best expresses lay intuitions. The present project also reveals the substantial conflict between community views and much existing legislation, indicating recommendations for legislative reform. Finally, the Article suggests lessons that such studies and their analyses offer for criminal law and theory.

The crime of blackmail has risen to national attention as a result of the highly public scandal involving David Letterman.[1] Yet as titillating or colorful as the details of one notorious case may be, they hardly provide the only reason to take an interest in this wonderfully curious crime. Indeed, blackmail has long been the favorite offense of clever criminal law theorists. It criminalizes the threat to do something that would not be criminal if one did it. If your acquaintance is having an affair, it is no crime to tell his wife of his infidelity. However, if you *threaten* to do so unless he pays you $100, that threat is criminal—even if he would consider it a bargain and quickly accept your offer. Unlike the similar but uncontroversial category of extortion—which involves conditional threats to engage in *criminal* acts, such as a threat to injure someone unless paid—this disparate legal treatment of the threat and the threatened activity makes blackmail seem like a puzzle or, in a well-known and often-repeated characterization, a "paradox."[2]

Though blackmail is not extortion, something about the use of coercion might seem to comprise the gravamen of the offense. But then, many forms of coercion are not criminal. A source pressed by a reporter to provide information or else face an unflattering portrayal, or an employer pressured to either give her best salesman a raise or watch him quit, may feel as much coercion as the recipient of a blackmail threat, yet this coercion is not criminal. What is it about the nature or circumstances of a threat that make it blackmail and not mere "hard bargaining"?

There exists a rich literature on the issue, with many prominent legal scholars jumping in to offer their accounts.[3] Each theorist has his own expla-

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1. *See* Bill Carter & Brian Stelter, *Extortion Case Raises Questions for Letterman and His Network*, N.Y. TIMES, Oct. 3, 2009, at A1 (describing Robert Halderman's attempt to obtain two million dollars from Letterman in exchange for not revealing Letterman's lurid sexual history); Bill Carter, *Inside CBS, Disbelief at an Arrest*, N.Y. TIMES, Oct. 8, 2009, at B1 (chronicling CBS employees' astonished reactions to the Halderman allegations); Lizzie Widdicombe, *Brainteaser: You've Got Mail*, NEW YORKER, Oct. 19, 2009, at 28 (using the Letterman case as springboard to a discussion of the intellectual riddle of blackmail).

2. *See, e.g.*, James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984) (contemplating the paradox that a blackmailer combines a legal means and a legal end to achieve an illegal result).

3. *See, e.g.*, 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 240 (1988) (noting that "the exploitation principle provides a rationale for blackmail laws where the liberal's unsupplemented harm principle finds only a 'paradox'"); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 797–98 (1998) (proffering a theory of blackmail where the overt act of blackmail serves only the evidentiary function of helping a fact finder separate disclosures of embarrassing information based on acceptable motivations from disclosures based on unacceptable motivations); Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 674–75 (1988) (noting a variety of distinctions between blackmail and business negotiations, such as the fact that instances of blackmail are not constrained by market competition or the hope of future business relations); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 566 (1983) (arguing that blackmail is

nation as to why the blackmail offense exists. Some theories are instrumentalist, explaining the criminalization of blackmail solely in terms of its positive practical effects rather than the wrongfulness of the underlying conduct.[4] Many theories, however, seek to justify the position that blackmail is a moral wrong.[5] It is typical for such theories to defend their moral judgments or assertions by relying on the claim that a stated moral position accords with widely shared moral intuitions. Indeed, the standard methodology for these blackmail theories is to seek a "reflective equilibrium" between general normative principles and shared intuitions about the proper outcome of particular cases.[6]

Blackmail theories thus place considerable reliance on claims about lay intuitions. Yet different theorists make different claims about "our" shared moral judgments regarding particular blackmail scenarios and do so without offering empirical data to support their favored intuition or to refute any other proffered intuition. So who is right? Which theory, if any, accurately captures people's shared moral intuitions about the contours of blackmail? Or are there no such shared intuitions at all? This Article summarizes the

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criminalized because the demand is usually "part of an overall scheme of abuse, itself rife with coercive and fraudulent elements," and that "[b]lackmail is made a crime not only because of what it is, but because of what it necessarily leads to"); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1626 (1993) (suggesting that "the proper test [for whether an act should constitute blackmail] . . . is whether the transaction with the suspected blackmailer generates a relationship of dominance and subordination"); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1873 (1993) (arguing that blackmail prohibition is an "economically rational rule" because "[i]f such threats were lawful, there would be an incentive for people to expend resources to develop embarrassing information about others in the hope of then selling their silence"); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1615 (1993) (defining blackmail as a situation in which the circumstances lead the victim to "prefer to be subjected to a greater rather than a lesser wrong"); Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 163–66 (1980) (turning to the social policies of preventing invasions of privacy, protecting the free press from being outpriced by private negotiation, and increasing the availability of information on public officials to justify the distinction between legal economic transactions and illegal instances of blackmail); Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1820 (1993) (stating that blackmail "diminishes social wealth" and is a "sterile redistributive activity" comparable to "(simple) theft"); Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1903 (1993) (stating that "there is still an obvious incentive-based reason for making blackmail illegal: to avoid being blackmailed by [persons] who might by chance be present, potential *victims* will exercise excessive precautions or reduce their level of innocent, yet embarrassing, activities").

4. *See, e.g.*, Ginsburg & Shechtman, *supra* note 3, at 1850 (applying an economic analysis to the criminalization of blackmail and finding the criminalization consistent with economic rationality).

5. *See, e.g.*, Berman, *supra* note 3, at 798 ("[S]ociety can punish the blackmailer . . . because the [blackmailer] causes (or threatens) harm while acting with morally culpable motives.").

6. Mitchell N. Berman, *Blackmail* (manuscript at 6, 7 & n.7) (on file with authors) (embracing the reflective equilibrium approach and expressing the belief "that most blackmail theorists share these methodological commitments"), *in* OXFORD HANDBOOK ON THE PHILOSOPHY OF THE CRIMINAL LAW (John Deigh & David Dolinko eds., forthcoming 2010).

results of an empirical study designed to test the various competing moral theories of blackmail to see which best accords with prevailing sentiment. Part I reviews the alternative theories, while Part III compares these to the results of an empirical test of lay intuitions.

Blackmail is not only a common subject of theoretical discussion but a common object of criminal prohibition. Every American jurisdiction criminalizes blackmail, although there is considerable variation in statutory formulation. Part II reviews the American statutes and describes the three general approaches these provisions reflect. The empirical study of lay intuitions reported in Part III also allows an assessment of which of these statutory approaches, if any, captures the community's views.

The analyses provide an opportunity to evaluate and critique the existing theories of blackmail and ultimately, perhaps, to develop a refined theory that best expresses lay intuitions. The present project also reveals the substantial conflict between community views and much existing legislation and indicates possible avenues for legislative reform. The Article's conclusion suggests lessons that this study offers and that other similar studies might offer for criminal law and theory.

I. Competing Theories of Blackmail

Theories of the proper basis for the criminal prohibition against blackmail differ profoundly from one another. One reason for this is that, unlike many other crimes, it is not entirely clear whom (if anyone) blackmail harms or victimizes. On one level, the "victim" of a blackmail threat seems to be the person receiving the threat who is forced to pay money (or give up something else of value) to prevent the blackmailer from carrying out the threat. Some theories of blackmail, which we discuss in subpart A, are based on this notion that the threat recipient is properly seen as the crime's victim.

Yet being blackmailed is arguably *less* harmful to that "victim" than if the blackmailer were simply to perform the threatened activity without first making the threat, as the blackmailer is entirely at liberty to do. If the recipient of the threat accedes to the blackmailer's demand, presumably he does so because he finds that preferable to having the blackmailer carry out the threat, as would occur if the demand were rejected. He is therefore in a better situation by virtue of having the option to pay than he would be if the blackmail threat—or, as it could also be seen, the blackmail *offer*—were never made. Some theories, following this logic, conclude that the true victim of blackmail is some other party who, because of the blackmail transaction, is losing access to what the blackmailer would provide that party (typically information) if the blackmailer could not extract value from the threat recipient by engaging in blackmail instead. Subpart B discusses these theories.

Some theories do not depend on any claim that individual cases of blackmail necessarily harm anyone at all. Rather, they defend the criminali-

zation of blackmail on the ground that if blackmail were legal, some overall social harm would ensue, such as a general loss of privacy or an inefficient allocation of resources to investments in protecting secrets.[7] We did not include such theories in our empirical survey because their premises are such as to make them unconcerned with whether any particular case of blackmail, or even the practice of blackmail as a whole, is wrongful or merits blame. Accordingly, these theories make no claim about relying on (or being able to predict) popular views as to when blackmail deserves punishment.

Even without their explicit reliance on lay intuitions of justice to justify themselves, we might nonetheless be interested to see whether such economic theories accord or conflict with lay intuitions. However, the nature of most such theories, at least as expressed in the current literature, lacks sufficient content to actually formulate an offense. That is, these theories may offer a basic explanation of why some form of blackmail offense should exist, but they typically do not tell us with any precision what such an offense should look like.[8] We discuss these theories more fully in subpart C.

Finally, there is the position that the criminalization of blackmail lacks any sound basis and is therefore inappropriate. We discuss this abolitionist position in subpart D.

A. Theories of Blackmail as a Crime Against the Threat Recipient

Two major theories of blackmail see it as fundamentally a crime that victimizes the person being threatened. The first view, set forth at different times and in somewhat different variations by Mitchell Berman and Leo Katz, claims that blackmail is truly a species of extortion, i.e., a threat to engage in a wrongful act. Accordingly, the putative blackmail "paradox" vanishes because both the act and the threat are wrongful. The second view, espoused by George Fletcher, finds blackmail to be a harm to the recipient not by virtue of the threat per se but because of the threat's potential for repetition, which creates the possibility that the recipient will be forced into an ongoing relationship of subordination to the blackmailer.

1. The Wrongful Intention Theory.—Over a series of articles, Mitchell Berman has elaborated and slightly refined what he calls the "evidentiary"

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7. *See, e.g.*, Epstein, *supra* note 3, at 566 ("[T]he [blackmail] demand will not take place in isolation, but will be part of an overall scheme of abuse, itself rife with coercive and fraudulent elements. . . . Blackmail should be a criminal offense even under the narrow theory of criminal activities because it is the handmaiden to corruption and deceit."); Posner, *supra* note 3, at 1832 ("In the face of this uncertainty [if blackmail were legal], the safest guess is that allowing the blackmailing . . . would yield a net social loss equal to the resources expended in blackmailing and in defending against blackmailing [to protect secrets].").

8. Given this limitation, one may wonder about the value of such theories as they relate to the development of substantive criminal law.

theory of blackmail.[9] For Berman, blackmail is wrongful if and only if it would be wrong for the blackmailer to carry out the threatened act.[10] Where the threatened act is inherently harmful or wrongful, as where one threatens to injure another unless paid, the threat presents a routine case of extortion, for which it is relatively easy to justify assigning blame or punishment. Yet even where the threatened act is not wrongful per se, it might also be wrongful based on the actor's culpability in performing it—and this, Berman claims, is the case with blackmail.[11] Further, Berman contends that the threat itself provides evidence of the blackmailer's culpability, i.e., evidence that he knows carrying out the threat will harm the recipient and that, were he to carry out the threat, he would be doing so for that very reason. In earlier writings, Berman described the offender's culpability as rooted in his motivations;[12] in more recent work, Berman discusses culpability in terms of the offender's knowledge and beliefs.[13]

Berman's explicit goal for his theory is that it should track common intuitions regarding blackmail as closely as possible: he is engaged in a process of "reflective equilibrium" in which the general theory is meant to track general intuitive reactions to specific cases.[14] (Berman also thinks this process of rationalizing and seeking to track common moral intuitions is the norm for blackmail theorists.[15])

Somewhat like Berman, Leo Katz advances a test for blackmail that asks whether the threatened activity is itself wrongful.[16] The harm of blackmail for Katz is in forcing the recipient of the threat to choose between two "immoralities," namely, facing the prospect of (1) having to pay for the blackmailer's silence or (2) having the blackmailer carry out the threat.[17] Importantly, and again similar to Berman's view, carrying out the threat

9. *See* Berman, *supra* note 3, at 848–51 (summarizing the evidentiary theory); Mitchell N. Berman, *Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 GEO. L.J. 787, 789 (2006) [hereinafter Berman, *Meta-Blackmail*] (arguing that the evidentiary theory explains why blackmail is coercive); Mitchell N. Berman, Book Review, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 322–25 (2007) [hereinafter Berman, *White Collar Crime*] (putting forth an abridged version of the evidentiary theory); Berman, *supra* note 6 (manuscript at 58–59) (discussing how the evidentiary theory relates to morality).

10. Berman, *supra* note 6 (manuscript at 36).

11. Berman, *White Collar Crime*, *supra* note 9, at 323.

12. Berman, *supra* note 3, at 839–40; Berman, *Meta-Blackmail*, *supra* note 9, at 791.

13. *See* Berman, *supra* note 6 (manuscript at 55, 56 n.118) (dispelling Michael Gorr's blackmail approach by discussing the importance of the actor's belief and knowledge regarding what he "morally ought to do" in the blackmail puzzle).

14. *See id.* (manuscript at 6–7) (discussing individual intuitions in terms of blackmail).

15. *Id.* (manuscript at 7 & n.7).

16. *See* Katz, *supra* note 3, at 1599 (stating that blackmail requires a threat of at least mildly wrongful conduct).

17. *Id.* at 1598.

might be "immoral" not only because of its objective harmfulness but also because of the blackmailer's motivations—such as a spiteful or vindictive decision to expose a secret in retaliation for not having one's demand satisfied.[18]

Like Berman, Katz explicitly relies on moral intuitions he expects readers to share and seeks to generate a theory of blackmail that accords with those intuitions. For example, he rejects Richard Epstein's social-harm account of blackmail on the ground that it does not reflect "our instinctive revulsion at the practice."[19] He summarizes his own account as capturing conduct that is "deemed by us a very major wrong."[20]

Both Berman and Katz, then, think blackmail is wrongful if and only if carrying out the threat would be wrongful. They also have detailed and nuanced views of what would make a threat, or any other conduct, wrongful—and on this broader score, their views sometimes (though not often) differ from one another. Importantly, however, their broader views about wrongfulness are not directly relevant to the project at hand. The present task is to determine the extent to which their view of when and why blackmail specifically is wrongful tracks common lay views of that same issue. As to blackmail in particular, Berman and Katz take the same position: the wrongfulness of blackmail depends on the wrongfulness of the threatened act. Significantly, this view of blackmail could be "right" (in the sense of tracking lay intuitions) even if neither Berman nor Katz is right in his broader positions as to what makes actions wrongful. In other words, if laypeople consistently give the same answer to the questions (1) "is this blackmail?" and (2) "would carrying out this threat be wrongful?" then they are employing the Berman/Katz approach to blackmail, even if they do not share Berman's or Katz's views regarding *why* carrying out the threat would be wrongful. If the driving criterion behind lay assessments of blackmail is

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18. *See id.* (noting the case where a threatened act "is immoral only because, if it were to be done, it would be done for purely retaliatory reasons—retaliation for [the victim's] refusal to pay"); *id.* at 1600 (discussing the nonhiring of a job applicant who refuses to have sex with her employer as wrongful because it would be retaliatory); *id.* at 1602. Katz has a similar response when addressing the situation of reporting information to the IRS out of a retaliatory motivation:

> Feinberg is incorrect about such cases as the proposal to withhold damaging information from the IRS, because a retaliatory reporting of such information to the IRS, (i.e., the reporting of such information not to help the government, but to settle a score) strikes us as quite immoral, not immoral at the level of criminality or tortiousness, but immoral all the same. Leveraging such immoral conduct into a substantial gain then becomes blameworthy at the level of theft.

Id.

19. *Id.* at 1578; *see also id.* at 1580 (finding fault with Feinberg's theory because it fails to include a case that "is viewed by many as the quintessential blackmail case"); *id.* at 1581 (assessing Lindgren's theory by noting that it "pretty closely matches our intuitions at the descriptive level, although it seems perhaps a bit underinclusive" as it fails to "account for several cases which many would agree clearly reek of blackmail").

20. *Id.* at 1615.

rooted in a moral assessment of the wrongfulness of carrying out the threat, then lay intuitions agree with Berman and Katz about blackmail, even if they disagree about other aspects of moral theory.

2. The Continuing Domination Theory.—George Fletcher has put forth a theory according to which blackmail is wrongful because it creates a relationship of "dominance and subordination" between the blackmailer and the recipient of the threat.[21] What distinguishes blackmail from other situations of hard bargaining between parties to a transaction is the potentially ongoing duration of the threat: it may involve not just one demand of money for silence but repeated demands because the blackmailer remains privy to the damaging information and can continue to extract money or other value from the threatened party. Like Berman, Fletcher aims to track shared views of what constitutes blackmail, explicitly seeking "reflective equilibrium" between theory and intuition, which Fletcher describes as "requir[ing] a convincing fit between . . . agreed-upon outcomes . . . and general principles that can account for these outcomes."[22]

However, Fletcher does not fully address whether the threatened act must involve a certain degree of coercion or whether the blackmailer's demand must reach a certain magnitude for the threat to create a relation of dominance and subordination. As to the first of these, Fletcher seems to answer in the negative because he thinks a proposal can be viewed as blackmail whether it is considered a "threat" or an "offer."[23] Elsewhere Fletcher seems to suggest that only certain kinds of demands qualify as blackmail, however, because he asserts that "no one can dominate someone else by asking for money to do or not to do that which is in one's recognized domain of freedom. . . . [T]here is no blackmail in demanding payments to do or not to do that which one has a right to do."[24] Yet that statement surely cannot be accurate as written, for any classic case of informational blackmail presents a situation where the blackmailer has the freedom or "right" to disclose the information rather than seeking payment, and the recipient of the threat has no legal or moral "right" to prevent that disclosure (in the case of disclosure of a crime, quite the contrary). It is equally clear that Fletcher himself views such cases as blackmail.[25] As to the magnitude of the demand, Fletcher

21. *See* Fletcher, *supra* note 3, at 1626–29 (proposing a dominance-and-subordination test and applying it to a set of paradigmatic situations).

22. *Id.* at 1617.

23. *See id.* at 1623 ("I am skeptical about whether a coherent account is available for these parallel distinctions between threats and offers and between nonproductive and productive exchanges.").

24. *Id.* at 1627–28.

25. *See, e.g.*, *id.* at 1617–19 (describing ten paradigmatic hypothetical situations, including, *inter alia*, criminal and noncriminal informational blackmail situations).

asserts only that a "minimal" demand does not reach the level of blackmail, though he acknowledges that "[e]xactly what is required . . . is not clear."[26]

B. Theories of Blackmail as a Crime Against Third Parties

Two other theories of blackmail view it not as a crime against the recipient of the threat but as a crime against whomever would have received the blackmailer's information had the blackmail not taken place. Joel Feinberg conceptualizes this view in terms of the moral duties of the blackmailer to the other party. James Lindgren describes it in terms of the third party's authority to regulate or discipline the threat recipient directly, which the blackmailer is usurping for personal gain.

1. The Breach-of-Duty Theory.—Joel Feinberg's test for blackmail asks whether, even holding aside the existence of the threat, the blackmailer's disclosure or nondisclosure of the information would be wrongful.[27] If the blackmailer has a duty to disclose the information, then it is improper for the blackmailer to violate that duty and keep silent in exchange for money. For example, withholding disclosure of the threatened party's criminal activity would be wrongful because one has a moral duty to report crimes; hence, nondisclosure of criminal activity in return for money would be blackmail.[28] On the other hand, if the blackmailer has a duty *not* to disclose the information, then it is improper to threaten disclosure.[29] (Such threats fall within the category of extortion—the threat to do an act that is itself impermissible—whose prohibition is relatively noncontroversial.) Yet where the person is allowed, but not obliged, to disclose the information, the conditional threat to do so is not blackmail for Feinberg.[30] In short, Feinberg takes seriously the so-called paradox of blackmail—its apparent willingness to punish a threat to perform conduct that would itself be permissible absent

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26. *Id.* at 1627.

27. *See* FEINBERG, *supra* note 3, at 211–13, 238–58 (defining five categories of blackmail-like threats and analyzing their wrongfulness in light of the harm caused to the victim, the harm caused to society, and the unjust gain to the blackmailer).

28. *See id.* at 241–45 (arguing that members of society do not have a right to withhold reports of a crime because nondisclosure causes a public harm).

29. *See id.* at 249–58 (noting that one has a civil duty not to make accusations known to be false and arguing that one has a moral duty to refrain from making truthful accusations of past wrongful conduct or conduct that is innocent but embarrassing).

30. *See id.* at 245–49 (arguing that blackmail should only be criminalized in situations where the threatened disclosure or offered failure to disclose would in itself violate a legal or civic duty); *id.* at 275 ("I don't see how a coherent criminal code based on liberal principles . . . can prohibit people from offering, in exchange for consideration, not to do what they have an independent legal right (but no legal duty) to do.").

the threat—and maintains that law should only sanction the threat where it would also sanction the threatened conduct.[31]

Whether Feinberg's theory depends on the breach of a *legal* duty or a *moral* duty is not always clear. For example, Feinberg posits a duty to report crimes to the police, though he recognizes that "[t]here is admittedly a problem about the precise status"[32]—legal or moral—of that duty and concludes that "our political system . . . clearly imposes a *civic duty* . . . to cooperate with law enforcement, even when that duty is not specifically enforced by the criminal or civil law."[33] Such a "civic duty" is enough for Feinberg to find that its violation in return for pay is blackmail. Feinberg is also willing to allow the criminal law's blackmail prohibition to rest on duties imposed under civil law,[34] such as the tort law governing invasions of privacy.[35] Further, Feinberg makes a normative argument that civil law *should* recognize additional duties, such as a defamation claim for some truthful statements,[36] whose threatened violation would then also support blackmail liability.[37] It seems fair to say, then, that for Feinberg a threat can be considered blackmail if it implicates the violation of a duty that *is* or *could be* legitimately imposed by law. Such a violation could arise from the satisfaction of the blackmailer's demand (preventing disclosure of information he had a duty to disclose), or its nonsatisfaction followed by the carrying out of the threat (leading to disclosure of information he had a duty *not* to disclose).

This category of legitimate (actual or potential) legal duties is similar to but distinct from the notion of a moral duty. Some behavior might be seen as immoral but outside the proper scope of law; as Feinberg says of the case where one knows of another's adultery, even if we think that disclosing the adultery might be the right thing to do, "[n]o *law* requiring or forbidding his disclosure would be justified."[38] Feinberg's general sense of when

31. *See id.* at 240, 246 (noting that only some types of blackmail are paradoxical but that criminalization of these types cannot be justified on principles of liberalism); *id.* at 258 (stating that criminalization in a liberal penal code should only be allowed if it "would not stumble over the paradox of blackmail"); *id.* at 275 (noting of his argument for decriminalizing certain commonly recognized instances of blackmail, "I came to this radical conclusion only because I take the argument of the 'paradox of blackmail' very seriously").

32. *Id.* at 243.

33. *Id.* at 244.

34. *See id.* at 253 (asserting that "[t]he important point is that 'the law' . . . imposes a duty," not whether the legal duty is criminal or civil).

35. *See id.* at 250–51 (arguing that the duty to not disclose certain damaging information, as imposed by the tort law of privacy invasions, justifies criminalization of blackmail in such cases).

36. *See id.* at 254–56 (supporting recognition of such a legal claim).

37. *See id.* at 254 ("It is open to the liberal, however, to argue that there *ought* to be a civil remedy for such moral wrongs, so that he can argue for criminalization . . . without being thwarted by the paradox of blackmail.").

38. *Id.* at 249.

criminalization is justified is driven by a liberal demand for some demonstration that the law would prevent harm or offense to others.[39] Yet Feinberg's discussion of adultery-blackmail, criminalization of which Feinberg personally opposes, also indicates his willingness to defer to shared community judgements about the proper scope of the law's reach:

> Surely most of those who advocate criminalization of adultery-blackmail would not also advocate legislation making it an independent crime to inform betrayed spouses; nor would they advocate prior legislation making it a legal *duty* to inform betrayed spouses. They cannot have it both ways. *Either* the blackmailer should have a duty to inform (or a duty not to, as the case may be) in which case it would be consistent to prohibit him from threatening to violate that duty unless paid off, *or* he should have no legal duty one way or the other, in which case it would be incoherent to punish him for threatening to do what is within his legal rights.[40]

If Feinberg's empirical assertion about public views as to prohibiting disclosure (or nondisclosure) of adultery were shown to be wrong, presumably he would change his position about the propriety of criminalizing adultery-blackmail. Accordingly, for Feinberg, whether the law should prohibit a threat (i.e., treat it as blackmail) depends on whether the law should also prohibit doing the threatened act. If not—if the person making the threat "should have no legal duty one way or the other"[41]—then the threat is not blackmail.

As with the wrongful-intention theory, then, it is possible for subjects to agree with Feinberg about the proper criterion for blackmail but to disagree about how to employ that criterion in particular cases. For the Berman/Katz theory, it is possible to agree with the position that threats should constitute blackmail if and only if they are "wrongful," but to disagree with the theorists' own broader views about what is "wrongful." So too here, it is possible to disagree with Feinberg as to the proper scope of our underlying legal obligations while agreeing that blackmail should apply only to threats that entail violation of those obligations.

Thus, like other theorists, Feinberg makes an appeal to shared intuitions in justifying the criminalization of blackmail as a general matter and his own account of blackmail in particular. He posits the existence of wide consensus as to the wrongfulness of the blackmailer's conduct: "It is a free-floating evil, many people would judge, that *he* [the blackmailer] should make a big gain as a byproduct of someone else's crime or indiscretion, that he should profit

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39. *See id.* at 275 ("I have tried to find a liberal alternative to the legal moralist's account of blackmail . . . .").

40. *Id.* at 249.

41. *Id.*

unproductively from others' wrongdoing. That his gain is unjust seems clear."[42]

Feinberg also maintains that his own account of blackmail would prohibit "precisely those actions that common sense most insistently demands should be criminal."[43] At the same time, what dictates the contours of Feinberg's view is not an appeal to popular moral intuition but an effort to develop an understanding of blackmail consistent with liberal principles. Indeed, Feinberg's desire to embrace such principles and avoid what he considers genuinely "paradoxical" cases of blackmail leads him to develop a theory that excludes cases commonly thought to be paradigmatic examples of blackmail, such as the threat to expose another's adultery.[44]

2. The Usurping Authority Theory.—For James Lindgren, the "victim" of blackmail is not the recipient of the threat but some third party whose interests the blackmailer is exploiting or suppressing. In the typical case of a conditional threat to disclose information, the wrong consists of the blackmailer's usurping or "leveraging" the interests of the party entitled to the information: law enforcement authorities, a wronged spouse, etc.[45] In a nutshell, for Lindgren, the wrong of blackmail is that the "blackmailer is negotiating for his own gain with someone else's leverage or bargaining chips."[46] Lindgren offers this account of blackmail in an effort to track common intuitions, describing his project as seeking to "meaningfully distinguish" between "large classes of threats that nearly everyone agrees ought to be illegal and other large classes of threats that nearly everyone agrees ought to be permitted."[47]

Whether the blackmailer is "leveraging" another's position or "using another's chips" can be determined by examining the nature of the blackmailer's demand. If the blackmailer is merely replicating the demand the other party would make if that party had the information, then no blackmail exists.[48] Even if the demand is not exactly what the other party would

42. *Id.* at 239.

43. *Id.* at 276.

44. *See id.* at 245–49 (concluding that threats to expose adultery should not be criminalized as blackmail because imposing a duty to reveal, or not to reveal, adultery would be inconsistent with liberal principles).

45. *See* James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975, 1981 (1993) (explaining the theory that "someone who threatens to expose criminality or tortious behavior [is] trading on leverage that properly belongs to others"); Lindgren, *supra* note 2, at 702 ("What makes [the blackmailer's] conduct blackmail is that [the blackmailer] interposes himself parasitically in an actual or potential dispute in which he lacks a sufficiently direct interest.").

46. Lindgren, *supra* note 2, at 702.

47. *Id.* at 680.

48. *See id.* at 714 (asserting there is "no blackmail" if "[t]here is a perfect congruence between the advantage sought . . . and the leverage used").

seek, so long as the maker of the threat is "trying in good faith" to benefit the other party rather than himself, Lindgren expresses "doubt that anyone would consider" the threat to be blackmail.[49] But if the person "requests something in return for suppressing the actual or potential interests of others," the request is blackmail.[50]

C. Theories of Blackmail as a Societal Harm

Some theories supporting the criminalization of blackmail are unconcerned with its moral status. For these theories, the prohibition of blackmail is justified not because blackmail is wrongful but because it is harmful (some would say "costly") to society. These theories do not focus on the harm an individual act of blackmail might cause the recipient of the threat but on the overall social costs that would arise from the improper behavioral incentives legalized blackmail would create. Some writers view these costs in terms of the unproductive efforts of would-be blackmailers, some in terms of the excessive privacy investments required of would-be blackmailees, but the shared underlying perspective is that blackmail's legal status should depend on a societal cost–benefit analysis rather than a moral inquiry.

A host of commentators have provided such a law-and-economics analysis of blackmail, according to which it is properly criminalized because it leads to inefficient allocation of resources.[51] These analyses are interested only in contemplating how legalizing or criminalizing blackmail would affect overall societal incentives to ferret out secrets, to overinvest in security, or to engage in fraud.[52] They are uninterested in generating a formulation of

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49. *Id.* at 715.

50. *Id.* at 672.

51. *See, e.g.*, Coase, *supra* note 3, at 674 (opining that blackmailers inefficiently expend resources gathering and transacting for the nondisclosure of information); Epstein, *supra* note 3, at 561, 566 (concluding that blackmail should be criminalized because, while an economic analysis of only the actions comprising the blackmail transaction may seem favorable, a broader analysis would take into account the host of inefficient auxiliary behavior encouraged by blackmail); Ginsburg & Shechtman, *supra* note 3, at 1873 (concluding that blackmail is economically inefficient because it encourages people to expend resources to gain information to protect information); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 26 (1975) (discussing the many ways in which private enforcement of laws through blackmail would incentivize inefficient behavior like fabricating evidence or entrapping victims); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2292 (1996) (demonstrating that a ban on blackmail combined with social norms will produce the most efficient distribution of information); Posner, *supra* note 3, at 1818 (arguing that, while blackmail is a voluntary transaction, it should be prohibited because it is on average wealth reducing); Shavell, *supra* note 3, at 1902 (explaining that economic analysis supports criminalizing blackmail because of blackmail's tendency to incentivize wasteful gathering and protecting of information).

52. *See, e.g.*, Epstein, *supra* note 3, at 564–65 (pointing out that the opportunity for legalized blackmail will give blackmailers an incentive to help their victims perpetuate fraud); Shavell, *supra* note 3, at 1894–95 (analyzing the effect of blackmail on the incentive to expend effort to obtain information and to take preventative measures to avoid being blackmailed).

blackmail that achieves the "right" or fair result in individual cases. Rather, according to this approach and its underlying concerns, the quality of a given formulation of blackmail would be assessed in terms of its likelihood of achieving the "optimal" or efficient overall societal level of blackmail, i.e., the level at which the marginal costs of preventing blackmail exceeded the marginal costs of the blackmail itself.[53] They are not concerned with the morality *vel non* of blackmail—indeed, some of these accounts raise the suggestion that blackmail might also have some efficiency-related *benefits* as a form of private law enforcement.[54]

Like the law-and-economics theorists, Jeffrie Murphy has offered an account focused on the general incentives that would arise if blackmail were legal.[55] Murphy's account is slightly distinct in its concern with the value of individual privacy.[56] While the economic account is mostly concerned with the prospect of wasted or unproductive efforts to obtain information, Murphy is concerned with the likelihood of privacy invasions and seems to think that such invasions are inherently problematic.[57] At the same time, Murphy would grant an exception allowing the blackmail of public figures, presumably because the information obtained from investigations of public figures would be more socially useful than information about purely private figures.[58] In the end, then, Murphy seems to be addressing a set of cost–benefit tradeoffs involving investments in obtaining or protecting secret information, similar to the typical economic theory.

Theorists of this type typically set themselves the task of merely justifying the blackmail prohibition's existence rather than specifying its proper scope. For economists, voluntary transactions, seemingly undertaken for mutual gain, are generally thought to be desirable, and their prohibition, as in the criminalization of blackmail, therefore stands in need of some explanation.[59] Having given the explanation, however, law-and-economics

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53. *See* Landes & Posner, *supra* note 51, at 42–43 (applying the concept of economically efficient private enforcement of laws to comment on the status of blackmail and concluding that society permits the private enforcement of blackmail-like demands where additional public enforcement would, according to broad social norms, not be worth the expenditure associated with the additional enforcement).

54. *Id.* (suggesting that blackmail by private individuals can substitute for public law enforcement because the amount that the blackmailed person should be willing to pay is equal to the cost of the penalty that law enforcement would impose).

55. *See generally* Murphy, *supra* note 3 (discussing possible incentive-based justifications for a prohibition against blackmail).

56. *See id.* at 159–60, 163–66 (stating that "the protection of privacy does play a role in justifying the criminalization of blackmail" and discussing different privacy issues).

57. *See id.* at 159 (arguing that a blackmailer acts wrongly "not because he is simply proposing an unjust economic transaction, but because he is economizing a part of life which he has no right to economize").

58. *Id.* at 164.

59. *See supra* note 51 and accompanying text.

accounts of blackmail typically do not proceed to elaborate as to the particular shape the blackmail offense should take. The implication is that once the cost or externality that justifies blackmail's prohibition has been identified, the definition of blackmail should be whatever minimizes (or produces the socially optimal level of) that cost. The perspective operates on the level of curtailing social harms rather than responding to individual acts of wrongdoing.

Among theorists of this variety, Joseph Isenbergh stands out in offering an account of blackmail that specifies which particular cases of blackmail should be criminalized and which should not.[60] He attempts to determine "what information is more valuable kept private and what information is more valuable disclosed."[61] Describing the threat recipient, blackmailer, and third party entitled to the information as *A*, *B*, and *C*, respectively, Isenbergh suggests the possibility of limiting the blackmail prohibition to two sets of cases: "1) information, however acquired, held by *B* concerning a prosecutable crime or tort committed by *A* against *C*; and 2) information acquired by *B* outside a prior course of dealing with *A*."[62] Isenbergh later elaborates on the second category, pointing out that the relevant distinction is "between information already held by *B* (or obtained fortuitously) and information generated by *B*'s special efforts for the purpose of blackmail."[63] Isenbergh then posits that situations where *A* and *B* "have a pre-existing relationship" are more likely to involve "information obtained fortuitously" in the course of the relationship, whereas situations where *A* and *B* have "no prior course of dealing" are more likely to involve "information deliberately farmed" and should hence be discouraged via legal sanction.[64] Even for the cases Isenbergh recognizes as undesirable blackmail, however, it is worth noting that he does not advocate direct criminalization as the best legal response. Rather, Isenbergh would favor making the blackmail transaction legally unenforceable and, in the first category of cases, also making *B* legally complicit in *A*'s criminal or tortious wrongdoing.[65]

D. Theories of Blackmail as Noncrime: The Abolitionist Position

A final possible response to the blackmail paradox is to conclude that its only proper resolution is to decriminalize blackmail, thereby eliminating the paradox. Some libertarian theorists have defended the position that

60. *See* Joseph Isenbergh, *Blackmail From A to C*, 141 U. PA. L. REV. 1905, 1907 (1993) (arguing that any justification for blackmail must "lie in the particular nature of information" and that for this reason it makes sense to criminalize certain forms of blackmail and not others).

61. *Id.* at 1927.

62. *Id.* at 1908.

63. *Id.* at 1929.

64. *Id.* at 1930.

65. *Id.* at 1928–29.

criminalizing threats to engage in lawful activity is an impermissible infringement on the freedom to engage in voluntary transactions, hence an unjustifiable exercise of criminal authority.[66]

Russell Christopher has offered a variation on this claim by introducing the concept of "meta-blackmail": the conditional threat to make a blackmail threat.[67] Christopher claims that there is no clear way to determine how meta-blackmail should be treated relative to blackmail itself—whether it should be punished more seriously, less seriously, or the same—and asserts that therefore the only way to avoid logical inconsistency, or at least even thornier puzzles than the paradox of blackmail itself, is to decriminalize blackmail (and hence meta-blackmail also).[68]

Mitchell Berman has argued against the soundness of Christopher's logic.[69] We need not concern ourselves here with the persuasiveness of Christopher's account as an analytical matter because our project is to determine whether that account (or any other) accords with common moral sensibilities. In this case, the abolitionist position is easily testable: if subjects reject the prospect of punishment in all scenarios of putative blackmail, then their moral intuitions would track the conclusion that blackmail should be abolished, and if not, then lay intuitions would contradict the abolitionist proposal. It should also be noted, however, that a disagreement between lay intuitions and these accounts would not necessarily undercut the relevant theorists on their own terms. The libertarian position rests on a broader un-

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66. *See, e.g.*, 1 MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE 443 n.49 (1970) ("[*B*]*lackmail* would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person."); Walter Block, *Berman on Blackmail: Taking Motives Fervently*, 3 FLA. ST. U. BUS. REV. 57, 61–62 (2003) (defining the libertarian view of blackmail as criminalizing something that the blackmailer has the right to do); Walter Block, *The Case for De-criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225, 225–26 (1997) (discussing how a transaction where one refrains from gossip for consideration from another party should be legal); Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 273, 273–74 (1982) (arguing that blackmail should not be prevented by the police power of the state); Ronald Joseph Scalise, Jr., Comment, *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483, 1506 (2000) ("In a liberal legal system, all voluntary actions between consenting adults are allowable.").

67. *See* Russell L. Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739, 746 (2006) [hereinafter Christopher, *Meta-Blackmail*] (originating the concept of meta-blackmail); Russell L. Christopher, *The Trilemma of Meta-Blackmail: Is Conditionally Threatening Blackmail Worse, the Same, or Better Than Blackmail Itself?*, 94 GEO. L.J. 813, 813 (2006) (asking whether meta-blackmail may be more severe than simple blackmail).

68. *See* Christopher, *Meta-Blackmail*, *supra* note 67, at 747–48 ("Resolving the trilemma of meta-blackmail either forces the decriminalization of blackmail or adds considerably to the already difficult puzzles to be surmounted in justifying the criminalization of blackmail.").

69. *See* Berman, *supra* note 6 (manuscript at 41–43) (arguing for the existence of a basis for differentiating meta-blackmail and blackmail); Berman, *Meta-Blackmail*, *supra* note 9, at 788 (arguing that the meta-blackmail "conceit" does not properly address the "widely and deeply held" opinion that some conditional threats to perform legal acts are properly criminalized).

derstanding that the proper scope of criminalization is very narrow and fails to justify a prohibition against blackmail even if blackmail is a moral wrong.[70] Christopher does not purport to offer a moral refutation of the criminalization of blackmail, but what he says is a logical one.[71]

II. Statutory Approaches

While each U.S. jurisdiction has a criminal provision prohibiting traditional blackmail,[72] there is no single statutory approach used by a majority of states. Even within any given approach, a close comparison of any two blackmail statutes is likely to reveal some differences. However, the range of differences might be summarized as moving along two dimensions: first, the breadth of the range of demands criminalized;[73] second, the breadth of the exceptions (or special defenses) to the crime.

On the first dimension, blackmail statutes can be categorized as either having a broad range of prohibited demands[74] or a narrow range.[75] "Narrow

70. *See* Berman, *supra* note 6 (manuscript at 36–38) (noting the basis for the libertarian position and asserting that it "rests on a fairly straightforward, easily articulated and understood, major premise that the overwhelming majority of contemporary theorists of the criminal law simply reject").

71. *See* Christopher, *Meta-Blackmail*, *supra* note 67, at 784–85 (arguing that "[c]riminalizing blackmail violates intuitions that are more compelling than the intuition that blackmail is properly criminalized").

72. The standard blackmail case is one in which an actor threatens to disclose a damaging secret if the victim does not pay her some amount of money. Terminology varies from jurisdiction to jurisdiction; most prohibit the blackmail offense via a statute covering "criminal coercion," "extortion," "intimidation," "threats," or a similar term.

73. Interestingly, statutes also vary on the breadth of the range of prohibited *threats*, as opposed to the range of *demands*. All prohibit threats to disclose damaging secrets or expose a committed crime; many also criminalize threats to injure the victim or her property, to impugn the character of the victim or of some third party, to commit a crime, etc. However, these distinctions are irrelevant in the context of this study; it will suffice to note that all jurisdictions criminalize the threat inherent to traditional blackmail.

74. Thirty-three jurisdictions have broad ranges of prohibited demands: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia. *See* ALASKA STAT. §§ 11.41.520, .530 (2008); ARK. CODE ANN. §§ 5-13-208, 5-36-101, -103 (2006); COLO. REV. STAT. ANN. § 18-3-207 (West 2009); CONN. GEN. STAT. ANN. §§ 53a-119, -192 (West 2007); FLA. STAT. ANN. § 836.05 (West 2005); HAW. REV. STAT. ANN. § 707-764 (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/12-6 (West 2007); IND. CODE § 35-45-2-1 (2004); IOWA CODE ANN. § 711.4 (West 2009); KAN. STAT. ANN. § 21-3428 (2007); KY. REV. STAT. ANN. §§ 509.080, 514.080 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:66 (2007); MD. CODE ANN., CRIM. LAW §§ 3-701 to 3-708 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 2000); MICH. COMP. LAWS ANN. § 750.213 (West 2009); MINN. STAT. ANN. §§ 609.27–.275 (West 2009); MISS. CODE ANN. § 97-3-82 (West 2006); MO. ANN. STAT. § 570.010 (West 1999); MONT. CODE ANN. §§ 45-2-101, 45-5-305(1)(f), 45-6-301 (2008); N.J. STAT. ANN. §§ 2C:13-5, 2C:20-5 (West 2005); N.M. STAT. ANN. § 30-16-9 (LexisNexis 2000); N.Y. PENAL LAW §§ 135.60, 155.05 (McKinney 2008); N.C. GEN. STAT. §§ 14-118, 118.4 (2007); N.D. CENT. CODE §§ 12.1-17-06,

definition" statutes address only threats made to obtain property or pecuniary value. "Broad definition" blackmail statutes cover those threats and also threats made to coerce action on the part of the victim or some third party.[76]

The second dimension of blackmail is somewhat more complex: statutes can be categorized as having broad exceptions, narrow exceptions, or no exceptions. "Broad exception" statutes generally provide a form of good-faith defense, holding that the blackmailer can escape liability where she is acting with the limited purpose of making the other party correct a wrong, desist from misbehavior, refrain from taking responsibility for which she is not qualified, or other similar situations.[77] These statutes commonly impose

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12.1-23-02, -23-10(12) (1997); OKLA. STAT. ANN. tit. 21, § 1488 (West 2003); 18 PA. CONS. STAT. ANN. §§ 2906, 3923 (West 2009); R.I. GEN. LAWS § 11-42-2 (2002); TENN. CODE ANN. § 39-14-112 (2006); VT. STAT. ANN. tit. 13, § 1701 (2002); WASH. REV. CODE ANN. §§ 9A.04.110(27), 9A.56.110–.130 (West 2003); WIS. STAT. § 943.30–.31 (2009); WYO. STAT. ANN. § 6-2-402 (2009); D.C. CODE §§ 22-3201(4), -3252(a) (2001).

75. Nineteen jurisdictions have narrow ranges of prohibited demands: Alabama, Arizona, California, Delaware, Georgia, Idaho, Maine, Nebraska, Nevada, New Hampshire, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and the federal government. *See* ALA. CODE §§ 13A-8-1(13), 13A-8-13 to -15 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-1804 (2009); CAL. PENAL CODE §§ 518–19 (West 2008); DEL. CODE ANN. tit. 11, §§ 791, 846–47 (2007); GA. CODE ANN. § 16-8-16 (2007); IDAHO CODE ANN. § 18-2403 (2008); ME. REV. STAT. ANN. tit. 17-A, § 355 (2006); NEB. REV. STAT. § 28-513 (2008); NEV. REV. STAT. § 207.190 (2007); N.H. REV. STAT. ANN. § 637:5 (2007); OHIO REV. CODE ANN. § 2905.11–.12 (West 2006); OR. REV. STAT. §§ 163.275, 164.075 (2007); S.C. CODE ANN. § 16-17-640 (2005); S.D. CODIFIED LAWS § 22-30A-4 (2006); TEX. PENAL CODE ANN. §§ 31.01, .03 (West 2009) (note that Texas utilizes a common law duress offense to punish acts equivalent to blackmail); UTAH CODE ANN. § 76-6-406 (LexisNexis 2008); VA. CODE ANN. § 18.2-59 (2009); W. VA. CODE ANN. § 61-2-13 (LexisNexis 2005); 18 U.S.C. § 873 (2006). Note that some of these jurisdictions also have a very limited statute prohibiting the coercion of *illegal* action via threats. *See, e.g.*, ALA. CODE § 13A-6-25; NEV. REV. STAT. § 207.190 (covering mostly classic extortion, i.e., threats of unlawful behavior); *id.* § 205.320 (covering threats to obtain property). While this may technically be approaching our definition of "broad ranges," the illegal-action limitation makes the statute so narrow as to not be comparable with the broad-range statutes.

76. Most statutes recognize threats to harm or otherwise wrong a third party as blackmail. An example would be *B* telling *V* that he will harm *J* (*V*'s brother) if *V* does not pay. *See, e.g.*, ALASKA STAT. § 11.41.520; ARIZ. REV. STAT. ANN. § 13-1804; CONN. GEN. STAT. ANN. § 53a-192; DEL. CODE ANN. tit. 11, § 846.

77. *See, e.g.*, MODEL PENAL CODE § 212.5(1)(d) (1962); *cf.* N.D. CENT. CODE § 12.1-17-06 (defining criminal coercion, including affirmative defenses). Twenty jurisdictions have broad exceptions to the blackmail offense: Alaska, California, Connecticut, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, and Washington. ALASKA STAT. §§ 11.41.520, .530; CAL. PENAL CODE §§ 518–19; CONN. GEN. STAT. ANN. §§ 53a-119, 53a-192; HAW. REV. STAT. ANN. § 707-769; KY. REV. STAT. ANN. §§ 509.080, 514.080; N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5; N.Y. PENAL LAW § 135.75; N.C. GEN. STAT. § 14-118; N.D. CENT. CODE §§ 12.1-17-06, 12.1-23-09; 18 PA. CONS. STAT. ANN. §§ 2906, 3923; WASH. REV. CODE ANN. §§ 9A.56.110–.130, 9A.04.110(27).

This group includes jurisdictions that do not explicitly provide a good-faith defense but whose statutory language seemingly incorporates a bad-faith requirement into the offense definition itself. For example, the California extortion statute only criminalizes "the obtaining of property from

additional requirements on the actor and her behavior before she can make use of the exception.[78] "Narrow exception" statutes generally hold that the blackmailer may be excepted only if she is acting to recover restitution for harm done or to recover compensation for property taken or services rendered.[79] Finally, "no exception" statutes provide no explicit provisions recognizing exceptions to the blackmail offense.[80]

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another, with his consent, or the obtaining of an official act of a public officer, induced by a *wrongful* use of force or fear, or under color of official right." CAL. PENAL CODE § 518 (emphasis added). This would permit the obtaining of property from another by a nonwrongful use of force or fear, as where the actor's motivation is to make another person right a previous wrong, stop creating harm, or disgorge stolen or otherwise unlawfully possessed property. Similar provisions exist in various "broad exception" statutes. *See* FLA. STAT. ANN. § 836.05; IND. CODE § 35-45-2-1; MD. CODE ANN., CRIM. LAW §§ 3-701 to -708; MASS. GEN. LAWS ANN. ch. 265, § 25; MICH. COMP. LAWS ANN. § 750.213; MISS. CODE. ANN. § 97-3-82; N.M. STAT. ANN. § 30-16-9; N.C. GEN. STAT. § 14-118; R.I. GEN. LAWS § 11-42-2; VT. STAT. ANN. tit. 13, § 1701.

78. For example, the Model Penal Code requires that an actor limit her purpose to compelling the "good" action, that the action coerced be reasonably related to the circumstances involved, and that the actor believe the accusation or secret revealed to be true. MODEL PENAL CODE § 212.5(1).

79. Twenty-two jurisdictions have narrow exceptions to the blackmail offense: Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Iowa, Maine, Missouri, Montana, Nebraska, New Hampshire, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, Wyoming, and the District of Columbia. ALA. CODE §§ 13A-6-25, 13A-8-1(13), 13A-8-13 to -15; ARIZ. REV. STAT. ANN. § 13-1804; ARK. CODE ANN. §§ 5-13-208, 5-36-101, 5-36-103; COLO. REV. STAT. ANN. § 18-3-207; DEL. CODE ANN. tit. 11, §§ 792, 847; GA. CODE ANN. § 16-8-16; IDAHO CODE ANN. § 18-2403; 720 ILL. COMP. STAT. ANN. 5/12-6; IOWA CODE ANN. § 711.4; ME. REV. STAT. ANN. tit. 17-A, §§ 355, 361; MO. ANN. STAT. § 570.010; MONT. CODE ANN. §§ 45-2-101, 45-6-301, 45-5-305(1)(f); NEB. REV. STAT. § 28-513; N.H. REV. STAT. ANN. § 637:5; N.M. STAT. ANN. § 30-16-9; S.D. CODIFIED LAWS § 22-30A-4; TENN. CODE ANN. § 39-14-112; TEX. PENAL CODE ANN. §§ 31.01, 31.03; UTAH CODE ANN. § 76-6-406; WIS. STAT. §§ 943.30–.31; D.C. CODE §§ 22-3201(4), 22-3252(a).

This group includes jurisdictions without explicit exception clauses but with statutory language seemingly designed to provide an exception from prosecution for cases in which the actor was attempting to recover property to which he had a legal entitlement. Examples include jurisdictions such as Colorado, where the statute only criminalizes blackmail committed "without legal authority." COLO. REV. STAT. ANN. § 18-3-207(1)(a); *see also* 720 ILL. COMP. STAT. ANN. 5/12-6; MONT. CODE ANN. §§ 45-2-101, 45-6-301, 45-5-305(1)(f); WIS. STAT. §§ 943.30–.31. Presumably, one would have legal authority to recover taken property or recover compensation for past harm. Another example is the District of Columbia, where the offense definition criminalizes blackmailing with intent to obtain "property of another," defined by statute as "any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent . . . ." D.C. CODE §§ 22-3252(a), 22-3201(4). An actor may be privileged to infringe on property owed to him; in such a case it would not be "property of another," and the actor will not be liable. Similar provisions exist in many statutes categorized as having narrow exceptions. *See* IDAHO CODE ANN. § 18-2403; ME. REV. STAT. ANN. tit. 17-A, §§ 355, 361; N.H. REV. STAT. ANN. § 637:5; S.C. CODE ANN. § 16-17-640; S.D. CODIFIED LAWS § 22-30A-4; TEX. PENAL CODE ANN. §§ 31.01, 31.03; UTAH CODE ANN. § 76-6-406; WYO. STAT. ANN. § 6-2-402.

80. Ten jurisdictions have no exceptions to the blackmail offense: Kansas, Louisiana, Minnesota, Nevada, Oklahoma, Ohio, Oregon, Virginia, West Virginia, and the federal government. KAN. STAT. ANN. § 21-3428; LA. REV. STAT. ANN. § 14:66; MINN. STAT. ANN. §§ 609.27–.275; NEV. REV. STAT. §§ 205.320, 207.190; OKLA. STAT. ANN. tit. 21, § 1488; OHIO REV. CODE ANN. § 2905.11–.12 (West 2006); OR. REV. STAT. §§ 163.275, 164.075 (2007); VA. CODE ANN. § 18.2-59; W. VA. CODE ANN. § 61-2-13; 18 U.S.C. § 873.

Relying upon these two dimensions of blackmail formulations creates four major categories into which the fifty-two American blackmail statutes fall:[81] broad–broad, broad–narrow, narrow–narrow, and "other." (There are narrow–broad statutes—a narrow definition of the crime, with broad exceptions—but the narrow definition means that the broad exceptions are never really used, so they are effectively the same in their operation as the narrow–narrow statutes.)

Nineteen jurisdictions follow the Model Penal Code's (MPC) broad–broad approach to blackmail by prohibiting threats made to coerce action or to take property and providing either explicit or implicit exceptions to the crime for actors who commit the offense in the course of an attempt to make the victim behave in a way reasonably related to the circumstances that were the subject of the threat.[82] While these jurisdictions generally follow the MPC's statutory language, there is some variation; Washington, for example, prohibits seeking "property or services" but specifically mentions sexual favors as being included in the definition of "services."[83] Other jurisdictions are not so explicit. Additionally, there is some variation in the defined exceptions to the crime. Most broad–broad jurisdictions employ the MPC's formulation, but some limit the applicability of the exception to certain situations, and others (most significantly North Dakota) dramatically broaden the MPC's exception.

Ten jurisdictions take the broad–narrow approach, criminalizing threats designed to coerce action or to take property but providing an exception only

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81. The fifty-two statutes are the codes of each of the fifty states plus the federal code and the District of Columbia code.

82. Alaska, Connecticut, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, and Washington. *See supra* notes 74, 77 and accompanying text. A typical broad–broad statute would be similar to Pennsylvania's:

> (a) Offense defined.—A person is guilty of criminal coercion, if, with intent unlawfully to restrict freedom of action of another to the detriment of the other, he threatens to:
>
> (1) commit any criminal offense;
>
> (2) accuse anyone of a criminal offense;
>
> (3) expose any secret tending to subject any person to hatred, contempt or ridicule; or
>
> (4) take or withhold action as an official, or cause an official to take or withhold action.
>
> (b) Defense.—It is a defense to prosecution based on paragraphs (a)(2), (a)(3) or (a)(4) of this section that the actor believed the accusation or secret to be true or the proposed official action justified and that his intent was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

18 PA. CONS. STAT. ANN. § 2906.

83. WASH. REV. CODE ANN. § 9A.56.110.

to actors who make the threat in order to recover restitution for harm done or to gain compensation for services rendered or property owed.[84] These statutes exhibit significantly more terminological and structural variation than do the broad–broad statutes; some are simply MPC-style provisions with narrower exceptions, some are uniquely drafted but part of a modern code structure, and others are common law-style provisions.[85] Some broad–narrow statutes ban an extensive list of threats,[86] while others are much more limited.[87] Nonetheless, these statutes are appropriately grouped because all prohibit threats seeking action *or* property but only provide an offense exception if the actor is seeking property to which she has some legal right.

Thirteen jurisdictions take the narrow–narrow approach, criminalizing threats made to gain property and providing an offense exception only where the actor makes an otherwise-prohibited threat in order to recover restitution for harm done or to gain compensation for services rendered or property owed.[88] As with the broad–narrow jurisdictions, these statutes exhibit

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84. Arkansas, Colorado, Illinois, Iowa, Missouri, Montana, Tennessee, Wisconsin, Wyoming, and the District of Columbia. *See supra* notes 74, 79 and accompanying text. Broad–narrow statutes can be constructed in a number of ways. One of the simplest is Tennessee's:

> (a) A person commits extortion who uses coercion upon another person with the intent to:
>
> (1) Obtain property, services, any advantage or immunity; or
>
> (2) Restrict unlawfully another's freedom of action.
>
> (b) It is an affirmative defense to prosecution for extortion that the person reasonably claimed:
>
> (1) Appropriate restitution or appropriate indemnification for harm done; or
>
> (2) Appropriate compensation for property or lawful services.

TENN. CODE ANN. § 39-14-112; *see also* D.C. CODE §§ 22-3252(a), 22-3201(4); MICH. COMP. LAWS ANN. § 750.213 (requiring the threat to be "malicious" to constitute a violation).

85. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1804 (MPC style); MINN. STAT. ANN. §§ 609.27–609.275 (modern structure code); MASS. GEN. LAWS ANN. ch. 265, § 25 (common law style).

86. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/12-6(a); IOWA CODE ANN. § 711.4.

87. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.213; TENN. CODE ANN. § 39-14-112.

88. Alabama, Arizona, Delaware, Georgia, Idaho, Maine, Nebraska, New Hampshire, South Carolina, South Dakota, Texas, and Utah are "true" narrow–narrow states, while California has a narrow prohibition but seemingly broad exceptions. *See supra* notes 75, 77, 79 and accompanying text. In practice, however, the distinction between narrow–narrow and narrow–broad statutes appears to be irrelevant; if the offense only makes seeking property via blackmail a crime, an exception that goes beyond rightful property recovery (the essence of "narrow exceptions") will never have any effect. Narrow–narrow statutes, like broad–narrow statutes, do not share a general pattern as do most broad–broad statutes. However, Arizona's theft by extortion statute is typical of those jurisdictions with a narrow demand language and a narrow affirmative defense:

> A. A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future any of the following:
>
> 1. Cause physical injury to anyone by means of a deadly weapon or dangerous instrument.
>
> 2. Cause physical injury to anyone except as provided in paragraph 1 of this subsection.
>
> 3. Cause damage to property.
>
> 4. Engage in other conduct constituting an offense.
>
> 5. Accuse anyone of a crime or bring criminal charges against anyone.

considerable variation in statutory language and organization. Many are codified as extortion statutes, but they are intended to cover the traditional blackmail crime also.[89]

In the "other" category are ten jurisdictions that appear to have no exceptions to their blackmail laws.[90] Four have broad prohibitions,[91] and six have narrow prohibitions.[92]

III. Testing Community Views

To test which of the theories and statutory schemes best capture lay intuitions about the conduct that should be criminalized, subjects were given a series of scenarios designed to focus on the differences among the theories. As to each scenario, a test document asked whether such conduct should be criminalized. To be sure that subjects were perceiving the scenarios as intended, a second test document performed a "manipulation check," asking for details about subjects' perception of each scenario—specifically questions testing what the subject perceived with regard to each of the factors that

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6. Expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair the person's credit or business.

7. Take or withhold action as a public servant or cause a public servant to take or withhold action.

8. Cause anyone to part with any property.

B. It is an affirmative defense to a prosecution under subsection A, paragraph 5, 6 or 7 that the property obtained by threat of the accusation, exposure, lawsuit or other invocation of official action was lawfully claimed either as:

1. Restitution or indemnification for harm done under circumstances to which the accusation, exposure, lawsuit or other official action relates.

2. Compensation for property that was lawfully obtained or for lawful services.

ARIZ. REV. STAT. ANN. § 13-1804. Other statutes achieve the same ends via different means. *See, e.g.*, GA. CODE ANN. § 16-8-16; LA. REV. STAT. ANN. § 14:66.

89. *See, e.g.*, ALA. CODE § 13A-8-15 ("Extortion by means of a threat . . . constitutes extortion in the second degree.").

90. Jurisdictions with "no exception" blackmail statutes have varied approaches. Kansas's blackmail statute is simple: "Blackmail is gaining or attempting to gain anything of value or compelling another to act against such person's will, by threatening to communicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation." KAN. STAT. ANN. § 21-3428 (2007). Other "no exception" statutes vary. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 60-1488 (West 2003) (codifying two exclusive components to Oklahoma's blackmail law—accusing or threatening to accuse a person of a crime or exposing or threatening to expose facts that would "subject such person to the ridicule or contempt of society"—but not recognizing any exceptions to the statute); 18 U.S.C. § 873 (2006) (declaring no statutory exceptions to federal blackmail law if an individual receives some value for the threat of informing or as consideration for not informing of any violation of the law of the United States).

91. KAN. STAT. ANN. § 21-3428; LA. REV. STAT. ANN. § 14:66; MINN. STAT. ANN. §§ 609.27–609.275; OKLA. STAT. ANN. tit. 21, § 60-1488.

92. NEV. REV. STAT. § 205.320 (2007); OHIO REV. CODE ANN. § 2905.11–.12 (West 2006); OR. REV. STAT. ANN. § 164.075 (2007); 18 U.S.C. § 873 (2006); VA. CODE ANN. § 18.2-59 (2009); W. VA. CODE ANN. § 61-2-13 (LexisNexis 2005).

were being manipulated to test the different theories. The subjects' criminalization responses were then compared to those predicted by each theory and each statutory approach to determine which best reflected the subjects' views.

A. Design and Methodology

The subjects were 129 men and women,[93] recruited through flyers and an e-mail listserv, who were brought into a quiet laboratory and completed the study in return for $4. Subjects were run in small groups (usually one to three per group). Each subject was tested individually, completing the study at his or her own pace. Subjects ranged in age from eighteen to fifty-eight and as a group were ethnically, educationally, and economically diverse.[94]

A series of pilot tests revealed that the order in which the two test documents were given had no effect on results, so all subjects were given the manipulation-check questionnaire first, then the criminalization questionnaire. Each questionnaire presented subjects with the same eleven scenarios (reproduced in Table 1) that were constructed to highlight the differences among the theories being tested. We administered two versions of the questionnaire, which varied the order of presentation of the eleven scenarios. Presentation order did not significantly affect any of the results we report.

As is apparent, each of the scenarios involves two main characters, Victor and Brian. In each case, Brian is the potential blackmailer who threatens Victor, the potential victim, and demands, in return for not carrying out the threat, some action or other compensation. The threat and the demand in each scenario are different, and each scenario generates a different pattern with respect to whether it satisfies the criteria of each of the theories.

Table 1. Text of Scenarios

1. Pay or Report Crime. Brian learns that Victor has killed a man and tells Victor he will report the crime to the authorities unless Victor pays him $1,000.

(continued)

93. Seventy-seven women, fifty-one men, and one subject unspecified.

94. Average age was 25.0, with a standard deviation of 7.9. Ethnicity of the subjects consisted of 58 white, 41 African-American, 15 Asian, 8 Latino, 4 multi-ethnic, and 3 Native American. Educationally, the subjects consisted of 7 high school, 69 some college, 46 college degree, 5 masters degree, and 2 professional degree, and their self-reported household incomes ranged from $10,000 to $175,000 (75th percentile = $65,000; median = $20,000; 25th percentile = $10,000).

Table 1 (cont.). Text of Scenarios

2. Pay or Face Lawsuit. Victor, driving negligently, seriously damages Brian's car in an accident. Brian tells Victor that he will sue him in court, where he can collect the cost of repairs, unless Victor pays him the $1,000 that the repairs will cost.
3. Sober Work or Expose Drinking. Brian and Victor both work in a factory. Brian discovers that Victor has a drinking problem, which not only explains his frequent absences and tardiness but might also create a risk in the workplace. Victor is worried that if management finds out, he will lose his job under the company's "zero tolerance" policy, which mandates dismissal of anyone found to have an existing drinking problem. Brian says he will report Victor's drinking problem to management unless Victor promises to show up sober every day to work, join an alcohol abuse treatment program to avoid recurrence, and make a donation to a charity fighting alcohol abuse.
4. Pay or Reveal Recipe. Victor owns a bakery known for its cupcakes, which are very popular despite their high price. Brian discovers that the cupcakes are actually made using a cheap store-bought cake mix and frosting. Though Victor has never made any false claims about how his cupcakes are made, he knows his business will be ruined if the truth is revealed. Brian threatens to make the cupcake "recipe" public unless Victor pays him $10,000.
5. Pay or Publish Book. Brian, a literature professor, has spent considerable time conducting research for a biography of Victor, a famous author. His research has turned up information that would destroy Victor's reputation. Despite what he has learned, Brian admires Victor and does not wish to cause him harm, but he also thinks it would be inappropriate to publish a biography that does not accurately present what he knows. Accordingly, he contacts Victor and says he will discontinue his biography project if Victor pays him the $4,000 that will properly compensate Brian for his expenses and the work he has already done.

(continued)

Table 1 (cont.). Text of Scenarios

6. Pay or Expose Cheating. Brian and Victor are taking the examination to enter the police academy. All applicants sign a promise not to cheat and to report those who do. Authorities aggressively prosecute cheating but only if there is hard evidence, such as the "cheat sheet" used during the exam. During the exam, Brian sees and picks up Victor's "cheat sheet." He says he will give it to the authorities unless Victor pays him $500. If Victor pays, Brian will give the "cheat sheet" back, and no action of any kind against Victor will be possible.
7. Withdraw or Expose Cheating. Brian and Victor are taking the examination to enter the police academy. All applicants sign a promise not to cheat and to report those who do. Authorities aggressively prosecute cheating but only if there is hard evidence, such as the "cheat sheet" used during the exam. During the exam, Brian sees and picks up Victor's "cheat sheet." Victor is remorseful about the cheating, but does not want to face legal action. Brian says he will expose the cheating unless Victor withdraws his application to the police force, so that he cannot actually benefit from this instance of cheating. If Victor does so, Brian will give back the cheat sheet, and no action of any kind against Victor will be possible.
8. Cut Tree or Publish Photos. Brian, Victor's neighbor, thinks that Victor's expensive and exotic tree is an eyesore. Brian has asked Victor to cut the tree down but Victor has refused to do so. Using a special telephoto lens, Brian takes photos of Victor in his home having sexual intercourse and tells Victor that he will post them on the Internet unless Victor agrees to cut down the offending tree. If Victor does cut it down, Brian will hand over the negatives and the only copy of the photos.

(continued)

Table 1 (cont.). Text of Scenarios

9. Pay or Report Smoking. Brian and Victor work for a nonprofit anti-smoking organization. Teresa, the current head of the organization, has made clear that she expects all her employees to not smoke, even though this was not an explicit condition for their employment, because she views smokers as insufficiently committed to her organization's mission. However, Teresa is permanently leaving the organization. Her replacement, Tina, does not care whether her employees smoke when they are outside the workplace. A few days before Teresa's departure, Brian runs into Victor at a restaurant. Victor is halfway through a cigar. He asks Brian not to tell Teresa, because he knows that if she finds out, her last act as head of the organization will be to fire him. Victor tells Brian that he loves his job, though he also enjoys smoking on occasion. Brian says he will tell Teresa immediately unless Victor pays him $1,000.
10. Pay or Report Crime. Brian doesn't like Victor. When he learns that Victor has killed a man, he tells Victor that he will report the crime to the authorities unless Victor pays him $1, as a way of forcing an admission of guilt that he might choose to use against Victor in the future.
11. Pay Penalty or Foreclose. Brian is the banker who oversees Victor's home mortgage loan. He is also in love with Victor's wife. Victor has missed several mortgage payments. Brian is authorized by his bosses to either arrange a refinancing of Victor's loan, or to impose a substantial one-time penalty on Victor for missing past payments. Brian tells Victor that unless Victor pays the substantial penalty — which he assumes Victor cannot do — the bank will foreclose on Victor's house. Brian believes if Victor loses his house, Victor's wife will leave him.

The first and second scenarios are designed for quality-control purposes. The first scenario is a classic case of blackmail for which all theorists[95] and all statutory schemes[96] would impose blackmail liability. Scenario 2 provides an example of the reverse case, one in which all theorists and all statutory schemes would agree that no blackmail liability should exist.[97] If a subject were to give an incorrect answer to either or both of these screening questions, that subject would be segregated from the bulk of the subjects and not included in the analysis of survey results. We are committed to putting

95. *See supra* subparts I(A)–(C). *But see supra* subpart I(D).
96. *See supra* notes 73–79 and accompanying text.
97. *See supra* subpart I(C).

the various theories and code-drafting approaches to a fair test, which should not include using subjects who cannot provide proper results for the clear cases presented in the two screening scenarios.[98]

To be sure that the subjects were in fact perceiving the scenarios in the way that each was intended, the manipulation-check questionnaire asked each subject whether he or she perceived certain facts or conclusions about each scenario, specifically those facts or conclusions that served as the criteria for each theory. The standard templates for each manipulation-check question for each of the four theories are set out in Table 2. (Recall that the Isenbergh economic theory made no claim that it was based in any part upon lay intuitions of justice, so there is no manipulation check for it as there is for each of the other theories, although we will later compare its liability preferences to the liability preferences of lay persons.)

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98. As a result of this screening mechanism, thirty-five subjects were excluded from the analysis: twenty-one who varied from the predicted response to Scenario 1, twenty-nine who varied from the predicted response to Scenario 2, and fifteen who varied on both.

For the fifteen who confounded both predictions, it is hard to see how their responses could indicate anything other than confusion, random answering, or malicious mischief, as any principled disagreement to the accepted result in the two cases would arise from different, and indeed opposing, views (abolitionists versus expansionists). In fact, as a group, those fifteen subjects' overall responses were "indifferent" (i.e., not statistically significant relative to a neutral answer) for seven of the remaining nine responses, suggesting randomness. (The other two scenarios were Scenario 5 (Pay or Publish Book), for which the excluded subjects favored liability but the included subjects gave an indeterminate response, and Scenario 10 (Pay or Report Crime), where the excluded subjects favored no liability and the included subjects favored liability.)

Those who "erred" on Scenario 1, rejecting liability where liability was predicted, might have been demonstrating an "abolitionist" position toward blackmail, thinking it should never be punished. Yet these respondents as a group also gave indifferent responses to seven of the other ten scenarios (including scenarios where respondents as a whole consistently rejected liability) and gave pro-liability responses to another two scenarios (Scenarios 4 (Pay or Reveal Recipe) and 8 (Cut Tree or Publish Photos)). In fact, the only other scenario for which this group decisively rejected liability was Scenario 10—the *other* "Pay or Report Crime" scenario. Again, this pattern of responses suggests arbitrariness or outright deception.

Those who erred on Scenario 2 also gave indifferent responses to seven of the other ten scenarios (though not the same seven as for those who erred on Scenario 1). For the other three—Scenarios 5 (Pay or Publish Book), 6 (Pay or Expose Cheating), and 8 (Cut Tree or Publish Photos)—this group favored liability.

The excluded subjects also fared very poorly on the manipulation checks, providing further reason to ignore their responses. Of the forty-four manipulation checks, those who "erred" on Scenario 1 gave indifferent responses to nineteen, and "wrong" (i.e., the opposite of predicted) answers to another six; those who erred on Scenario 2 also gave nineteen indifferent answers and six wrong ones, though they were not for the same sets of manipulation checks as the other group.

Table 2. Manipulation-Check Questions for Criteria for Each Theory

a. Wrongful Intention. If Victor refuses Brian's offer, and Brian carries out the threat, would his primary reason for acting be wrongful? (+ = liability) *[a^1: Berman] [& finding demand is substantial = a^2: Katz]*
b. Offer to Violate Legal Duty. If another person knew what Brian knows, should the law require that the person do [or: forbid the person from doing] what Brian threatens to do to Victor, or face legal liability? (+ = liability) *[Feinberg]*
c. Continuing Domination. If Victor agrees to the demand, would Brian retain the power to make additional demands based on the same threat on a future occasion? (+ & finding demand is substantial = liability) *[Fletcher]*
d. Leveraging Another's Influence. If an interested third party learned what Brian knows, would the third party's reaction be to want something different from what Brian demands that Victor do? (+ = liability) *[Lindgren]*

* Scenario #2 required a special *d* question because the standard *d* question above assumes that there might be an interested third party, but scenario 2 was constructed to not have one. Thus, we needed to confirm that the subjects perceived this to be the case and asked: Is there an interested third party who should more properly be exercising the authority that Brian is exercising when he threatens Victor? (If you think that Brian is threatening to use authority that properly belongs to him alone, select –3, –2, or –1.) (– = no liability)

However, each manipulation-check question was in fact individualized to reflect the facts of each scenario. Thus, for example, the manipulation check for the Wrongful Intention Theory for Scenario 1 was as follows.

a. If Victor does not pay Brian the $1,000 and Brian reports Victor's crime to the authorities, would Brian's primary reason for reporting Victor's crime be wrongful?					
–3 Clearly no	–2 Probably no	–1 Possibly no	+1 Possibly yes	+2 Probably yes	+3 Clearly yes

The same six-point, no–yes scale was used for all forty-four of these questions (one question for each of the four theories' criteria for each of the eleven scenarios).

Following these four manipulation-check questions, three additional questions were asked with regard to each scenario. One asked whether the threat was substantial—an additional element of two of the theories (Katz's and Fletcher's). The two other questions asked about the extent of the harm that would be caused if Brian did as he threatened and about the wrongfulness of the victim's conduct that Brian was threatening to expose. Again, each of these three questions was customized to the facts of the scenario. Thus, the questions for Scenario 1 were as follows, with the response scales shown below.

e. How substantial is a demand that another person pay $1,000?					
0 No demand	1 Trivial demand	2 Somewhat substantial	3 Substantial	4 Very substantial	5 Extremely substantial
f. What is the extent of the harm that would be caused to Victor if Brian reported Victor's crime to the authorities?					
0 Not damaging	1 Only trivially damaging	2 Somewhat damaging	3 Damaging	4 Seriously damaging	5 Extremely damaging
g. How wrongfully did Victor behave by killing a man?					
0 Not wrongful at all	1 Trivial	2 Somewhat wrongful	3 Wrongful	4 Seriously wrongful	5 Extremely wrongful

The last two questions were asked so we could test whether these variables might play a role in the subjects' criminalization decisions. Notice that all three of these questions asked not merely for a binary response (e.g., wrongful or not wrongful) but for a quantitative measure of the factor, which we could then use to see if it correlated with subjects' criminalization decisions.

The "correct answers"—those sought by the researchers to assure subjects were perceiving each scenario as intended—are set out in Table 3 below.

Table 3. Manipulation Check "Correct Answers"

#	Scenario	*WI*	*BD*	*CD*	*UA*	*SD*
1	Pay or Report Crime	+	+	+	+	≥2
2	Pay or Face Lawsuit	–	–	–	–*	≥2
3	Sober Work or Expose Drinking	–	–	–	+	≥2
4	Pay or Reveal Recipe	+	–	+	+	≥2
5	Pay or Publish Book	–	–	+	+	≥2
6	Pay or Expose Cheating	+	+	–	+	≥2
7	Withdraw or Expose Cheating	–	+	–	+	≥2
8	Cut Tree or Publish Photos	+	+	–	+	≥2
9	Pay or Report Smoking	+	–	–	+	≥2
10	Pay or Report Crime	+**	+	+**	+	<3**
11	Pay Penalty or Foreclose	+	–	–	–	≥2

Key: *WI* – Wrongful Intention Theory of Berman and Katz
BD – Breach of Duty Theory of Feinberg
CD – Continuing Domination Theory of Fletcher
UA – Usurping Authority Theory of Lindgren
SD – substantial demand (2 or less suggests subject thought Brian's demand was not substantial)
+ = 'yes' response – = 'no' response

* Question *d* for scenario 2 asks the preliminary question of whether there is an interested third party, to which we expect the answer to be "no," thereby obviating the need to ask subjects the question that is used in all other scenarios.

**In scenario 10, question *e* we expect to confirm that subjects do not see the threat as substantial, thus barring liability under theories *WI-K* and *CD* even though the liability requirements for those theories are otherwise satisfied.

In the criminalization questionnaire, after each scenario was presented, participants were asked whether or not Brian should be held criminally liable for his threat. Again, each liability question was customized to the facts of the scenario. So the question for Scenario 1 was as follows, with the same scale used for each scenario.

Does Brian deserve any degree of criminal liability for threatening to report Victor's crime if Victor does not pay him $1,000?						
–3 Definitely no liability of any degree	–2 Probably no liability of any degree	–1 Perhaps no liability of any degree	0 Unsure	1 Perhaps liability of some degree	2 Probably liability of some degree	3 Definitely liability of some degree

After responding to the manipulation-check questionnaire and the criminalization questionnaire, participants were given a short demographic questionnaire asking for information such as age, gender, household income, ethnic background, marital status, number of children, political affiliation, and membership in various types of organizations. Participants also were asked about situations in which they may have been coerced or had coerced others in any of the ways similar to those described in the scenarios and were given space to explain further any coercion that they had experienced.

B. Theory Predictions

Each theory predicts a different pattern of criminalization results for the eleven scenarios, as summarized in Table 4 below. By comparing these predictions to the participants' actual preferences, as we do in subpart D below, we can determine which of the theories best reflects the participants' views.

Table 4. Criminalization Predictions for Each Theory

Scenario	*WI-B*	*WI-K*	*BD*	*CD*	*UA*	*EI*
1. Pay or Report Crime	Y	Y	Y	Y	Y	Y
2. Pay or Face Lawsuit	N	N	N	N	N	N

(continued)

Table 4 (cont.). Criminalization Predictions for Each Theory

3. Sober Work or Expose Drinking	N	N	N	N	Y	N
4. Pay or Reveal Recipe	Y	Y	N	Y	Y	Y
5. Pay or Publish Book	N	N	N	Y	Y	Y
6. Pay or Expose Cheating	Y	Y	Y	N	Y	Y
7. Withdraw or Expose Cheating	N	N	Y	N	Y	Y
8. Cut Tree or Publish Photos	Y	Y	Y	N	Y	N
9. Pay or Report Smoking	Y	Y	N	N	Y	N
10. Pay or Report Crime	Y	N	Y	N	Y	Y
11. Pay Penalty or Foreclose	Y	Y	N	N	N	N

Key: *WI-B and WI-K* – Wrongful Intention Theory of Berman and Katz, respectively
BD – Breach of Duty Theory of Feinberg
CD – Continuing Domination Theory of Fletcher
UA – Usurping Authority Theory of Lindgren
EI – Efficient Information Allocation Theory of Isenbergh
Y = this theory would impose liability in this scenario
N = this theory would not impose liability in this scenario

Below we explain and document why each of the theories gives the pattern of criminalization set out in this table.

1. Wrongful Intention.—Mitchell Berman and Leo Katz both offer theories of blackmail as the wrongful exploitation of the recipient of the threat by the maker of the threat.[99] Under Berman's view, the threat itself

99. *See supra* section I(A)(1).

provides evidence of the blackmailer's wrongful motivations or beliefs.[100] Had the blackmailer been interested in disclosing the information (or engaging in whatever other conduct he threatens), he would simply have done so. The willingness to exchange silence (or other nonaction) for personal gain indicates that if the blackmailer's demand is not satisfied and he carries out the threat, he will be doing so in retaliation for not getting what he sought rather than out of a good-faith desire to inform the party receiving the information.[101] Katz similarly thinks that a retaliatory motivation can make an otherwise innocuous disclosure or other threatened act wrongful.[102]

Both Berman and Katz would find five of our scenarios to describe blackmail based on this retaliatory dimension: Scenario 1 ("Pay or Report Crime [$1,000]"), Scenario 4 ("Pay or Reveal Recipe"), Scenario 6 ("Pay or Expose Cheating"), Scenario 8 ("Cut Tree or Publish Photos"), and Scenario 9 ("Pay or Report Smoking"). In each case, Brian will accept money—or, in Scenario 8, the cutting down of the tree—in exchange for keeping secret whatever information he has, indicating that if he later discloses what he knows, he will not be doing so for the right reasons, but only because the recipient of the threat did not satisfy his desire to get paid.

Scenario 10 ("Pay or Report Crime [$1]") involves a similar threat but presents the one case where Berman and Katz would disagree about the outcome. For Berman, if the willingness to keep one's silence about a known crime indicates a wrongful motivation, the magnitude of the demand does not change the wrongfulness of the threat.[103] For Katz, on the other hand, even a wrongfully motivated threat ceases to be blackmail if the demand is too trivial, and a demand for $1 does not rise to the level of substantiality Katz would require.[104]

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100. Initially, Berman's discussions of blackmail focused on the blackmailer's motivations; in more recent work, Berman has characterized blackmail in terms of the blackmailer's beliefs. *See supra* notes 12–13 and accompanying text.

101. *See supra* notes 11–13 and accompanying text.

102. *See* Katz, *supra* note 3, at 1598 (assessing a hypothetical act of blackmail as "immoral only because, if it were to be done, it would be done for purely retaliatory reasons").

103. *See* E-mail from Mitchell Berman, Richard Dale Endowed Chair in Law, the Univ. of Texas Sch. of Law, to Paul Robinson, Colin S. Diver Professor of Law, Univ. of Pa. Law Sch. (June 5, 2009) (on file with author) (agreeing that Berman's theory "does not have an exclusion for trivial demands").

104. *See, e.g.*, E-mail from Leo Katz, Frank Carano Professor of Law, Univ. of Pa. Law Sch., to Paul Robinson, Colin S. Diver Professor of Law, Univ. of Pa. Law Sch. (June 8, 2009) (on file with author) (claiming that in this scenario the threat is "too insignificant to count as immoral"); Memorandum from Leo Katz, Frank Carano Professor of Law, Univ. of Pa. Law Sch. (Nov. 21, 2008) (on file with author) ("At some point the threatened misconduct is just too trivial. There is some line to be drawn. . . . Where is that line? We probably have discretion about where to draw it. The only thing we are compelled to do by logical consistency is to have such a line."); *see also* Katz, *supra* note 3, at 1597. In discussing his substantiality requirement for demands, Katz states,

> The blackmailer puts the victim to a choice between a theft (or some other criminal encroachment) and some other, minor wrong. The execution of the theft then carries

Scenario 11 ("Pay Penalty or Foreclose") counts as blackmail for both Berman and Katz. Here Brian has the authority to make Victor pay the bank a penalty (and to foreclose if Victor does not), but he is exercising that authority for wrongful reasons—seeking to cause harm to Victor rather than make his decision on more neutral and fair grounds.

The remaining four cases are not blackmail under this theory as they involve situations where the threat is not driven by any wrongful purpose but by a good-faith desire to achieve a fair outcome for all concerned. In Scenario 2 ("Pay or Face Lawsuit"), Brian simply seeks what he is owed in a way that will avoid litigation costs for both parties. If his request fails, his lawsuit would pursue the same legal entitlement as his earlier request, and Brian would not behave wrongfully in pursuing it. In Scenario 5 ("Pay or Publish Book"), Brian has Victor's best interests at heart but also does not want to bear the financial costs of behaving decently toward Victor. Finally, in both Scenario 3 ("Sober Work or Expose Drinking") and Scenario 7 ("Withdraw or Expose Cheating"), Brian is seeking nothing for himself, but he is trying to help Victor hold on to his job or reputation while also respecting (and seeking to ensure that Victor respects) the legitimate interests of others.

2. Breach of Duty.—Under Feinberg's theory, it is acceptable to prohibit a threat as blackmail if it would also be justifiable for the law to prohibit or mandate the threatened act.[105] Where the law imposes a duty, a person may not threaten to violate that duty (as occurs where the threatened act is prohibited), nor may he offer to violate the duty in exchange for compensation (as occurs where the threatened act is mandated).[106] Further, even if the law does not currently recognize a given duty, where the duty is one the law *should* recognize, then Feinberg argues for both adopting that duty and treating threats (or offers) to violate it as blackmail. For example, Feinberg maintains that revelation of some truthful but damaging information should be treated as defamation and threats to reveal such information should

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> with it the level of blameworthiness of a theft. To be sure, the wrong must not be *too* minor. The mere threat to be nasty or unpleasant won't suffice; the immorality has to be more substantial than that. But it need not—and this is the crucial point—be an immorality that comes anywhere close to being criminal.

Id.

105. *See* FEINBERG, *supra* note 3, at 258, 275 (arguing that blackmail appropriately criminalizes "legally extortive" conduct where the threatened acts violate civil or criminal laws).

106. *See id.* at 243 ("No citizen can be allowed to barter away his duties for personal advantage, or even offer to do so (the offer in this case being very much like an *attempt* at crime, itself punishable).").

be treated as blackmail.[107] The test, then, can be stated as follows: if it would be proper for the law to impose a duty to act in a certain way, then it would also be proper for the law to treat a threat or offer to violate that duty as blackmail.

Four of our scenarios are blackmail under Feinberg's theory because they involve offers to violate a duty: situations where the blackmailer's failure to do what he proposes to do would be improper. Feinberg explicitly discusses cases such as Scenario 1 ("Pay or Report Crime [$1,000]") and Scenario 10 ("Pay or Report Crime [$1]"), involving offers to breach one's duty to report criminal activity.[108] As to Scenario 10, Feinberg even points out that, in his view, even a modest demand still counts as blackmail if it involves a violation of one's obligations or civic duty to the community, such as nondisclosure of a crime.[109] Scenario 6 ("Pay or Expose Cheating") and Scenario 7 ("Withdraw or Expose Cheating") both contain a promise on the part of would-be police officers, such as Brian, to expose cheating by other applicants, and Brian's offer to Victor would violate that promise in both cases.[110]

One other case would also constitute blackmail under Feinberg's theory. Under the theory, threats to violate a legal duty are blackmail whether the source of a legal duty is civil or criminal. For example, if someone would be entitled to bring a private lawsuit against another for disclosing secret information in violation of his privacy, then the threat to disclose that information can be treated as blackmail.[111] Scenario 8 ("Cut Tree or Publish Photos"), where Brian uses a special device to take compromising photographs of Victor in his own home and threatens to make them public, presents just such a situation, as Victor would almost certainly have a tort claim against Brian for invasion of privacy.

Feinberg's breach-of-duty theory finds that a threat is not blackmail if there is no duty in either direction, but the maker of the threat should be legally free either to engage in the threatened conduct or not.[112] Three of our cases involve situations where the person making the threat is in possession

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107. *See id.* at 254–56 (advocating both civil duties and criminal laws designed to protect personal reputations from such revelations when the public interest in the truth is minimal).

108. *See id.* at 241–45 (describing threats to expose criminal wrongdoing as one form of blackmail).

109. *See id.* at 262 (noting that a minor demand made in exchange for not revealing a crime to the authorities is blackmail not because of the excessive harm to the victim but because it "default[s] on a civic duty to the community").

110. *See id.* at 244–45 (arguing that an offer to violate the civic duty to cooperate with law enforcement should be considered blackmail).

111. *See id.* at 250–51 (asserting that blackmail includes a demand for payment in exchange for revealing information that would constitute a tortious invasion of privacy).

112. *See id.* at 245–49 (arguing that threats to reveal noncriminal conduct by the victim ought not to be criminalized as blackmail).

of certain secret information and neither has, nor plausibly should have, any legal obligation either to disclose or to conceal such information.[113] In Scenario 3 ("Sober Work or Expose Addiction"), Brian might arguably have a moral responsibility to tell his employer of Victor's addiction, but it seems dubious to claim that his failure to do so should subject him to legal liability, either criminally or civilly. In the other cases—Scenario 4 ("Pay or Reveal Recipe"),[114] Scenario 5 ("Pay or Publish Book"),[115] and Scenario 9 ("Pay or Report Smoking")[116]—Brian is clearly free to decide whether or not he should reveal what he knows, as Victor's secret behavior is neither illegal nor dangerous.

Our other two cases—Scenario 2 ("Pay or Face Lawsuit") and Scenario 11 ("Pay Penalty or Foreclose")—involve situations where the maker of the demand is legally entitled to what he is demanding and therefore clearly violates no duty in making the request for it.[117]

3. Continuing Domination.—The criteria for establishing blackmail under George Fletcher's theory are whether the threat involves a demand that is both significant and capable of repetition, thus having the potential to create an ongoing relationship of dominance and subordination between the blackmailer and the victim.[118] Three of our scenarios count as blackmail under this theory. All three involve situations where the blackmailer makes a demand for money that could easily be replicated, even if the recipient of the threat pays the money, because the blackmailer will retain access to the information that grounds the threat: Scenario 1 ("Pay or Report Crime [$1,000]"), Scenario 4 ("Pay or Reveal Recipe"), and Scenario 5 ("Pay or Publish Book").[119]

A fourth case, Scenario 10 ("Pay or Report Crime [$1]"), also involves such a threat but would not count as blackmail for Fletcher because the de-

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113. *Cf. id.* at 248–49 (noting the absence of justifiable duty for those who know about another's adultery either to reveal or to conceal it).

114. *Cf. id.* at 245 (noting the lack of duty to disclose noncriminal "trickery" such as that of "a merchant whose underhandedness falls short of outright fraud . . . but misleads unwary customers into purchasing inferior products for inflated prices").

115. *See id.* at 263–64 (claiming that a publisher who requests fair compensation for not including "damaging" elements in a forthcoming book may be justified and has not committed blackmail).

116. *See id.* at 245–49 (arguing that threats to reveal noncriminal conduct by the victim ought not to be criminalized as blackmail).

117. *See id.* at 264–66 (noting that demands made under a legal claim of right are justifiable and not blackmail).

118. *See supra* section I(A)(2).

119. *See* Fletcher, *supra* note 3, at 1626 ("Blackmail occurs when, by virtue of the demand and the action satisfying the demands, the blackmailer knows that she can repeat the demand in the future.").

mand is not "substantial." A "minimal" demand, such as the request for $1 in this case, is insufficient to create the degree of subordination Fletcher considers to be the gravamen of blackmail.[120]

Our other seven scenarios involve threats that cannot be repeated, so no continuing pattern of domination can be established. Three scenarios are designed to present threats that cannot be repeated because the maker of the threat is offering to relinquish the physical evidence or documentation enabling the threat: Scenario 6 ("Pay or Expose Cheating"), Scenario 7 ("Withdraw or Expose Cheating"), and Scenario 8 ("Cut Tree or Publish Photos").

The four remaining scenarios also involve threats incapable of repetition, each because of more unique circumstances. In Scenario 2 ("Pay or Face Lawsuit"), payment of the cost of repairs will leave Brian with no damages, hence no further ability to bring a lawsuit. In Scenario 3 ("Sober Work or Expose Addiction"), if Victor accedes to Brian's current demand and becomes sober, he will no longer have any problem for Brian to expose. In Scenario 9 ("Pay or Report Smoking"), Brian will lose the opportunity to repeat the demand because the scenario provides that the currently damaging information about Victor's smoking will no longer pose any threat to Victor once the new head of the organization, Tina, takes charge. Scenario 11 ("Pay Penalty or Foreclose") involves a "one-time" penalty that Victor will either pay or not within thirty days. If the penalty is paid, Brian loses his leverage, and if it is not, Brian might make good on the foreclosure threat but would then have no continuing authority to exercise over Victor.

4. Usurping Authority.—Under James Lindgren's theory, "blackmail is a way that one person requests something in return for suppressing the actual or potential interests of others. To get what he wants, the blackmailer uses leverage that is less his than someone else's."[121] Often this involves making a threat "to release damaging information" that some other party might want to know.[122] In our Scenario 1 ("Pay or Report Crime [$1,000]"), Scenario 6 ("Pay or Expose Cheating"), and Scenario 10 ("Pay or Report Crime [$1]"), Brian seeks personal gain by using information in which law enforcement authorities (and the public at large) would have an interest. In Scenario 4 ("Pay or Reveal Recipe"), Brian seeks money to withhold information that would interest the bakery's customers. In Scenario 9 ("Pay or Report Smoking"), Brian seeks money in return for keeping from Teresa information that she would want to know.

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120. *Cf. id.* at 1627 (noting that the case of one who threatens to withhold a kiss in demand of dinner does not pose a threat of dominance and subordination because the "threat and the demand are minimal").

121. Lindgren, *supra* note 2, at 672.

122. *Id.*

Similar, though perhaps less intuitive, results obtain under Lindgren's theory for Scenario 5 ("Pay or Publish Book")[123] and Scenario 8 ("Cut Tree or Publish Photos"). Here also, Lindgren's theory finds the threat to be blackmail on the basis that Brian is somehow selling out the public's interest in obtaining secret, even salacious information about a private citizen.[124]

Finally, Scenario 3 ("Sober Work or Expose Addiction") and Scenario 7 ("Withdraw or Expose Cheating") are also blackmail under Lindgren's theory. In both cases, though Brian does not seem to seek anything for his own benefit, what he asks of Victor departs from what the relevant third party would demand in Brian's stead (and Brian is aware of this). Scenario 3 makes clear that if the employer knew about Victor's substance-abuse problem, it would fire Victor under the "zero-tolerance" policy. Brian is additionally demanding things (such as the donation to charity) that the employer would not be in a position to demand. Accordingly, though Brian might not be advancing his own interests over the employer's, he is pursuing a remedy at odds with what the entitled, but ignorant, third party would pursue. Scenario 7 is similar. Indeed, Scenario 7 presents an even stronger case for blackmail under Lindgren's theory because here not only is Brian making a demand that might be incongruent with what the police force would do, but Brian is also violating his own promise to turn in cheaters to the proper authorities. Accordingly, Brian knows himself to be substituting his own judgment for that of another authorized decision maker.

For two cases, there is no third party whose interests are infringed by Brian's demand to Victor. In Scenario 2 ("Pay or Face Lawsuit"), Brian is not advancing the rights or interests of a third party but his own rights to payment for damage to his car.[125] In Scenario 11 ("Pay Penalty or Foreclose"), Brian's position as an agent of the bank entitles him to impose the penalty, and he is arguably protecting the interests of the bank by doing so. Even if his motivation is not to advance the interests of the bank alone, the bank's position has not been compromised in any way—indeed, the bank is the source of Brian's authority and has delegated to Brian exactly the power he is exercising in this situation.

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123. Lindgren discusses this precise situation. *See id.* at 683 ("Consider also the biographer or memoirist who seeks money to refrain from publishing a book that will damage someone's reputation. Publishing would further the writer's lawful business, but seeking money to refrain from ruining someone's reputation or business is blackmail.").

124. *See id.* at 672 ("[S]elling the right to inform others of embarrassing (but legal) behavior involves suppressing the interests of those other people.").

125. *See id.* at 713–14 ("For example, assume a person believes he has been tortiously and criminally harmed by another person. All authorities agree that it is legitimate for the injured party or his lawyer to threaten to file a civil suit for damages.").

5. Efficient Information Allocation.—Four of the scenarios are clearly blackmail of Isenbergh's first variety:[126] both Scenarios 1 and 10 ("Pay or Report Crime") and Scenarios 6 and 7 ("Pay/Withdraw or Expose Cheating") involve situations where the information could form the basis for a criminal prosecution. Two other scenarios are just as clearly *not* blackmail for Isenbergh: in both Scenario 2 ("Pay or Face Lawsuit") and Scenario 11 ("Pay Penalty or Foreclose"), Brian is directly enforcing legal rights that he has the authority to enforce.

For the remaining cases, the issue under Isenbergh's test is whether there has been any "prior course of dealing" between Brian and Victor; if not, the disclosure threat would be blackmail.[127] In Scenario 4 ("Pay or Reveal Recipe"), the case does not specify whether Brian obtained the information about Victor's cupcake recipe fortuitously or through deliberate effort, but there is no indication of any previous relationship, so Isenbergh would treat the case as blackmail. The same seems true for Scenario 5 ("Pay or Publish Book"), where it is clear that Brian was deliberately researching the details of Victor's life for the sake of uncovering what information he could.

This case indicates that Isenbergh's account has a difficult time dealing with cases of journalism or other investigation, where the researcher is, in Isenbergh's terms, engaged in "systematic information-farming" though not "bent only on profit from suppressing what they have uncovered."[128] Are such cases blackmail, because nonprohibition would promote excessive fruitless investigations, or nonblackmail, because the researcher is as or more likely to find (and disclose) useful public information as to find damaging private secrets, and she is not planning at the outset to "bargain" with the target to keep the information secret? Under Isenbergh's test, such cases are blackmail, though it is by no means clear whether such treatment is in keeping with Isenbergh's underlying goals.[129] A basic concern of Isenbergh (as with other law-and-economics thinkers) is to ensure that information ends up where it is most highly valued, and it is not clear in these cases whether the threat recipient values secrecy more than the public would value the

126. *See* Isenbergh, *supra* note 60, at 1928 (stating the "tentative first rule" in blackmail is that "*B* cannot legally bargain with *A* to suppress information about a prosecutable crime or tortious act committed by *A*").

127. *See id.* at 1908 (noting that an alternative to criminalization would be to treat threats based on information obtained outside a prior course of dealing as legally unenforceable "and to treat *B*'s receipt of compensation for silence as a form of complicity in whatever is kept silent").

128. *See id.* at 1929 (recognizing that one danger of permitted bargaining is that it may "open the door to systematic information-farming by blackmailers bent only on profit from suppressing what they have uncovered").

129. *See id.* at 1930 (suggesting a test where contracts not to disclose private information would be valid only when the parties involved have a preexisting relationship).

information—though often the researcher, with the option of selling the information to either party, might be in the best position to decide.[130]

In the remaining three cases, Brian and Victor do have a preexisting relationship, so Isenbergh's test would not treat any of them as blackmail.[131] In Scenario 9 ("Pay or Report Smoking") and Scenario 3 ("Sober Work or Expose Drinking"), the implication is that Brian obtained the information fortuitously, so the result is consistent with Isenbergh's underlying principle. In such situations it also seems likely that Victor would be the "lowest cost avoider of untoward disclosure, and there is no obvious reason to protect [Victor] from bearing the full cost of preserving his own secrets."[132] The result of nonblackmail in the final case, Scenario 8 ("Cut Tree or Publish Photos"), is somewhat curious because Brian has engaged in deliberate snooping with a specific view to using its fruits as the basis of a threat. Here again, though, perhaps an individual should bear the burden of taking steps to prevent neighbors from spying. Further, it also seems likely that Victor values nondisclosure of the photos more than the public would value access to them; the photos' main, and perhaps only, value lies in Victor's desire to keep them private.

C. Statutory Liability Patterns

We also sought to test which statutory approach in current law best captures the participants' views. Building upon the analysis of current statutes in Part II, which suggested the existence of three common statutory approaches, we analyzed each scenario using the legal criteria summarized in Table 5.

130. *See id.* at 1925 ("The most important concern in framing a regime for bargaining over private information is to enhance the likelihood that it will be controlled by the one who values it most.").

131. *Id.* at 1930.

132. *Id.* at 1931.

Table 5. Legal Criminalization Criteria

e. Model Penal Code (broad-broad)[133] (Broad offense definitions, broad exceptions). Did Brian, with purpose unlawfully to restrict Victor's freedom of action to his detriment, threaten to commit a criminal offense, accuse anyone of a criminal offense, or expose a secret tending to subject any person to hatred, contempt, or ridicule? Brian is not liable if he believed the secret to be true and his action was limited to compelling Victor to behave in a way reasonably related to the circumstances which were the subject of the accusation, or exposure. Examples of permissible behaviors for Brian to compel include making Victor desist from further misbehavior, making Victor fix a previous wrong, or making Victor refrain from taking any action or responsibility for which Brian believes that Victor is not qualified.
f. Narrow-narrow jurisdictions[134] (Narrow offense definitions, narrow exceptions). Did Brian threaten to expose a secret, accuse anyone of a crime, or threaten injury to Victor's property or reputation with intent to obtain Victor's property? Brian is not liable if he was owed the property as compensation for property or services, or as restitution for harm done to Brian.
g. Broad-narrow jurisdictions[135] (Broad offense definitions, narrow exceptions). Did Brian threaten to expose a secret, accuse anyone of a crime, or threaten injury to Victor's property or reputation with intent to coerce Victor into taking or refraining from action, or with intent to obtain Victor's property? Brian is not liable if he was owed the property as compensation for property or services, or as restitution for harm done to Brian.

Using these criteria, the three statutory approaches would generate criminalization for the eleven scenarios in the patterns set out in Table 6 below.

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[133] *See supra* notes 82–83 and accompanying text.

[134] *See supra* notes 88–89 and accompanying text.

[135] *See supra* notes 84–87 and accompanying text.

Table 6. Legal Liability Analysis

Scenario	MPC	N-N	B-N
1. Pay or Report Crime	Y	Y	Y
2. Pay or Face Lawsuit	N	N	N
3. Sober Work or Expose Drinking	N	N	Y
4. Pay or Reveal Recipe	Y	Y	Y
5. Pay or Publish Book	Y	N	N
6. Pay or Expose Cheating	Y	Y	Y
7. Withdraw or Expose Cheating	N	N	Y
8. Cut Tree or Publish Photos	Y	N	Y
9. Pay or Report Smoking	Y	Y	Y
10. Pay or Report Crime	Y	Y	Y
11. Pay Penalty or Foreclose	N	N	N

Key: *MPC* – *MPC* (broad-broad) jurisdictions
N-N – narrow-narrow jurisdictions
B-N – broad-narrow jurisdictions
Y – this statutory group typically would impose liability in this case
N – this statutory group typically would not impose liability in this case

The MPC (broad–broad) jurisdictions would find liability for Brian in Scenarios 1, 4,[136] 5,[137] 6, 8, 9, and 10. However, Brian would get the excep-

136. Note that in Scenario 4, Brian does not get the MPC affirmative defense because his purpose is not limited to compelling Victor to behave in a way reasonably related to the circumstances. However, North Dakota's formulation of the exception is significantly different: rather than having a limited-purpose requirement, the statute only requires that Brian believe "[t]hat a purpose of the threat was to cause the other to . . . refrain from taking any action or responsibility for which he was disqualified." N.D. CENT. CODE § 12.1-17-06(2)(b) (1997). While preventing Victor from taking a job for which he was unqualified is clearly not Brian's primary purpose, it could arguably be one of his secondary motives. As such, Brian would receive an exception for Scenario 4 in North Dakota.

137. The outcome for this scenario is slightly curious, as it presents one of the few situations that might fit into the "narrow" exception but does not fit within the "broad" one. Brian's request for money to cover his work expenses has no direct connection to Victor's underlying wrongdoing,

tion offered by the MPC in Scenarios 2 and 7, as his purpose in those situations was to make Victor act in a way reasonably related to the circumstances surrounding Brian's threat. In Scenario 3, Brian will get the exception, but he does not satisfy the MPC's offense requirements in any case because he does not have purpose to restrict Victor's freedom of action "to his detriment."[138]

It is difficult to formulate a "model" broad–narrow statute because of their different drafting styles, but we conclude that statutes in this group would find liability for Brian in every scenario except 2, 5, and 11. The critical difference between this category and the broad–broad category relates to the nature of the exception: in every scenario in which the broad-exception statutes, such as the MPC, would give an exception, the narrow-exception statutes would not (in Scenario 5, however, the narrow exception would apply even though the MPC's would not).[139] Brian does not have a right to any of the property demanded in Scenarios 1, 6, 9, and 10; thus he will not get an exception. If he did have a right to the money, however, he could get an exception under a broad–narrow statute.

For the narrow–narrow statutes, it is again difficult to formulate a model, but these statutes will find liability for Brian in Scenarios 1, 4, 6, 9, and 10. Predictably, these statutes differ from the broad–broad statutes with respect to Scenario 8, where Brian demands action from Victor rather than compensation; a narrow–narrow statute will not criminalize the actor who makes this type of demand. These statutes also find no liability where the actor demands only compensation for property or "lawful services," as in Scenario 5.[140]

Of the jurisdictions in the "other" category, the four "broad prohibition" statutes would impose liability for Brian in all scenarios, and the five "narrow prohibition" statutes would impose liability in Scenarios 1, 5, 6, 9, and 10, tracking the narrow–narrow jurisdictions' results.

A more complete legal analysis explaining and documenting each of these liability judgments for each statutory approach is set out in Appendix A. In subpart D below, we will compare these statutory criminalization patterns to the participants' liability patterns.

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thus it is not "reasonably related to the circumstances which were the subject of the accusation," as the MPC exception requires. MODEL PENAL CODE § 212.5(1) (1962). At the same time, Brian is at least arguably requesting "restitution" or "compensation" from Victor, as required by the narrow exception; even though Victor did not commission the biography and so does not legally owe Brian for his work, Brian would complete the work and obtain due compensation from other sources were he not forbearing from disclosing what he knows about Victor.

138. *Id.* § 212.5(1)(d).

139. *See supra* note 137.

140. *See supra* note 137.

D. Results and Discussion

1. Manipulation-Check Results.—The results of the manipulation-check questionnaire are set out in Table 7, which can be compared to the desired subject perceptions described in Table 3. Average responses greater than zero are a "yes" response; those below zero are a "no" response.

Table 7. Manipulation Check Results

#	Scenario Q:	*WI*	*BD*	*CD*	*UA*	*SD*
1	Pay or Report Crime	1.1	2.2	2.2	2.3	2.6
2	Pay or Face Lawsuit	–2.4	–0.7	–1.2	–0.6	2.7
3	Sober Work or Expose Drinking	–2.2	*0.3*	–0.4	0.5	2.9
4	Pay or Reveal Recipe	2.3	–1.9	2.0	1.5	4.1
5	Pay or Publish Book	–0.4	–1.4	1.4	1.2	3.2
6	Pay or Expose Cheating	1.3	0.8	**0.6**	2.1	3.0
7	Withdraw or Expose Cheating	–1.5	1.0	–0.5	*0.4*	3.3
8	Cut Tree or Publish Photos	2.7	2.5	–0.5	1.5	2.8
9	Pay or Report Smoking	2.2	–1.7	–0.7	2.0	3.0
10	Pay or Report Crime	0.9	2.2	2.1	2.2	1.0
11	Pay Penalty or Foreclose	1.5	–0.6	*–0.1*	*–0.1*	3.1

Key: *WI* – Wrongful Intention Theory of Berman and Katz
BD – Breach of Duty Theory of Feinberg
CD – Continuing Domination Theory of Fletcher
UA – Usurping Authority Theory of Lindgren
SD – substantial demand (2 or less suggests subject thought Brian's demand was not substantial)
+ = 'yes' response – = 'no' response

Although the concepts being manipulated here are quite complex and abstract, a comparison to Table 3 suggests that these results are quite good. The one response of the sixty-six that is not the desired perception described in Table 3 is set out in bold. The four responses that indicate indifference—those that do not statistically significantly differ from zero, meaning a neutral

response—are in italics. (Later in our analysis, we will introduce specific analyses that attempt to compensate for these subject misperceptions.)[141]

A special note may be appropriate here. Part of the goal of this project is to encourage criminal law theorists to undertake or to participate in such empirical research. By themselves, the excellent results above may create a false impression that it is easy for researchers to write scenarios that subjects will perceive as the researcher intends. In fact, the opposite is true. No matter how clear or obvious a researcher may think the picture painted by a scenario, one can be almost guaranteed that some minority of subjects, or even a majority, will read the scenario in unanticipated ways. Ambiguity is rarely obvious when a scenario is first drafted.

This creates a serious problem, of course, because when subjects perceive a scenario in a way different than that intended—which means that different subjects are probably perceiving the scenario differently from one another—it is difficult, if not impossible, to draw reliable conclusions from the liability results reported. Without knowing what the subjects are responding to, a researcher cannot know what conclusions to draw from their responses.

The good manipulation-check results reported in this study are not the result of either good luck or a special talent in drafting scenarios but rather the result of dozens of manipulation-check mini field tests together with three formal manipulation-check pilot tests. After each test, adjustments were made to the scenarios' texts, which were then retested. As may be apparent to the reader, one may spend months making scenarios unambiguous for a data collection of the main point of interest that may be done once and done quickly. The vast bulk of the work is in the preparation, not in the data collection or analysis.

The larger point here is that criminal law theorists who undertake such studies can benefit significantly from partnering with a well-trained experimental psychologist and from having a good deal of patience for the unexpected trials that reliable experimental work inevitably brings.

2. Liability Results.—The subjects' criminalization judgments are set out in Table 8. The theory predictions from Table 4 and the statutory liability patterns from Table 6 are reproduced for comparison purposes. The points at which a theory or a statutory approach disagree with the subjects' views, on average, are marked in bold.

141. *See infra* Table 10 (showing the correlation between the predictions and the subjects' liability responses, conditioned on the subjects' manipulation-check responses).

Table 8. Criminalization Results (and Comparisons)

Scenario	Mean	Y/N	*WI-B*	*WI-K*	*BD*	*CD*	*UA*	*EI*	*MPC*	*N-N*	*B-N*
1. Pay or Report Crime	2.5	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
2. Pay or Face Lawsuit	–2.5	N	N	N	N	N	N	N	N	N	N
3. Sober Work or Expose Drinking	–1.6	N	N	N	N	N	**Y**	N	N	N	**Y**
4. Pay or Reveal Recipe	1.3	Y	Y	Y	**N**	Y	Y	Y	Y	Y	Y
5. Pay or Publish Book	*0.2*	–	*N*	*N*	*N*	*Y*	*Y*	*Y*	*Y*	*N*	*N*
6. Pay or Expose Cheating	1.6	Y	Y	Y	Y	**N**	Y	Y	Y	Y	Y
7. With-draw or Expose Cheating	–1.1	N	N	N	**Y**	N	**Y**	**Y**	N	N	**Y**
8. Cut Tree or Publish Photos	2.3	Y	Y	Y	Y	**N**	Y	**N**	Y	**N**	Y

(continued)

Table 8 (cont.). Criminalization Results (and Comparisons)

9. Pay or Report Smoking	0.7	Y	Y	Y	**N**	**N**	Y	**N**	Y	Y	Y
10. Pay or Report Crime	1.5	Y	Y	**N**	Y	**N**	Y	Y	Y	Y	Y
11. Pay Penalty or Foreclose	–0.5	N	**Y**	**Y**	N	N	N	N	N	N	N

Key: *WI-B and WI-K* – Wrongful Intention Theory of Berman and Katz, respectively
BD – Breach of Duty Theory of Feinberg
CD – Continuing Domination Theory of Fletcher
UA – Usurping Authority Theory of Lindgren
EI – Efficient Information Allocation Theory of Isenbergh
MPC – MPC (broad-broad) jurisdictions
N-N – narrow-narrow jurisdictions
B-N – broad-narrow jurisdictions
Y = this theory would impose liability in this scenario
N = this theory would not impose liability in this scenario

All of the liability averages are statistically significantly different from zero, except those for Scenario 5, set in italics. That scenario was the one in which the author of a biography gave the subject of the biography an opportunity to compensate him for his work to date in return for not publishing damaging information that the author had found during his research work. The problem was not one of different subjects perceiving the scenario differently and, therefore, coming to different liability conclusions. As is apparent from Table 7 above, the Scenario 5 manipulations for all four types of theories tested worked. The subjects simply disagreed with one another about whether there should be criminal liability in such a case. The resulting average of 0.2 was not statistically significantly different from zero, which was "unsure."[142] In our analyses below, we will for the most part exclude consideration of Scenario 5.

142. 48.8% of the subjects would impose liability and 34.9% would not, while 16.3% were undecided (the highest number of undecided responses of any scenario). More subjects (twenty-one) answered "unsure" for this scenario than for any other, and the overall distribution of responses for this scenario was uniquely "flat," with all possible responses from –3 ("definitely no liability") to +3 ("definitely liability") chosen by at least thirteen subjects but no more than twenty-five subjects.

At least one of the six theories disagreed with the subjects on every scenario (except the two screening scenarios, Scenarios 1 and 2, of course). This is as planned. The scenarios were constructed to test the differences between the theories. The more theories the subjects' responses for a given scenario contradicted, the more support those responses would tend to provide for the theory or theories supporting the result. The maximum support for any given theory would be a scenario where only that theory, and no others, predicted a given result, and the subjects' responses generated that result. On the other hand, the clearest evidence of disagreement with a given theory would be if only that theory predicted a given result and the subjects chose the opposite result.

Two scenarios generated liability results that disagreed with the predictions of three theories: Scenario 7 (*BD*, *UA*, *EI*) and Scenario 9 (*BD*, *CD*, *EI*). Another three scenarios had results that disagreed with two theories: Scenario 8 (*CD*, *EI*), Scenario 10 (*WI-K*, *CD*), and Scenario 11 (both versions of *WI*). Three scenarios gave results that conflicted with the prediction of only one theory: Scenario 3 (*UA*), Scenario 4 (*BD*), and Scenario 6 (*CD*). As discussed earlier, the results of Scenario 5 were inconclusive.

A simple way to test the relative descriptive adequacy of the various positions is to simply count to see how many of their predictions bear out when looking at the mean liability judgments for the ten scenarios with significant liability results presented in Table 8.[143] Here's the scorecard:

10 (out of a possible 10): MPC (Broad–Broad)
9: Wrongful Intention (Berman); Narrow–Narrow
8: Wrongful Intention (Katz); Usurping Authority (Lindgren); Broad–Narrow
7: Breach of Duty (Feinberg); Efficient Allocation (Isenbergh)
6: Continuing Domination (Fletcher)[144]

Below we give a more detailed look.

3. The Theories.—As is apparent from Table 8, no liability theory exactly matches the subjects' liability judgments, although the Wrongful

143. Scenario 5 is excluded from the analysis. *See supra* text accompanying note 142.

144. As noted above, one of the manipulation checks for Fletcher (Scenario 6) gave the opposite of the predicted result. *Compare supra* Table 3, *with supra* Table 7. The subjects' pro-liability result for that scenario does not conflict with Fletcher's theory, however, given the subjects' perception of the scenario. *See infra* Table 10. Accordingly, Fletcher could as easily fit into the "7" scorecard category above.

Intention Theory, especially the Berman version, comes quite close. Apart from Scenario 5 (the scenario on which the subjects themselves substantially disagreed about the proper result), the only scenario the theory got wrong was Scenario 11, in which Brian, a bank official, does what the bank has authorized him to do but with a wrongful intention. The subjects on average said no liability, while the Wrongful Intention Theory would impose liability. All four of the other theories got this liability prediction correct. On the other hand, this was the scenario on which there was the most disagreement among the subjects (apart from Scenario 5): a majority of 51.2% versus a minority of 39.5% (with 9.3% undecided).[145] Thus, the Wrongful Intention Theory does accurately capture the views of a substantial minority of the subjects.

Each other theory had more points of disagreement with the subjects. The Katz version of the Wrongful Intention Theory had the same disagreements with subjects as did the Berman version but, in addition, turned out wrong about the one aspect on which the Katz and the Berman versions disagreed: Scenario 10. The subjects were happy to impose criminal liability even though the demand itself was not substantial (only for $1), while Katz would have taken the trivial demand as barring liability.

Lindgren's Usurping Authority Theory did slightly less well, with two points of disagreement: Scenarios 3 and 7. In both cases, Lindgren's theory would impose liability, but the subjects did not, even though they recognized that Lindgren's relevant factor was present, i.e., the manipulation checks were positive (though modestly so). More generally, Lindgren's theory was only weakly predictive where it indicated liability but was the second most strongly predictive theory (after Berman's) where it predicted no liability,[146] including an accurate prediction of no liability for Scenario 11, the only one Berman's theory predicted incorrectly.[147]

Feinberg's Breach of Duty Theory had three points of disagreement with subjects (beyond Scenario 5): Scenarios 4, 7, and 9—and the disagreements were in both directions. The disagreement on Scenarios 4 ("Pay or

145. Five of the nine test scenarios—3, 4, 6, 8, and 10—had a trivial amount of dissent (ranging from 3.0% to 19.2%). Two other scenarios had a larger group of dissenters: 7 and 9 (25.3% and 26.3%, respectively).

146. *See infra* Tables 9, 10.

147. This might suggest Lindgren's test provides a useful factor that might supplement Berman's as a "negative" predictor: where Lindgren's factor is not present, subjects might reject liability even though Berman's test is satisfied. In other words, perhaps subjects are inclined to impose liability where the person making the threat has wrongful motivations and is seeking an entitlement that is properly someone else's. This effect, however, might also be attributable to the fact that Lindgren's theory predicted no liability for only two scenarios, one of which (Scenario 2) was a screening case for the no-liability result. Further, subjects were strongly willing to impose liability in Scenario 8, for which the relevant entitlement under Lindgren's theory—the public's putative interest in seeing compromising photos of a private citizen—seems relatively weak.

Reveal Recipe") and 9 ("Pay or Report Smoking") is hardly surprising, as both bear some similarity to the classic adultery-disclosure blackmail scenario that Feinberg's theory excludes from liability.[148] In both situations, the person making the threat has access to potentially reputation-harming information that he has no obligation to share with anyone, and he offers to reveal that information unless paid. Subjects would treat such situations as blackmail, though Feinberg would not.[149] Yet Feinberg would impose liability in Scenario 7 ("Withdraw or Expose Cheating"), though subjects would not.[150]

As with Feinberg's theory, Isenbergh's Efficient Information Allocation Theory had three points of disagreement with subjects: Scenarios 7, 8, and 9. And, again, the disagreements were in both directions: for Scenario 7, Isenbergh would favor liability, but the subjects rejected it, whereas for Scenario 8, Isenbergh would oppose liability, but the subjects favored it (quite strongly).[151] In Scenario 9, subjects were willing to impose liability though Brian clearly obtained the information fortuitously rather than by "information farming." It seems unlikely that the subjects' intuitions were driven by the considerations Isenbergh finds relevant—which is not a direct critique of Isenbergh, of course, because his account of blackmail made no claim to reflect public moral sentiment.

The Continuing Domination Theory of Fletcher had four points of disagreement with subjects: Scenarios 6, 8, 9, and 10. Like Katz, Fletcher takes the position that threats should only constitute blackmail if the blackmailer's demand is above some threshold level of significance.[152] As with Katz, the subjects' willingness to impose liability in Scenario 10, involving a demand of $1, indicates that this aspect of Fletcher's theory does not accord with popular intuitions.[153] The other three scenarios for which Fletcher's predictions depart from actual responses also err in the same direction: subjects imposing liability where Fletcher's theory would not.[154] Scenario 6, however, does not truly count against Fletcher, for the subjects' manipulation-check responses for that scenario were positive for Fletcher's theory, indicating that they believed its criterion was satisfied, so their willingness to impose liability for that scenario actually aligns with what Fletcher would predict given the subjects' own understanding of the case.[155] For

148. *See supra* section III(B)(2).
149. *See supra* Table 8.
150. *See supra* section III(B)(2).
151. *See supra* section III(B)(5).
152. *See supra* sections III(B)(1), (3).
153. *See infra* Table 9 and accompanying text.
154. *See supra* section III(B)(3).
155. *See supra* Table 7.

Scenarios 8 and 9, however, the manipulation-check test for Fletcher's theory is negative, yet the subjects' liability response is positive, indicating that they are not following Fletcher's ongoing-subordination account of blackmail. Both cases are constructed so that Brian could not repeat his demand of Victor, and the subjects perceived this feature of both scenarios but were willing to impose liability nonetheless.

Finally, it is worth noting the lack of support for the abolitionist position. Subjects supported liability in six of the eleven scenarios tested. Only one subject who completed the survey imposed no liability for any of the eleven scenarios. Moreover, this person responded in a manner consistent with our predictions for the manipulation checks for only seventeen of the possible fifty-five theory items, raising doubts about how seriously the subject took the survey.[156] The empirical data suggests that the abolitionist position is inconsistent with community views.

4. The Statutory Schemes.—It turns out that the statutory schemes did better overall than the theorists in predicting the subjects' liability views. Indeed, setting aside Scenario 5 (on which the subjects were essentially split among themselves), the Model Penal Code's broad–broad approach matched the subjects' views exactly, the only one to do so! The consonance between the statutory approach and the subjects' intuitions is all the more remarkable given the Model Penal Code's overtly utilitarian focus and disavowal of any effort to track public moral sentiment—though it is possible the Code's drafters were more influenced by considerations of moral blameworthiness than they let on.[157]

The other two statutory options seemed to fall short insofar as they departed from the Model Penal Code's approach. The broad–narrow approach, which defines the offense expansively (like the Model Penal Code) but recognizes fewer exceptions, erred in the direction of imposing liability in two cases where the subjects would not: Scenarios 3 and 7. On the other hand, the narrow–narrow approach, which defines the offense itself less broadly, failed to impose liability in one scenario where the subjects would, Scenario 8—which was also the scenario which had the second strongest pro-liability result, nearly as strong as the result for Scenario 1, the archetypal

156. As noted earlier, because this subject did not give the predicted response to Scenario 1, his or her survey was not used in calculating the results of the study. *See supra* note 98 and accompanying text.

157. *See, e.g.*, Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1839 (2000) (asserting that the Model Penal Code "defers to laypersons' shared intuitions of justice on issues touching essentially all criminal cases"). For a similar example of the Model Code drafters taking account of community intuitions without admitting it, see their treatment of resulting harm, discussed in Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES 299, 317 (1994).

blackmail case. It seems, then, that so far as community sentiment is concerned, the "narrow offense" approach is too exclusive, and the "narrow exception" approach too inclusive, in determining which threats count as blackmail.

5. More Sophisticated Measures of Best Fit with Subjects' Criminalization Views.—Comparisons of relative accuracy also can be made using more sophisticated statistical analyses. Tables 9 and 10 use η_p^2, or "partial eta squared," which is a measure of effect size that approximates the proportion of variance in liability judgments due to the distinction made by the theory. (For both logical and statistical reasons, the screening scenarios—Scenarios 1 and 2—are excluded from these analyses.[158]) Under the standard interpretive scheme for such measurements, η_p^2s of .02, .13, and .26 conservatively are seen as small, medium, and large effects, respectively, for behavioral research.[159] By this measure, most of the study's measured effects are large.

Table 9 below compares the average responses given by each subject for the nine test scenarios as distinguished by the frameworks' predictions. For example, to calculate the statistics in the first row, for each participant, we calculated the average liability response she gave to the six scenarios for which Berman predicts liability (4, 6, 8, 9, 10, and 11). Then, we calculated the average response given for the three scenarios for which Berman predicts no liability (3, 5, and 7). A negative number in the "no" column indicates that the theory had some accuracy when it predicted no liability (the larger the negative number, the better the predictive power); a positive number in the "yes" column indicates the theory had some accuracy when it predicted liability (again, the larger the positive number, the better the predictive power). The *t*-value indicates whether, across our participants, the average difference score (liability for "yes" minus liability for "no") significantly differs from zero. The larger the *t*-value (or η_p^2 in the following column), the

158. Logically, the *t*-tests intend to contrast the descriptive adequacy of the various positions, and thus it makes sense to include only the scenarios that were intended to distinguish the positions. Statistically, for Scenarios 1 and 2 we cut the distributions of liability judgments before zero, making the mean liability judgments quite extreme. Because some of the theories make relatively few predictions of one kind (e.g., Fletcher makes only three "yes" predictions for our eleven; Katz makes six), the effects of mixing in these extreme responses will be more pronounced for some of the theories than others. That is, the inclusion of responses to Scenario 1 will bias the "yes" bin for Fletcher upwards more than it will for Lindgren, who makes nine "yes" predictions. Katz, Feinberg, MPC, and narrow–narrow will be less biased, as their predictions are closer to fifty–fifty (six of one type, five of the other).

159. *See* JAMES P. STEVENS, APPLIED MULTIVARIATE STATISTICS FOR THE SOCIAL SCIENCES 197 (4th ed. 2002) (citing reference using .01 as a small effect size, .06 as a medium effect size, and .13 as a large effect size using eta squared or partial eta squared); *see also* SCHUYLER W. HUCK, STATISTICAL MISCONCEPTIONS 238 (2009).

higher the overall predictive power of the theory (or statutory scheme) in question.

Table 9. Liability Judgments By Theories' Predictions

	Predicts Liability			
Theory	"No" Scenarios	"Yes" Scenarios	*t*-value	η_p^2
MPC Broad-Broad	–0.73	1.50	21.09	0.78
Wrongful Intention (Berman)	–0.82	1.17	18.61	0.73
Narrow-Narrow	–0.12	1.29	13.84	0.60
Wrongful Intention (Katz)	–0.23	1.10	12.36	0.54
Breach of Duty (Feinberg)	0.03	1.09	10.93	0.48
Usurping Authority (Lindgren)	–0.46	0.63	6.46	0.25
Broad-Narrow	–0.11	0.68	6.23	0.23
Efficient Allocation (Isenbergh)	0.24	0.72	5.51	0.19
Continuing Domination (Fletcher)	0.43	0.78	2.97	0.06

Each of these *t*-values is highly significant ($p < .001$), except for Continuing Domination, where $p < .01$.

In keeping with the earlier, less sophisticated analyses, the MPC formulation and the Berman theory perform best under this analysis. Feinberg, Isenbergh, and Fletcher perform considerably less well, particularly in their "no" predictions, which do not correspond to subjects' actual liability judgements—on average, when these theories oppose liability, subjects favored it. As noted above, Lindgren's theory is relatively highly predictive of "no" responses (the second best theory, after Berman's), but does the worst job of predicting "yes" responses. The narrow–narrow statutory formulation does very well at predicting liability—where it would impose liability, so would the subjects—but, because it defines the offense narrowly, it does a poor job with its no-liability predictions (i.e., the narrow–narrow test sometimes denies liability where the subjects are willing to impose liability).

Table 10 below presents a similar analysis by using not the theories' predictions of liability for each scenario directly but rather their predictions based upon how the subjects perceived each scenario. Recall from Table 7 that not every manipulation worked as exactly hoped: for example, there was

one manipulation check, the Fletcher check for Scenario 6, where the subjects' manipulation-check responses were marginally contrary to the sought-after response. To compensate for this, we can look at the same issue for the five theories for which there were manipulation checks and use the subjects' *actual* perceptions, rather than what we had hoped the subjects would perceive. In other words, how well did each subject's liability responses track any given theory given that subject's responses to the manipulation checks? Using this corrective measure, the relative effects of the five theories are as set out in Table 10.

Table 10. Liability Judgments by Theory Predictions Based Upon Participants' Perceptions

	Predicts Liability			
Theory	"No" Scenarios	"Yes" Scenarios	*t*-value	η_p^2
Wrongful Intention (Berman)	–0.80	1.17	15.39	0.65
Wrongful Intention (Katz)	–0.20	1.07	9.47	0.42
Usurping Authority (Lindgren)	–0.49	0.77	7.03	0.31
Breach of Duty (Feinberg)	0.13	0.84	4.76	0.16
Continuing Domination (Fletcher)	0.44	0.60	1.08	0.01

Each of these *t*-values is highly significant ($p < .001$), except for Continuing Domination, which fails to reach significance ($p = .284$).

As is apparent from Table 10, this alternative analysis generally confirms the predictive value of the five theories (on which manipulation-check data was collected). The Berman and Katz theories still work the best and the Fletcher theory the worst, although the corrective measure in Table 10 makes it clearer that the Lindgren theory does better overall than the Feinberg theory.

Taken together, these analyses confirm the earlier discussion with the MPC statutory approach having the most predictive power of any blackmail scheme and Berman's theory having the most predictive power of any of the theoretical accounts. After Berman's theory, Lindgren's theory is most highly predictive as to "no" results but relatively weakly predictive of "yes" results. Fletcher's theory is most weakly predictive even after adjusting for

subjects' perceptions—an adjustment that should correct for the fact that subjects' manipulation-check responses for one scenario were contrary to the expected response for Fletcher's theory.

6. Effect of Seriousness of Threat and Wrongfulness of Victim's Undisclosed Conduct.—Set out in Table 11 below are the results of the last three questions in the manipulation-check questionnaire (*e*, *f*, and *g*). Recall that these three questions asked subjects for a quantitative assessment of the extent of the seriousness of the demand, the threat, and the victim's secret, rather than just the binary choice of agree–disagree or yes–no asked in the manipulation-check and the criminalization questions, respectively.

Table 11. Subject Evaluations of Extent of Demand, Disclosure, and Secret

Scenario	*e. Demand*	*f. Disclosure*	*g. Secret*
1. Pay or Report Crime	2.6	4.7	4.8
2. Pay or Face Lawsuit	2.7	2.3	3.2
3. Sober Work or Expose Drinking	2.9	3.8	2.8
4. Pay or Reveal Recipe	4.1	3.9	1.5
5. Pay or Publish Book	3.2	3.7	2.6
6. Pay or Expose Cheating	3.0	4.1	4.1
7. Withdraw or Expose Cheating	3.3	3.9	4.1
8. Cut Tree or Publish Photos	2.8	4.1	0.3
9. Pay or Report Smoking	3.0	3.7	1.3
10. Pay or Report Crime	1.0	4.8	4.8
11. Pay Penalty or Foreclose	3.1	4.5	2.5
Correlation with subject liability judgment	.01	.41	.06

Key: *e* – How substantial was the demand?
f – How harmful would disclosure have been?
g – How wrongful was the victim's conduct to be revealed?

We computed for each subject the correlation between the liability judgments she supplied for each of the eleven scenarios with the eleven ratings she gave across the scenarios for demand, for disclosure, and for secret. The median correlations observed between liability and each of these factors were .01, .41, and .06, respectively. Of these, only disclosure was significantly different from zero (by signed rank test, $W = 3760$, $p < .001$). In other words, the more harmful a subject viewed Brian's threat of disclosure to be, the more likely she was to assess criminal liability for the action, but the relationship between the other factors and liability was not significant.

The absence of correlation between the magnitude of the demand and the subjects' liability judgments across the battery of eleven scenarios suggests that Katz's and Fletcher's adherence to a "trivial-demand exception" for blackmail does not accord with lay intuitions.[160] The correlation between subjects' liability judgments and their estimates of the harmfulness of disclosure offers some indirect support for the perspective (shared by Berman, Katz, and Fletcher) that the recipient of the threat is the true victim of the blackmail offense.[161] As the potential harm to the recipient increases, so does the subjects' support for liability. Finally, the absence of correlation between subjects' liability judgments and their moral assessment of the victim's behavior offers some reassurance that their views about blackmail are not driven purely by their sympathy (or lack of sympathy) for the victim.

IV. Conclusion

Our study reveals that the Model Penal Code's legal formulation and Mitchell Berman's theoretical account are better than their existing rivals at capturing shared intuitions regarding blackmail. One important shared trait of these two versions of blackmail is that both see blackmail as a form of extortion—a category traditionally limited to conditional threats to engage in criminal acts, such as a threat to injure someone unless paid. The Model Penal Code's coverage of blackmail falls within its broader extortion offense (entitled "Criminal Coercion"[162]), and Berman's theory seeks to justify the criminalization of blackmail on the ground that it constitutes a variety of extortion.[163] Our study indicates that lay understandings of blackmail share the position that its gravamen involves harm to the recipient of the threat, rather than some third party or generalized social interest. (Further, and

160. *See supra* note 104 and accompanying text; *supra* note 26 and accompanying text.

161. *See supra* note 11 and accompanying text; *supra* note 17 and accompanying text; *supra* note 21 and accompanying text.

162. MODEL PENAL CODE § 212.5(1) (1962). Section (1)(a) is traditional extortion; sections (1)(b) and (1)(c) are common situations of blackmail.

163. *See supra* note 11 and accompanying text.

significantly, our study indicates that some other factors that might be considered relevant to the blackmail inquiry are not seen that way: general lay intuitions regarding blackmail do not seem to attach any significance to the magnitude of the blackmailer's demand or to the nature of the information the blackmailer threatens to disclose.)

More specifically, as Berman's theory claims,[164] lay intuitions seem to accord with the position that blackmail amounts to extortion because of the blackmailer's bad faith or improper motivations. The blackmailer's central interest is to benefit himself, and his means of pursuing that interest displays his willingness to wrong the other person, either by forcing that person to sacrifice money (or something else) or by subjecting that person to the harm the blackmailer knows the threatened act will cause.

At the same time, however, and unlike Berman's theory,[165] lay intuitions seem to view some demands as objectively legitimate even if their subjective motivation in a given case is improper. Thus a person whose demand seeks to vindicate a valid legal or societal interest, as in our Scenario 11, is not seen as engaging in blackmail even if his underlying motivation is to harm the recipient rather than to advance the legitimate interest. This sentiment accords with the Model Penal Code's exception where the putative blackmail threat is made for the sake of compelling the other "to behave in a way reasonably related to the circumstances which were the subject of the [threat], . . . as by desisting from further misbehavior, [or] making good a wrong done."[166]

Taken together, the theoretical basis Berman excavates for blackmail and the more practical objective constraints the Model Penal Code imposes might suggest a formulation of criminal coercion that embraces, but also limits, the scope of blackmail, perhaps along the lines of the following:

> Criminal Coercion
>
> (1) A person commits criminal coercion if he demands money or other valuable consideration as a condition of refraining from any act he intends or knows would cause harm to another person.
>
> (2) For purposes of subsection (1), "harm" may include physical injury, financial deprivation, or substantial psychological stress.
>
> (3) Exception. It is not an offense under subsection (1) if the actor believed his demand to be justified as a means of advancing a legitimate legal or societal interest.[167]

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164. *See supra* note 14 and accompanying text.

165. *See, e.g.*, Berman, *supra* note 3, at 848 (describing how even threats of legitimate action constitute appropriately criminal blackmail if made with bad motives).

166. MODEL PENAL CODE § 212.5(1).

167. The exact text of the statutory provision, we would suggest, depends in part on the features of other provisions in the code of which the provision would be part, especially its General Part and

Such a formulation illuminates and makes explicit the general normative intuitions that seem to underlie popular sentiment while also drawing lines that prevent blackmail from being a purely subjectivized offense concerned only with culpability and not with objectively unjustified harm.

Our study also suggests some more general conclusions about criminal law and theory. First, whether discussing blackmail, other offenses, or more general normative issues of punishment, nearly all theorists rely on what they take to be popular moral intuitions—but they cannot all be right. Further, which (if any) of them are right is testable. Accordingly, empirical work regarding lay intuitions can provide meaningful critique or illumination of theory. Our study put the blackmail tests to the test, and the results provide strong support for one theory and much weaker support for others.

Finally, though some may not find the contention novel or surprising, this study may lend further credence to the claim that some aspects of criminal law are, if anything, overtheorized. The intellectual paradox of blackmail has given rise to a host of explanatory theories, most rooted in an effort to reflect and justify shared moral intuitions, yet many of those theories miss their mark rather widely, and none accord with popular intuitions as well as the Model Penal Code, a document purporting to advance a purely pragmatic agenda rather than to embody any deep or wide moral commitments. Many of the theorists who have gone to great lengths to advance and defend a principled justification of the blackmail offense might have done better by simply asking people what they think.

Special Part provisions, such as the extent to which the code prefers objective example lists over general criterion definitions. For an example of specific prohibited threat descriptions, see *id.* § 212.5(1)(a)–(d).

Appendix A: Scenario Legal Liability Analyses
(explanations of conclusions in Table 6 in subpart III(C))

Model Penal Code (broad–broad)[168]

1. Liability under 212.5(1)(b). No exception because although the accusation would be true, Brian's purpose is not "limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation."[169]

2. No liability per the exception; Brian is compelling Victor to act in a way rationally related to the circumstances surrounding the crash and is only demanding that Victor fix a past wrong.

3. No liability. Brian's threat was not made "with purpose unlawfully to restrict [Victor's] freedom of action *to his detriment*."[170] He would get the exception in any case because the threatened action is reasonably related to workplace safety.

4. Liability. Brian is threatening to reveal a secret that will subject Victor to contempt. He will not get the exception because a $10,000 payment is not related to cupcake ingredients.

5. Liability. Brian's action satisfies § 212.5(1)(c), and he will not get the exception because a $4,000 payment to Brian is not "reasonably related" to the circumstances of Victor's wrongful behavior.

6. Liability. There is some question, however, as to whether Brian's threatened action (giving the sheet to the authorities) falls into one of the four prohibited threats in the MPC. Brian will not get the exception because the $500 payment is not reasonably related to cheating on an exam.

7. No liability. Brian will get an exception—his purpose is limited to compelling Victor to obey the promise.

8. Liability. The action satisfies § 212.5(1)(c), and publishing the photos is not related to cutting down the tree.

9. Liability. The $500 payment is not rationally related to smoking or to workplace dedication.

10. Liability. There is no minimum-threat language in the MPC's criminal coercion statute; analysis is the same as for Scenario 1.

11. No liability. Brian is not threatening to reveal a secret, accuse anyone of a crime, or commit a crime, nor is he acting as an official. (The

168. Note that while these analyses cite specific MPC provisions, all broad–broad statutes will have the same outcomes. Statute numbering and structure will vary by jurisdiction.

169. MODEL PENAL CODE § 212.5(1).

170. *Id.* (emphasis added).

MPC does not define "official," but it is valid to assume that this means "government official.")

Narrow–Narrow Jurisdictions

1. Liability. Brian is threatening to expose a secret and demanding property (the $1,000). The exception does not apply because Brian is not owed the money, and it is not compensation for a past wrong.

2. No liability. Brian is owed the property (that is, the money needed to fix the car) as compensation for the damage caused by Victor's negligent driving. As such, Brian will get the exception.

3. No liability. No transfer of property to Brian is involved.

4. Liability. Brian is demanding property and threatening to expose a secret.

5. No liability. Brian is trying to get Victor's property by threatening to expose a secret, but he gets an exception because he is claiming that money as compensation for the time and effort that was necessary to write the biography.

6. Liability. Brian is threatening to reveal a secret in order to gain Victor's property.

7. No liability. Brian is not demanding property.

8. No liability. Same as above; Brian is demanding action, not property.

9. Liability. Brian is demanding money and threatening to reveal a secret if the property is not turned over.

10. Liability. Same analysis as Scenario 1.

11. No liability. Brian, an agent of the bank, is threatening harm to Victor's property, but Brian is claiming the property as compensation for services rendered (that is, the mortgage). Brian's other motivations are probably not relevant to the analysis.

Broad–Narrow Jurisdictions

1. Liability. Brian attempted to obtain Victor's property (the $1,000) by threatening to accuse him of a crime. Brian will get no exception because the narrow exception only operates if Brian is trying to recover compensation or restitution for services rendered or harm caused to Brian by Victor.

2. No liability. Brian will get the exception because he is only demanding property as compensation for harm done by Victor.

3. Liability. Brian threatened to expose a secret with intent to coerce Victor into taking action (showing up to work sober, etc.). No exception applies.

4. Liability. Brian is trying to make Victor take action against his will by threatening to expose a secret and does not have an exception.

5. No liability. Brian is threatening to expose a secret in order to take Victor's property, but the payment is compensation for Brian's effort and thus will justify an exception.

6. Liability. Victor is being coerced to pay Brian $500 via a threat to expose a secret. The money is not compensation or restitution, and as such there is no exception.

7. Liability. Brian is attempting to get Victor to take action against his will by threatening to expose a secret. No exception.

8. Liability. Brian is trying to coerce action by threatening injury to Victor's reputation.

9. Liability. Brian is attempting to take Victor's property (the money) by threatening to expose a secret. No exception applies.

10. Liability. Same analysis as Scenario 1.

11. No liability. Brian is threatening harm, but he is claiming the property as compensation for the mortgage. Because Victor agreed to the conditions of the mortgage, Brian will get the exception.

Special Feature

No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code

Carol S. Steiker* & Jordan M. Steiker**

"From this day forward, I no longer shall tinker with the machinery of death."[1]

I. Introduction

Justice Harry Blackmun was new to the Supreme Court in 1972 when the Court declared prevailing capital punishment statutes unconstitutional in the landmark case of *Furman v. Georgia*.[2] He dissented from that decision, along with the three other Justices recently appointed by President Richard Nixon. Justice Blackmun wrote separately to explain that he believed that the death penalty was an issue for the legislative and executive spheres: "The authority [to abolish capital punishment] should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue."[3] After the Court reauthorized the death penalty by upholding a new generation of capital statutes in 1976, Justice Blackmun worked for most of the next two decades with the center of the Court to apply the Court's increasingly convoluted capital jurisprudence—neither dissenting from the left (as Justices Brennan and Marshall did, voting against every execution that came before the Court[4]) nor from the right (as Justices Scalia and Thomas now do in rejecting the Court's constitutional requirement of individualized capital sentencing[5]). Near the end of his career on the bench, however, Justice

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1. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

2. 408 U.S. 238 (1972).

3. *Id.* at 410 (Blackmun, J., dissenting).

4. *See, e.g.*, Boggs v. Muncy, 497 U.S. 1043, 1043 (1990) (Brennan & Marshall, JJ., dissenting from denial of application for stay of execution) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, . . . we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case." (citation omitted)).

5. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 373 (1993) (Scalia, J., concurring) ("In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled."); *id.* at 374 (Thomas, J., concurring) ("Although *Penry* v. *Lynaugh*, 492 U.S. 302

Blackmun abandoned the enterprise of attempting to regulate the practice of capital punishment under the Constitution. After cataloging the incoherence and inefficacy of the Court's death penalty doctrine since 1976, Blackmun declared that "the death penalty experiment has failed"[6] and announced his refusal to further engage in it: "From this day forward, I no longer shall tinker with the machinery of death."[7]

The decision of the American Law Institute (ALI) in October of 2009 to withdraw the death penalty provisions (§ 210.6) of the venerable Model Penal Code (MPC) "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment"[8] represents a similar recognition of the futility of further regulatory efforts. Although the ALI voted neither to endorse nor oppose the abolition of capital punishment as a general matter, its withdrawal of MPC § 210.6 was accompanied not only by a statement recognizing the "intractable" problems in the capital justice process but also by a deliberate refusal to undertake any further attempts at law reform in the area of capital punishment "either to revise or replace § 210.6 or to draft a separate model statutory provision."[9] Thus, it is clear that the ALI's decision to forgo further reform efforts was based not on its own resource constraints or other pragmatic concerns, but rather, like Justice Blackmun's renunciation of constitutional regulation, on the impossible—"intractable"—nature of the task.

Justice Blackmun's repudiation of the Court's death penalty jurisprudence and the ALI's withdrawal of the MPC's death penalty provisions are linked by more than their joint acknowledgement of the intractability of the problems in the capital justice process. Rather, the MPC's death penalty provisions provided the template for the modern death penalty statutes that the Supreme Court approved in 1976, and the failures of the Supreme Court's regulatory role in the post-1976 era provided the foundation for the ALI's withdrawal of the MPC's death penalty provisions. In the remainder of this introduction (Part I), we describe the origins of the MPC's death penalty provisions, the role they played in the Supreme Court's death penalty jurisprudence, the events leading up to the ALI's withdrawal of MPC § 210.6, and the potential implications of the ALI's decision. Part II consists of the paper commissioned from us by the ALI, which, while not adopted by the ALI as its own publication, informed the ALI's decision to withdraw

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(1989), 'remains the law,' . . . in the sense that it has not been expressly overruled, I adhere to my view that it was wrongly decided." (citations omitted)).

6. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari).

7. *Id.*

8. Message from Lance Liebman, Dir., Am. Law Inst. (Oct. 23, 2009), http://www.ali.org/_news/10232009.htm.

9. AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (2009), *available at* http://www.ali.org/doc/Capital%20Punishment_web.pdf.

§ 210.6.[10] This paper highlights "the major concerns regarding the state of the death-penalty systems in the United States today"[11] and thus should be of interest not only to those seeking to understand the decision of the ALI but also to those interested in the fairness and efficacy of the capital justice process more generally.

The ALI's Model Penal Code project arose from the ALI's general mission as an independent, nonprofit, nonpartisan, expert organization to "produc[e] scholarly work to clarify, modernize, and otherwise improve the law."[12] The ALI is perhaps best known for its "Restatement" projects, in which the ALI has sought to address uncertainty in the law through restatements of basic legal subjects that serve as authoritative sources for judges and lawyers.[13] When the ALI turned its hand to a project on American criminal law, however, "it judged the existing law too chaotic and irrational to merit 'restatement.'"[14] Instead, the ALI decided to draft a model penal code that could serve as a template for state legislative reform. The ALI's enormously influential Model Penal Code project—"far and away the most successful attempt to codify American criminal law"[15]—was launched in 1951, and the MPC was finally adopted by the ALI in 1962. While the MPC was under preparation, the Advisory Committee to the MPC Project, which was headed by Professor Herbert Wechsler of Columbia Law School as Chief Reporter, voted 18 to 2 to recommend the abolition of capital punishment.[16] But the ALI's Council held the view "that the Institute could not be influential" on the issue of abolition or retention of the death penalty and thus should not take a position either way.[17] The body of the Institute agreed with the Council, and thus the MPC took no position on the issue but rather promulgated model procedures for administering capital punishment for adoption by states that retained the death penalty.[18]

The death penalty procedures promulgated by MPC § 210.6 differed from prevailing capital statutes in several key provisions. First, the MPC allowed the death penalty only for the crime of murder, not for crimes such as kidnapping, treason, and rape (among others) as many state statutes permitted.[19] Second, the MPC categorically exempted juveniles from the

10. *Id.* at 1.

11. *Id.*

12. *ALI Overview*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.overview.

13. *Id.*

14. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

15. *Id.* at 320.

16. MODEL PENAL CODE § 210.6 cmt. at 111 (1980) (repealed 2009).

17. *Id.*

18. *Id.*

19. *See id.* at 117 ("Although the Model Code neither endorses nor rejects capital punishment for murder, it does disallow the death penalty for all other offenses."); THE DEATH PENALTY IN AMERICA 36–38 (Hugo Adam Bedau ed., 1997) (listing the different crimes eligible for capital punishment in thirty-six states).

death penalty and gave the trial judge discretion to exempt defendants if "the defendant's physical or mental condition calls for leniency."[20] Moreover, the MPC precluded a sentence of death in cases in which "the evidence suffices to sustain the verdict, [but] does not foreclose all doubt respecting the defendant's guilt."[21] As for which murders should be punished with death, the MPC did not confine capital punishment to "first-degree" murder (generally defined by state statutes as either premeditated and deliberate murder or felony murder); rather, the MPC made eligibility for the death penalty for any murder turn on the finding, in a separate penalty phase, of one of eight "aggravating circumstances" that ranged from the more objective and clear-cut ("The murder was committed by a convict under sentence of imprisonment."[22]) to the more subjective and qualitative ("The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."[23]). The MPC's innovation was not only the list of aggravating circumstances but also the requirement of a bifurcated procedure in which the determination of guilt and the determination of the appropriate penalty were to be considered in two separate proceedings. The MPC required the finding of at least one aggravating circumstance at the penalty phase for a defendant to be eligible for the death penalty but also required the consideration of "mitigating circumstances" and authorized the death penalty only when "there are no mitigating circumstances sufficiently substantial to call for leniency."[24] Mitigation consisted of eight statutorily defined mitigating circumstances (such as "[t]he defendant has no significant history of prior criminal activity"[25] and "[t]he youth of the defendant at the time of the crime"[26]), but the sentencer was also instructed to consider other evidence "including but not limited to the nature and circumstances of the crime [and] the defendant's character, background, history, mental and physical condition."[27] The MPC's structuring of the penalty phase, with its lists of aggravating and mitigating circumstances, was a significant departure from prevailing practice, which gave sentencing juries essentially unfettered

20. MODEL PENAL CODE § 210.6(1)(e); *see also id.* § 210.6 cmt. at 134 (rationalizing the "leniency" language as cognizant of the possibility that in some unusual instances, such as a defendant with a terminal illness, "it may be thought that fate's judgment on the defendant is punishment enough"); THE DEATH PENALTY, *supra* note 19, at 41 (listing the "Minimum Age Authorized for Capital Punishment, by Jurisdiction" in 1994).

21. MODEL PENAL CODE § 210.6(1)(f); *see also id.* § 210.6 cmt. at 134 (describing the provision as "an accommodation to the irrevocability of the capital sanction" that preserves the possibility of new exculpatory evidence at a later time); Alan Berlow, *The Wrong Man*, ATLANTIC ONLINE, Nov. 1999, http://www.theatlantic.com/past/docs/issues/99nov/9911wrongman.htm (decrying the fact that "[t]o date no state has adopted this 'residual doubt' provision").

22. MODEL PENAL CODE § 210.6(3)(a).

23. *Id.* § 210.6(3)(h).

24. *Id.* § 210.6(2).

25. *Id.* § 210.6(4)(a).

26. *Id.* § 210.6(4)(h).

27. *Id.* § 210.6(2).

discretion in capital trials to impose life or death (and for a much wider range of crimes than simply murder) without any statutory standards or guidance.[28]

For a decade after their adoption, the MPC death penalty provisions had virtually no impact on state procedures.[29] But after the Supreme Court constitutionally invalidated prevailing death penalty statutes in 1972 in *Furman*, a large majority of states sought to draft new capital statutes that would meet the *Furman* Court's apparent concern with standardless sentencing discretion. Although a significant number of states sought to address the problem of standardless discretion through the enactment of mandatory capital statutes,[30] a substantial number of states modeled their new statutory endeavors on the Model Penal Code.[31] In 1976, the Supreme Court struck down mandatory capital statutes as unconstitutional under the Eighth Amendment,[32] but upheld the "guided discretion" statutes enacted by Georgia, Florida, and Texas.[33] In doing so, the Court made a point of referencing the ALI's efforts to guide capital sentencing discretion through the Model Penal Code and the similarity, either textual or functional, of each of the state statutes before it to the MPC's death penalty provisions.[34]

Two years after the 1976 cases reinstating the death penalty, the Supreme Court invalidated a conviction obtained under Ohio's capital statute on the ground that the statute's narrowly drawn list of mitigating circumstances unconstitutionally constrained the sentencer's consideration of mitigating evidence that might call for a sentence less than death.[35] In doing so, the Court adopted as a constitutional requirement an approach virtually identical to the MPC provision that capital sentencers must consider "the nature and circumstances of the crime [and] the defendant's character,

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28. *See id.* § 210.6 cmt. at 129–32 (discussing the history of capital sentencing and contrasting it with the procedures expounded in the Model Penal Code).

29. While "[p]rior to 1972, no American jurisdiction had followed the Model Code in adopting statutory criteria for the discretionary imposition of the death penalty . . . the only discernible effect of the Model Code proposal was introduction of a bifurcated capital trial procedure in six states." *Id.* at 167–68 (citing Comment, *Jury Discretion and the Unitary Trial Procedure in Capital Cases*, 26 ARK. L. REV. 33, 39 n.9 (1972) (listing states)).

30. *See id.* at 168 ("Following *Furman* the legislative response was diverse, with the majority of retentionist jurisdictions enacting mandatory capital punishment for certain offenses.").

31. *See id.* at 169 ("Each of the 19 new statutes examined when this comment was prepared resembles the Model Code provision and provides for bifurcation and consideration of specified aggravating circumstances.").

32. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

33. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976); Proffitt v. Florida, 428 U.S. 242, 259 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

34. *See Gregg*, 428 U.S. at 193 (citing the Model Penal Code to reject the claim that standards to guide a capital jury's sentencing deliberations are impossible to formulate); *Proffitt*, 428 U.S. at 247–48 (noting that the Florida statute in question was patterned after the Model Penal Code); *Jurek*, 428 U.S. at 270 (recognizing that Texas's action in statutorily narrowing the categories of murder for which the death penalty may be imposed serves essentially the same purpose as the list of aggravating circumstances expounded by the Model Penal Code).

35. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

background, history, mental and physical condition."[36] As the ALI itself recognized, the Court's cases from 1976 to 1978 outlining the constitutional preconditions for a valid capital punishment scheme "confirm what the 1976 plurality several times implied—that Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislation."[37]

Shortly after the new generation of MPC-inspired, guided-discretion statutes were approved by the Court in 1976, executions resumed in the United States after a decade-long hiatus. Over the next quarter century, the national execution rate soared, reaching levels that the country had not seen since the early 1950s (though the execution rate has declined substantially in the first decade of the new century).[38] Many observers, us among them, lamented that the new generation of capital statutes failed to fulfill their promise of rationalizing the administration of capital punishment and ameliorating the problems that the ALI and the Supreme Court had sought to address.[39] Observers within the ALI were especially concerned about the shortcomings of the new capital statutes in light of the role that the ALI's reform efforts and institutional prestige had played in the constitutional reinstatement of capital punishment. Thus, when the ALI approved the undertaking of a law reform project that would reconsider the provisions of the MPC relating to criminal sentencing in general, internal critics of the administration of capital punishment viewed the new project as an opportunity to reconsider the ALI's contribution to the new status quo. In particular, law professor Frank Zimring, an Adviser to the new ALI Sentencing Project, called upon the Project to address (and call for the abolition of) capital punishment.[40] When the ALI set aside the question of capital punishment as beyond the scope of the Project, Professor Zimring resigned in protest as an Adviser and later published an article criticizing the ALI's failure to address capital punishment.[41]

Zimring's call for abolition within the ALI was taken up by members Roger Clark and Ellen Podgor, both law professors as well, who moved at the ALI's annual meeting in 2007: "That the Institute is opposed to capital

36. MODEL PENAL CODE § 210.6(2); *see also Lockett*, 438 U.S. at 604 ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

37. MODEL PENAL CODE § 210.6 cmt. at 167.

38. *See* DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE (2010), http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf (listing executions in the United States from 1608–2002); DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2010), http://deathpenaltyinfo.org/documents/FactSheet.pdf (tallying executions yearly from 1976–2010).

39. *See generally* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (analyzing the Supreme Court's doctrinal approach to capital punishment regulation).

40. AM. LAW INST., *supra* note 9, at 15 annex C.

41. *Id.* at 15 n.6 (citing Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005)).

punishment."[42] The President of the ALI responded by assigning the Institute's Program Committee the task of deciding whether the ALI should study and make recommendations about the death penalty.[43] The President also appointed an Ad Hoc Committee on the Death Penalty "to advise the Program Committee, the Council, and the Director about alternative ways in which the Institute might respond to the concerns underlying the motion."[44] The Director of the ALI, Lance Liebman, engaged us, Carol Steiker and Jordan Steiker, to write a paper in which we would,

> [R]eview the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?[45]

Part II of this Article is the paper that we eventually submitted to the ALI, after detailed discussions of an earlier draft with an advisory committee assembled by the ALI consisting of prosecutors, defense lawyers, judges, and academics. The paper reviewed the history and current state of the administration of capital punishment in the United States and recommended that the ALI withdraw § 210.6 with the following statement: "[I]n light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."[46]

The Council of the ALI, its chief governing board, submitted a report to the body in advance of the ALI's annual meeting in 2009. The Council recommended that the Institute withdraw the death penalty provisions of the MPC and not undertake any further project to revise or replace those provisions.[47] Although the Council's report acknowledged "reasons for concern about whether death-penalty systems in the United States can be made fair,"[48] it did not endorse the statement that we proposed in the paper and instead recommended that the body take no position to either endorse or oppose the abolition of capital punishment.[49] At the ALI's 2009 annual meeting, the body voted as the Council had recommended on the withdrawal of the MPC's death penalty provisions and the decision not to undertake further reform efforts regarding capital punishment, but it also added, after several hours of vigorous discussion, the following statement: "For reasons

42. *Id.* at 11 annex 3.
43. *Id.*
44. *Id.*
45. *Id.* at 46.
46. *See infra* at __.
47. AM. LAW INST., *supra* note 9, at 1.
48. *Id.* at 5 (capitalization omitted).
49. *Id.* at 6.

stated in Part V of the Council's report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[50]

In essence, the body split the baby in half: it adopted the Council's report and thus rejected an explicit call for the abolition of capital punishment, but it also adopted the language from our report recognizing "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." As Adam Liptak, who reported the ALI's decision for the *New York Times*, translated, "What the [I]nstitute was saying is that the capital justice system in the United States is irretrievably broken."[51] The body's resolution went back to the Council, which must approve any action of the body before it becomes official policy of the ALI. In October 2009, the Council approved of the body's vote and statement, and the ALI's withdrawal of the death penalty provisions, and its reasons for that withdrawal, became official.[52]

The ALI decision comes at a time of significant uncertainty for the American death penalty. Fifteen years ago, capital punishment in this country seemed firmly entrenched both politically and legally. Death sentencing (both in absolute numbers and as a function of homicides) peaked in the mid-1990s (averaging about 325 per year nationwide)[53] and executions climbed to their modern-era highs by the late 1990s (averaging close to 100 per year nationwide).[54] Reversal rates in capital cases dipped dramatically by the end of the 1990s as state and federal courts finished sorting through the bulk of challenges to the new state statutes adopted in the wake of *Furman*.[55] Moreover, in the late 1980s, the U.S. Supreme Court had rejected several prominent attacks on the administration of the death penalty, signaling a greater degree of deference toward state policies. In 1989, the Court declined to impose an Eighth Amendment bar against the execution of juveniles or persons with mental retardation.[56] And, perhaps more importantly, the

50. Message from Lance Liebman, *supra* note 8.

51. Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

52. Message from Lance Liebman, *supra* note 8.

53. *Death Sentences by Year: 1977-2008*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-year-1977-2008 (tallying death sentences yearly from 1977–2008).

54. *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year (tallying executions yearly from 1977–2010).

55. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II 60 fig.3A (2000) (showing a regular decrease in post-conviction reversals from the early 1990s to 2000).

56. *See* Stanford v. Kentucky, 492 U.S. 361, 372–73 (1989) (rejecting the claim that an emerging national consensus precluded the imposition of the death penalty for offenders who were sixteen or seventeen years old at the time of the offense); Penry v. Lynaugh, 492 U.S. 302, 333–35 (1989) (rejecting the claim that an emerging national consensus precluded the imposition of the death penalty for offenders with mental retardation).

Court rejected in 1987 what appeared to be the last potentially comprehensive challenge to capital punishment—the claim that significant racial disparities in the imposition of the death penalty require judicial intervention (and perhaps abolition).[57] In the early 1990s, the Court also expressed skepticism that the Constitution affords any special protection against the execution of the innocent, emphasizing that collateral review of state criminal convictions has traditionally focused on constitutional rather than merely factual error.[58] On the legislative side, three states reenacted death penalty statutes in the 1990s (New Hampshire, New York, and Kansas),[59] and most of the state legislative efforts during this period were designed to expand rather than contract the availability of the punishment. At the federal level, the bombing of the federal courthouse in Oklahoma City culminated in the most significant comprehensive reform of federal habeas corpus law in the twentieth century, with Congress imposing unprecedented limits on the availability of federal habeas review of state capital convictions.[60]

After this period of expansion during the 1990s, however, the most recent decade has witnessed a sea change in the political and legal status of the death penalty. The discovery of numerous wrongfully convicted and death-sentenced inmates (many of whom were exonerated via emerging sophisticated techniques for evaluating DNA evidence) appears to have weakened public support for capital punishment (especially in light of the nearly universal embrace of life-without-possibility-of-parole as the sentencing alternative to the death penalty). In addition, the economic crisis of 2008 has amplified growing concerns about the financial cost of capital punishment. Whereas twenty-five years ago many people attributed their *support* of the death penalty to the perceived financial savings relative to lifetime imprisonment,[61] over the past decade it has become clear that the death penalty imposes substantial financial costs above and beyond ordinary imprisonment.[62] Indeed, a new framework for calculating capital costs focuses on the cost of a capital prosecution actually culminating in an execution. In states where executions remain very rare events (and the costs of death-row incarceration are quite high), the results are staggering. In California, for example, estimates suggest that the cost of each execution obtained in the modern era (dividing total capital costs incurred during this

57. McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

58. *See* Herrera v. Collins, 506 U.S. 390, 400–02 (1993) (holding in a plurality opinion that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation").

59. *See, e.g.*, Act of Jan. 4, 1995, ch. 1, 1995 N.Y. Laws 1; Act of Apr. 22, 1994, ch. 252, 1994 Kan. Sess. Laws 1069; Act of Apr. 27, 1990, ch. 199, 1990 N.H. Laws 304.

60. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

61. THE GALLUP REPORT, NOS. 232, 233, THE DEATH PENALTY: SUPPORT FOR DEATH PENALTY HIGHEST IN HALF-CENTURY 3 (1985).

62. *See infra* at __.

period by the thirteen executions carried out) is about a quarter of a billion dollars.[63]

Innocence and cost concerns have contributed to the remarkable decline in capital sentencing over the past decade. The past four years have produced about 115 death sentences per year, a greater than sixty percent decline from the highs of the mid-1990s;[64] each of the last four years produced fewer death sentences nationwide than any other year since reinstatement in 1976.[65] Executions have also dropped significantly, to an average of about forty-four per year over the past three years (compared to an average of about seventy per year over the preceding decade).[66] Some of this decline is attributable to concerns about whether the prevailing protocol for administering lethal injection sufficiently protects against unnecessary pain; such concerns led to the first judicially imposed moratorium on executions (lasting about seven months) in the post-*Furman* era.[67]

Politically, the direction of the last decade has decisively favored reform and restriction. New Jersey (2007) and New Mexico (2009) repealed their death penalty laws, and New York chose not to reinstate the death penalty after its capital statute was found to violate state law.[68] Maryland flirted with abolition and instead chose to drastically limit the cases in which death could be imposed.[69] Several other states, including Kansas, Montana, New Hampshire, and Colorado, have seen repeal bills advance in the legislature without ultimate success.[70] North Carolina enacted a broad provision safeguarding against the racially discriminatory imposition of the death

63. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. (forthcoming 2010).

64. *Death Sentences by Year*, *supra* note 53.

65. *Id.*

66. *Executions by Year*, *supra* note 54.

67. *See* Adam Liptak, *Challenges Remain for Lethal Injection*, N.Y. TIMES, Apr. 17, 2008, http://www.nytimes.com/2008/04/17/washington/17lethal.html (analyzing how state lethal injection protocols might be affected after the Supreme Court's decision in *Baze* effectively ended "the informal moratorium of the last seven months").

68. *See* Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3 (describing the repeal of New Jersey's death penalty); *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16 (reporting the repeal of New Mexico's death penalty); Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3 (chronicling the committee vote not to reinstate the death penalty in New York).

69. *See* John Wagner, *Md. Likely to Pass Death Penalty Bill*, WASH. POST, Mar. 26, 2009, at B1 (explaining the limits placed on the use of the death penalty in Maryland).

70. *See* Kirk Johnson, *Death Penalty Repeal Fails in Colorado*, N.Y. TIMES, May 5, 2009, at A16; Raja Mishra, *N.H. Bill to Repeal Death Penalty Fails: Officer's Slaying Fuels Debate*, BOSTON GLOBE, Mar. 28, 2007, *available at* 2007 WLNR 5870704; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3 (noting that the Montana state legislature had debated repeal of the death penalty but did not adopt any repeal); Scott Rothschild, *Bill to Abolish the Death Penalty Fails in Kansas Senate*, LJWORLD (Feb. 19, 2010), http://www2.ljworld.com/news/2010/feb/19/death-penalty-ban-debate-kansas-senate-today/?city_local.

penalty,[71] and many other states have established commissions to study various aspects of the administration of the death penalty within their jurisdictions.[72]

On the legal side, the U.S. Supreme Court has increasingly imposed constitutional restraints on state capital practices. A trio of decisions in the early 2000s marked the first Supreme Court cases finding ineffective assistance of counsel in the capital context;[73] they appear to call for more searching review of counsel performance in capital litigation. The Court also embraced significant proportionality restrictions on the imposition of the death penalty, reversing its 1989 rulings permitting the execution of juveniles[74] and persons with mental retardation,[75] and invalidating an emerging effort to punish child rape with the death penalty.[76] Apart from the practical significance of these decisions in narrowing death eligibility, the Court's opinions provided a more solicitous methodological framework for challenging state capital practices as violative of "evolving standards of decency."[77] Whereas previous decisions privileged the raw count of state laws permitting or prohibiting the challenged practice, the Court's decisions invalidated the death penalty for juveniles and persons with mental retardation despite the fact that a majority of death penalty states authorized these practices.[78] The Court emphasized the role of nonlegislative indicia in gauging evolving standards, including expert opinion, international opinion, and polling data.[79] Moreover, in its decision invalidating the death penalty for child rape, the Court went beyond the facts of the case to proscribe the imposition of the death penalty for any nonhomicidal, ordinary crime on the grounds that prevailing death penalty law already invited an excessive risk of

71. North Carolina Racial Justice Act, ch. 464, 2009 N.C. Sess. Laws, *available at* http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S461v7.pdf.

72. *See, e.g.*, Act of July 29, 2009, ch. 284, 2009 N.H. Laws 544 (establishing a commission to study the death penalty in New Hampshire); Act of Jan. 12, 2006, ch. 321, 2005 N.J. Laws 2165 (establishing the New Jersey Death Penalty Study Commission).

73. *See* Rompilla v. Beard, 545 U.S. 374, 389 (2005) (holding that sentencing-phase investigation was inadequate in light of the norms for capital representation); Wiggins v. Smith, 539 U.S. 510, 533–34 (2003) (holding that investigation supporting counsel's decision not to introduce mitigating evidence was itself unreasonable); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (determining that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision).

74. Roper v. Simmons, 543 U.S. 551, 574 (2005).

75. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

76. Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008).

77. *See, e.g.*, *Atkins*, 536 U.S. at 321.

78. *See* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 180–83 (2008) (discussing the transition in the Court's proportionality methodology).

79. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21 (listing factors that support the finding of a national consensus against executing offenders with mental retardation).

arbitrary decision making.[80] Along these same lines, the last decade has seen an increased willingness of members of the Court to echo Justice Blackmun's reservations about the American capital system. In an obscure Kansas case adjudicating a technical flaw in the Kansas statute, four dissenting Justices insisted that the risk of error in capital cases called for a new capital jurisprudence informed by the lessons of wrongful convictions.[81] In his concurring opinion in the lethal injection case, Justice Stevens expressed his view that the death penalty no longer serves societal purposes sufficient to justify its imposition, essentially joining Justice Blackmun in his unwillingness to continue the post-*Furman* experiment with capital punishment, though agreeing to abide by the Court's precedents as a matter of stare decisis.[82]

In what ways might the ALI decision interact with these legal and political developments? Given the Supreme Court's invocation of the MPC in its foundational death penalty decisions, the Court has already accorded some significance to the ALI's views regarding the administration of capital punishment. The ALI's withdrawal of the MPC provisions—and its accompanying language recognizing "intractable" problems—straightforwardly undercuts the Court's reliance on the MPC—and the expertise reflected in the ALI's endorsement of a model approach to capital sentencing. In addition, the Court's newly crafted proportionality analysis (developed in its decisions invalidating the death penalty for juveniles and persons with mental retardation) enhances the constitutional significance of the ALI's action. Given the increased role of "expert" opinion in gauging evolving standards of decency, the ALI's doubts about the prevailing administration of the American death penalty are relevant to the Court's own determination whether current deficiencies are constitutionally tolerable. Equally important, the ALI's action will likely inform political debate about whether and how to reform the death penalty. As political actors increasingly ask whether the administration of the death penalty in their jurisdictions is sufficiently reliable and fair, the ALI's own assessment along these dimensions might well affect legislative outcomes.

The ALI's decision is also likely to be significant because it dovetails with the particular nature of contemporary concerns about capital punishment. The increased fragility of the American death penalty, both politically and legally, is rooted less in abstract moral dissatisfaction with the punishment than in pragmatic concerns about its administration. There does not appear to be markedly greater concern within the courts, legislatures, or the public at large about whether the death penalty denies human dignity or

80. *Kennedy*, 128 S. Ct. at 2661 ("[T]he resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.").

81. Kansas v. Marsh, 548 U.S. 163, 207–10 (2006) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

82. Baze v. Rees, 128 S. Ct. 1520 (2008) (Stevens, J., concurring).

creates an inappropriate relation between state and citizen. Rather, the momentum toward restriction and restraint has been propelled by perceptions about the inability of states to implement the death penalty in an accurate, nonarbitrary, and efficacious manner. In this respect, the ALI decision proceeds along the same path. As our report indicates, the ALI did not endeavor to address the broad moral question of whether the death penalty is a just practice. Our report assumed, for the sake of argument, that states might have compelling reasons in the abstract for choosing to impose such a severe punishment, and we then turned to the question more suited to the expertise of the ALI—whether the system that the MPC capital provisions have helped to produce and sustain has successfully redressed the flaws in American capital practice that inspired states to turn to the MPC in the wake of *Furman*.

The ALI's decision to withdraw the MPC capital provisions—and to decline to investigate further reform—reflects skepticism about the capacity of sentencing instructions to ensure accurate, evenhanded capital decision making. The past ten years have seen similar expressions of skepticism from lawmakers and judges confronted with concrete evidence about the administration of the American death penalty. But even though the skepticism is not new, it likely carries distinctive weight when voiced by the very body that invested its labor and prestige in the effort to craft such instructions.

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Part II: Report to the ALI Concerning Capital Punishment*

Prepared at the Request of ALI Director Lance Liebman by Professors Carol S. Steiker (Harvard Law School) & Jordan M. Steiker (University of Texas)

Introduction and Overview

We have been asked by Director Lance Liebman to write a paper for the Institute to help it assess the appropriate course of action with regard to Model Penal Code § 210.6 (adopted in 1962 to prescribe procedures for the imposition of capital punishment). This request stems from two recent developments. First, the Institute has already undertaken a project revisiting the MPC sentencing provisions, but that project has not included any consideration of capital punishment. Second, at the Institute's Annual Meeting in May of 2007, Roger Clark and Ellen Podgor moved "That the Institute is opposed to capital punishment." In response to the motion, an Ad Hoc Committee on the Death Penalty was convened, and in light of that committee's deliberations, Director Liebman gave us the following charge: "to review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?" (Program Committee Recommendation Regarding the Death Penalty, Dec. 3, 2007).

The possible approaches that the Institute might take with regard to § 210.6 at the present time were identified in Dan Meltzer's memorandum on behalf of the Ad Hoc Committee on the Death Penalty (Report on ALI Consideration of Issues Relating to the Death Penalty, Oct. 2, 2007): 1) revise § 210.6, 2) call for abolition, or 3) withdraw § 210.6. Although each of these options obviously allows for various permutations, we agree that these three options mark the Institute's primary choices of action. In light of the difficulties, elaborated below, that would be raised by either the Institute's attempt to revise § 210.6 or the Institute's embrace of an unadorned call for abolition, we believe that the soundest course of action for the Institute would be withdrawal of § 210.6 with an accompanying statement to the effect that, in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for

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administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option.

This choice comes at a time of widespread reflection about American capital punishment. On the one hand, popular political support for the death penalty appears to remain relatively high, with opinion polls reporting stable majorities (about 70%) embracing the death penalty on a question that asks "Are you in favor of the death penalty for a person convicted of murder?" Thirty-six states presently authorize the death penalty (as well as the federal government), twenty-four of those states have at least ten inmates on death row, and nineteen of those states have conducted at least ten executions over the past forty years. At the same time, however, use of the death penalty (in terms of executions and especially death sentences) has declined significantly in recent years. Nationwide executions reached a modern-era (post-1976) high of 98 in 1998; the past three years have seen significantly lower totals – 53 (2006), 42 (2007), and 34 (2008 – as of Nov. 20). Nationwide death sentences have dropped even more precipitously, from modern-era highs of around 300 in the mid-1990s (315 (1994), 326 (1995), 323 (1996)), to modern-era lows in each of the past four years (140 (2004), 138 (2005), 115 (2006), 110 (2007)). In addition, executions during the modern era have been heavily concentrated in a small number of states, with five states (Texas (422), Virginia (102), Oklahoma (88), Florida (66) and Missouri (66)) accounting for about two-thirds of the executions nationwide (744/1133). Several states, including California and Pennsylvania, have large death-row populations (CA = 667, PA = 228) but very few executions in the modern era (CA = 13, PA = 3). This snapshot captures both the continuing political support for the death penalty as an available punishment but also significant ambivalence about its use in practice. Although different in its particulars, this snapshot shares some similarities to the state of the American death penalty almost a half century ago when the Institute last addressed capital punishment.

The Institute's initial involvement in American capital punishment resulted in its promulgation of § 210.6 of the Model Penal Code in 1962. As the Meltzer memorandum recounts, the drafters of the MPC considered the problems plaguing the then-prevailing death penalty practices. The provision sought to ameliorate concerns about the arbitrary administration of the punishment and the absence of meaningful guidance in state capital statutes. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia*[1] in 1972. *Furman* raised concerns about the arbitrary and discriminatory administration of the death penalty. These concerns stemmed from the interplay of extremely broad death eligibility in state schemes, the fact of its rare imposition, and the absence of any standards guiding charging or

1. 408 U.S. 238 (1972).

sentencer discretion. After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*; many of the states turned to § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on § 210.6. The Court in turn relied on the expertise of the Institute – particularly its view that guided discretion could improve capital decisionmaking – when it upheld the Georgia, Florida, and Texas statutes.[2] Those statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty.

The stance that the Court took in 1976 was provisional; it then adopted a role of continuing constitutional oversight of the administration of capital punishment. Each year the Court has granted review in a substantial number of capital cases, and the Court has continually adjusted its regulatory approach to prevailing capital practices. It is clear that the Court's attempt to regulate capital punishment – largely on the model provided by the MPC – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court's regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases. An abundant literature, reviewed below, reveals the continuing influence of arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. Moreover, such a difficult task is compounded by deeply

2. Gregg v. Georgia, 428 U.S. 153, 193 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.'") (emphasis in original) (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (footnote omitted) (the citation to "§ 2.01.6" rather than to "§ 2.10.6" reflects the change in numbering from the 1959 draft to the 1962 Code); Proffitt v. Florida, 428 U.S. 242, 247-48 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (describing Florida statute as "patterned in large part on the Model Penal Code"); Jurek v. Texas, 428 U.S. 262, 270 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citing Model Penal Code to support its conclusion that the narrowing of capital murder in the Texas statute serves much the same purpose as the use of aggravating factors in Florida and Georgia).

rooted institutional and structural obstacles to an adequate capital justice process. Such obstacles include the intense politicization of the capital justice process, the inadequacy of resources for capital defense services, and the lack of meaningful independent federal review of capital convictions.

In many legal contexts, the identification of problems in the administration of justice and obstacles to reform would counsel in favor of the Institute's undertaking a reform project in order to promote needed improvement. The administration of capital punishment, however, presents a context highly unfavorable for a successful law reform project, for several related reasons.

First, numerous other organizations have already undertaken to study the administration of capital punishment, both at the state and the national level. These studies have generated an enormous amount of raw data and a large body of proposed reforms (about which there is a substantial degree of agreement from a variety of sources). A large number of diverse states have undertaken systematic self-studies of the administration of their systems of capital punishment in the recent past. For example, in 2001, Governor George Ryan of Illinois appointed a blue-ribbon, bi-partisan commission to conduct a comprehensive study his state's administration of capital punishment after 13 exonerations from Illinois' death row.[3] In 2004, a task force of the New Mexico State Bar undertook a comprehensive study of capital punishment in that state.[4] The legislatures of a number of other states have also undertaken systematic studies of their death penalty systems, including Connecticut in 2001,[5] North Carolina in 2005,[6] New Jersey in 2006,[7] Tennessee in 2007,[8] and Maryland in 2008.[9] In addition to these comprehensive studies, virtually every death penalty state has undertaken one or more smaller investigations into various aspects of their capital justice system (such as cost, racial disparities, forensic evidence processing, etc.).

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3. *See* http://www.idoc.state.il.us/ccp/index.html for a copy of the Executive Order, a list of Commission Members, and the Commission's final report. Two years later, Governor Mitt Romney of Massachusetts (an abolitionist state) took a similar step in appointing a blue-ribbon commission; the Massachusetts Commission was charged with determining how to create a "fool proof" death penalty statute that would avoid the erroneous conviction and execution of murderers. *See* http://www.cjpc.org/dp_govs_commission.htm.

4. *See* http://www.nmbar.org/Attorneys/lawpubs/TskfrcDthPnltyrpt.pdf for a copy of the Task Force's final report.

5. *See* http://www.ct.gov/.../commission_on_the_death_penalty_final_report_2003.pdf for a copy of the Connecticut Commission's final report.

6. *See* http://www.deathpenaltyinfo.org/node/1557 (20 members of the North Carolina House of Representatives appointed to undertake study the administration of the death penalty).

7. *See* http://www.njleg.state.nj.us/committees/njdeath_penalty.asp. New Jersey abolished the death penalty in 2007.

8. *See* http://www.thejusticeproject.org/press/tn-death-penalty-study-bill-passed/ (16 member expert committee appointed in Tennessee).

9. *See* http://www.deathpenaltyinfo.org/node/2336 (commission appointed to study racial, socio-economic, and geographical disparities, the execution of the innocent, and cost issues relating to the death penalty in Maryland).

The most wide-ranging studies to date are those conducted by the American Bar Association in conjunction with its call for a nationwide moratorium on capital punishment in 1997. In the wake of the adoption of its moratorium resolution, the ABA developed a publication entitled *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, which was intended to serve as "Protocols" for jurisdictions undertaking reviews of death penalty-related laws and processes. The ABA, as part of its Death Penalty Moratorium Implementation Project, has recently completed a three-year study of eight states to determine the extent to which their capital punishment systems achieve fairness and provide due process.[10] A review of the ABA's research and the state self-studies together strongly suggests that the death penalty is not an area in which the Institute can measurably contribute by conducting new research or compiling or explicating existing research.

Second, there is also reason to be skeptical that the Institute will be able to promote needed death penalty reform by adding its voice, with the expertise and prestige that is associated with it, to influence political actors. Capital punishment has remained an issue strongly resistant to reform through the political process in most jurisdictions. Consider first the reforms contained in § 210.6 itself. Although adopted by the Institute in 1962, § 210.6 was ignored in the political realm for a decade, until the Supreme Court constitutionally invalidated capital punishment in 1972, at which point § 210.6 was pressed into service by state legislatures in order to revive the moribund penalty. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, have likewise failed to succeed in the political realm; indeed, the ABA's Death Penalty Moratorium Implementation Project found in 2007 that not a single one of the eight states that it studied were fully in compliance with any aspect of the ABA *Guidelines* studied. (See discussion in section on "Inadequacy of Resources, *infra*.) Perhaps most telling is the view of Professor Joseph Hoffman, someone who has devoted enormous time and energy to death penalty reform, spearheading death penalty reform efforts in both Illinois and Indiana and serving as Co-Chair and Reporter for the Massachusetts Governor's Council on Capital Punishment. Hoffman served as a member of an advisory group to discuss an earlier draft of this paper, and he strongly expressed the view that seeking reform of capital punishment in the political realm is futile. This is a striking position to take by one who is not morally opposed to the death penalty and who has worked on numerous reform projects. But Hoffman cited as grounds for his change of heart the example of Illinois, in which there were confirmed wrongful convictions in capital cases, a sympathetic Governor, and a bi-partisan reform commission, but still strong resistance in the state

10. *See* http://www.abanet.org/moratorium/ for the full reports of the ABA Moratorium Implementation Project.

legislature to reforms specifically targeted at capital punishment. In short, serious concerns about efficacy in the political realm militate against the undertaking of a new reform effort by the Institute.

Moreover, some of the structural problems in the administration of capital punishment are not the sort of problems that the Institute can address with its legal expertise. While standards for defense counsel, for example, might be considered within the purview of the Institute's expertise, the problem of the intense politicization of the capital process – arising from the decentralization of criminal justice authority within states, the political accountability of many of the key actors in the capital justice system, and the sensationalism of death cases in the media – is a problem largely beyond the reach of legal reform.

Finally, were the Institute to take on a death penalty reform project despite the likelihood of ineffectiveness in the political realm and the fact that some of the underlying problems are not amenable to legal reform, it would run the risk not merely of failing to improve the death penalty, but also of helping to entrench or legitimate it. The undertaking of a reform project, despite its impetus in the flaws of current practice, might be understood as an indication that "the fundamentals" of the capital justice process are sound, or at least remediable. If the Institute upon reflection concludes, as this report suggests, that the administration of capital punishment is beset by problems that cannot be remedied by even an ambitious reform project, the Institute should say so, rather than invest its own time and resources and the hopes of reformers, in a project that will not succeed but may delay the recognition of failure.

We also recommend against the Institute's adoption of the Clark-Podgor motion declaring "[t]hat the Institute is opposed to capital punishment." As this report reflects, our study of capital punishment focuses on its contemporary administration in the United States and the prevailing obstacles to institutional reform. We did not understand our charge from the Institute to encompass review of moral and political arguments supporting or opposing the death penalty as a legitimate form of punishment. Obviously there is deep disagreement along these dimensions regarding the basic justice of the death penalty. Some supporters view the death penalty as retributively justified (or indeed required). Other supporters maintain that the death penalty deters violent offenses and should be embraced on utilitarian grounds, especially in light of some recent empirical work purporting to establish its deterrent value.[11] Opponents generally reject the retributive argument and insist that capital punishment violates human dignity or vests an intolerable power in the State over the individual. Some opponents reject the empirical claims of deterrence and advance contrary claims of a

11. *See generally* Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 Ann. Rev. L. & Soc. Sci. 151 (2005) (reviewing recent empirical studies and their critics).

"brutalization effect" in which executions actually reduce inhibitions toward violent crime.

Resolution of these competing claims falls outside the expertise of the Institute. The Institute is well-positioned to evaluate the contemporary administration and legal regulation of the death penalty. Moreover, the Institute is well-suited to evaluate the success, or lack thereof, of the MPC death penalty provisions in light of their subsequent adoption (in whole or part) by many jurisdictions. If, in its review of the prevailing system and of the prospects for securing a minimally adequate capital process, the Institute were to conclude that the death penalty should not be a penal option, the Institute should frame its conclusion to reflect the basis for its judgment. Endorsement of the Clark-Podgor motion might well be understood to reflect a moral or philosophical judgment rather than a judgment about the inadequacy of prevailing or prospective institutional arrangements to satisfy basic requirements of fairness and accuracy. That perception of the Institute's position would be inconsistent with the focus of this report (and the questions propounded by the Program Committee Recommendation Regarding the Death Penalty) and could possibly undermine the authority of the Institute's voice on this issue.

The remaining question for the Institute is whether to withdraw § 210.6, and if so, whether to include an accompanying statement regarding the withdrawal. The case for withdrawal is compelling and reflects a consensus among the Institute's members who have spoken to the issue thus far. At the outset, it should be noted that several provisions in § 210.6 have been rendered unconstitutional by rulings of the U.S. Supreme Court in the years since 1962. For example, section 210.6's failure to require a jury determination of death eligibility conflicts with the Supreme Court's recognition of a Sixth Amendment right to such a determination;[12] one of § 210.6's aggravating factors ("the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity") has been deemed to be impermissibly vague;[13] and section 210.6's failure to identify mental retardation as a basis for exemption from capital punishment violates the Court's recent Eighth Amendment proportionality jurisprudence.[14] These specific defects could be corrected, but more fundamentally § 210.6 is simply inadequate to address the endemic flaws of the current system. Section 210.6, which in many respects provided the template for contemporary state capital schemes, represents a failed attempt to rationalize the administration of the death penalty and, for the reasons we discuss in greater detail below, its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty.

12. Ring v. Arizona, 536 U.S. 584 (2002).
13. Godfrey v. Georgia, 446 U.S. 420 (1980).
14. Atkins v. Virginia, 536 U.S. 304 (2002).

Given the prevailing problems in the administration of the death penalty and the discouraging prospects for successful reform, we recommend that the Institute issue a statement accompanying the withdrawal of § 210.6 calling for the rejection of capital punishment as a penal option under current circumstances ("In light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."). Such a statement would reflect the view that the death penalty should not be imposed unless its administration can satisfy a reasonable threshold of fairness and reliability.

Mere withdrawal of § 210.6, without such an accompanying statement, would pose two problems. First, the absence of any explanation might suggest that the Institute is simply acknowledging specific defects in the section, or that the Institute believes that the problems afflicting the administration of the death penalty are discrete and amenable to adequate amelioration. Second, and more importantly, the Institute's role is to speak directly and forthrightly on policy questions within its expertise. If the Institute is persuaded that the death penalty cannot be fairly and reliably administered in the current structural and institutional setting, it should say so.

Of course, many of the problems in the capital justice system exist to some degree in the broader criminal justice system as well. Why should these problems call for the rejection of the death penalty as a penal option if such problems could not justify elimination of criminal punishment altogether? Four considerations suggest the distinctiveness of the capital context. First, unlike incarceration, capital punishment is not an essential part of a functioning criminal justice system (as reflected by its absence in many localities, states and, indeed, many countries). While many of the same problems that afflict the prevailing capital system are also present in the non-capital system, the deficiencies of the non-capital system must be tolerated because the social purposes served by incarceration cannot otherwise be achieved. Second, many of the problems undermining the fair and accurate administration of criminal punishment are more pronounced in capital cases. For example, the distorting pressures of politicization exist in both capital and non-capital cases, but the high visibility and symbolic salience of the death penalty heightens these pressures in capital litigation. The inadequacy of resources and the absence of meaningful supervision of counsel are also prevalent throughout the criminal justice system, but these problems appear with greater regularity and severity on the capital side as a consequence the special training, experience, and funding necessary to ensure even minimally competent capital representation. Third, the irrevocability of the death penalty counsels against accepting a system with a demonstrably significant rate of error. Evidence suggests a higher rate of erroneous convictions in capital versus non-capital cases, and there is little reason to believe that the problem of wrongful convictions and executions

will be solved in the foreseeable future. Fourth, deficiencies within the capital system impose significant and disproportionate costs on the broader legitimacy of the criminal justice system. In light of the high visibility and high political salience of capital cases, the arbitrary or inaccurate imposition of the death penalty undermines public confidence in our institutions and generates a distinctive and more damaging type of disrepute than similar problems in non-capital cases.

What follows below is a more thorough account of the existing problems in capital practice, the various efforts to address those problems, and the prospects for meaningful reform. Part I evaluates the course of constitutional regulation over the past three decades. The remaining sections examine the underlying problems and structural barriers that have undermined regulatory efforts (Part II: The Politicization of Capital Punishment; Part III: Race Discrimination; Part IV: Juror Confusion; Part V: The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases; Part VI: Erroneous Conviction of the Innocent; Part VII: Inadequate Enforcement of Federal Rights; Part VIII: The Death Penalty's Effect on the Administration of Criminal Justice). Of course, it is possible to improve discrete aspects of the capital justice process through incremental reform. But achieving the degree of improvement that would be necessary to secure a minimally adequate system for administering capital punishment in the United States today faces insurmountable institutional and structural obstacles. Those obstacles counsel against the Institute's undertaking a reform project and in favor of the Institute's recognition of the inappropriateness of retaining capital punishment as a penal option.

I. The Inadequacies of Constitutional Regulation

The Supreme Court's constitutional regulation of capital punishment, which commenced in earnest with the Court's temporary invalidation of capital punishment in *Furman v. Georgia* in 1972[15] and its reauthorization of capital punishment in *Gregg v. Georgia* in 1976,[16] has produced some significant advances, both substantively and procedurally, in the administration of the death penalty. Indeed, most of these advances track the requirements of § 210.6, which served as a template for many states in reforming their capital schemes to avoid constitutional invalidation. For example, like the MPC, most states try to guide capital sentencing discretion through consideration of "aggravating" and "mitigating" factors in response to the *Furman* Court's rejection of "standardless" capital sentencing discretion and the *Gregg* Court's approval of "guided discretion." Such guidance seeks to avoid the arbitrariness that was guaranteed by the pre-

15. 408 U.S. 238.

16. 428 U.S. 153. *See also Gregg*'s four accompanying cases: *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

Furman practice of instructing juries merely that the sentencing decision was to be made according to their conscience, or in their sole discretion, without any further elaboration. By invalidating the death penalty for rape in 1977[17] and extending that invalidation to the crime of child rape this past Term,[18] the Supreme Court, again like the MPC, has limited capital punishment to the crime of murder,[19] in comparison to the pre-*Furman* world in which death sentences for rape, armed robbery, burglary and kidnapping were authorized and more than occasionally imposed. The Court recently has categorically excluded juveniles and offenders with mental retardation from the ambit of the death penalty.[20] Although the Court has never held that bifurcated proceedings (separate guilt and sentencing phases) are constitutionally required,[21] post-*Furman* statutes have made bifurcation the norm, and it would likely be held to be a constitutional essential today, should the issue ever arise.

Despite these genuine improvements to the administration of capital punishment, constitutional regulation has proven inadequate to address the concerns about arbitrariness, discrimination, and error in the capital justice process that led to the Court's intervention in the first place. At its worst, constitutional regulation is part of the problem. When the Court requires irreconcilable procedures, its own conflicting doctrines doom its efforts to failure. Such conflicts have led several Justices to reject the Court's regulatory efforts as unsustainable. In many more instances, the Court's doctrine, though it may recognize serious threats to fairness in the process or recognize important rights, fails to provide adequate mechanisms to address the threats or vindicate the rights. Some of these inadequacies have led additional Justices to defect in various ways from the Court's death penalty doctrine. Finally, the existence of an extensive web of constitutional regulation with minimal regulatory effect stands in the way of *non*-constitutional legislative reform of the administration of capital punishment – not only because such reform is generally extremely unpopular politically, but also because political actors and the general public assume that constitutional oversight by the federal courts is the proper locus for ensuring the fairness in capital sentencing and that the lengthy appeals process in capital cases demonstrates that the courts are doing their job (indeed, maybe even *over*-doing their job, considering how long cases take to get through the

17. Coker v. Georgia, 433 U.S. 584 (1977).

18. Kennedy v. Louisiana, 128 S. Ct. 2651 (2008).

19. The Court limited its holding to crimes against persons, and put to one side crimes against the state such as treason or terrorism. *See id.* at 2659.

20. Atkins v. Virginia, 536 U.S. 304 (2002) (offenders with mental retardation); Roper v. Simmons, 543 U.S. 551 (2005) (juvenile offenders). The MPC categorically excludes juvenile offenders, and addresses mental retardation by requiring a life sentence when the court is satisfied that "the defendant's physical or mental condition calls for leniency." § 211.6(1)(e).

21. McGautha v. California, 402 U.S. 183 (1971). The MPC requires bifurcated proceedings. § 210.6(2).

entire review process). What follows is a discussion of the four most serious inadequacies in the constitutional regulation of capital punishment and their implications for reform efforts.

1. The central tension between guided discretion and individualized sentencing.—The two central pillars of the Court's Eighth Amendment regulation of capital punishment are the twin requirements that capital sentencers be afforded sufficient guidance in the exercise of their discretion and that sentencers at the same time not be restricted in any way in their consideration of potentially mitigating evidence. The first requirement led the Court to reject aggravating factors that rendered capital defendants death eligible but failed to furnish sufficient guidance to sentencers – most notably, factors similar to MPC § 210.6(3)(h): "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." The Court rejected such vague factors as insufficient either to narrow the class of those eligible for capital punishment or to channel the exercise of sentencing discretion.[22] The second requirement led the Court to reject statutory schemes that limited sentencers' consideration of any potentially mitigating evidence, either by restricting mitigating circumstances to a statutory list,[23] or by excluding full consideration of some potentially relevant mitigating evidence.[24]

From the start, the tension between the demands of consistency and individualization were apparent. As early as a year prior to *Furman*, the lawyers who litigated *Furman* and *Gregg* argued that unregulated mercy was essentially equivalent to unregulated selection: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."[25] After more than a decade of attempting to administer both requirements, several members of the Court with widely divergent perspectives came to see the incoherence of the foundations of their Eighth Amendment doctrine. In 1990, Justice Scalia argued that the second doctrine – or "counterdoctrine" – of individualized sentencing "exploded whatever coherence the notion of 'guided discretion' once had."[26] Justice Scalia rejected the view that the two doctrines were merely in tension rather than flatly contradictory: "To acknowledge that 'there perhaps is an inherent tension' [between the two doctrines] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing 'twin objectives' is rather like referring to the twin objectives of good and evil. They cannot be

22. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988).

23. *See* Lockett v. Ohio, 438 U.S. 586 (1978).

24. *See* Penry v. Lynaugh, 492 U.S. 303 (1989).

25. *See* Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent at 69, McGautha v. California, 402 U.S. 183 (1971) (No. 71-203).

26. Walton v. Arizona, 497 U.S. 639, 661 (1990) (Scalia, J., concurring)

reconciled."[27] As a result, Justice Scalia (later joined by Justice Thomas), has chosen between the two commands and rejected the requirement of individualized sentencing as without constitutional pedigree: "Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."[28]

Four years later, Justice Blackmun came to same recognition of the essential conflict between the doctrines, but reached a different conclusion. Justice Blackmun found himself at a loss to imagine any sort of reform that could mediate between the two conflicting commands: "Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would 'thro[w] open the back door to arbitrary and irrational sentencing.'"[29] Unlike Justices Scalia and Thomas, however, Justice Blackmun did not resolve to jettison either constitutional command – not merely because of the demands of *stare decisis*, but "because there is a heightened need for both in the administration of death."[30] Consequently, Justice Blackmun concluded that "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution."[31]

One Justice's response to the conflict between the need for guidance and the need for individualization was to call for limiting eligibility for capital punishment to a very small group of the worst of the worst – "the tip of the pyramid" of all murderers, in the words of Justice Stevens.[32] If unguided mercy reprieves some from this group, there will still be arbitrariness in choosing among the death eligible, but it will operate on a much smaller scale, and with greater assurance that those who make it to the "tip" belong in the group of the death eligible. However, even if it were agreed that limiting arbitrariness to a smaller arena is sufficient to mediate the conflict between guidance and discretion, this solution is neither constitutionally prescribed nor politically feasible. The Court's "narrowing" requirement is formal rather than quantitative; there is no requirement that

27. *Id.* at 664 (citations omitted).

28. *Id.* at 673.

29. Callins v. Collins, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting from denial of certiorari) (citation omitted).

30. *Id.*

31. *Id.* at 1157.

32. *See Walton*, 497 U.S. at 716-18 (Stevens, J., dissenting).

any state restrict the ambit of the death penalty to a group of any particular size or with any particular aggravating attributes. And in the absence of a constitutional command, the scope of most capital statutes remains extraordinarily broad. One study, for example, of the Georgia statute upheld in *Gregg* as a model of guided discretion, found that 86% of all persons convicted of murder in Georgia over a five-year period after the adoption of Georgia's new statute were death-eligible under that scheme,[33] and that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.[34] The widespread authorization of the death penalty for felony murder, murder for pecuniary gain, and murders that could be described as "cold-blooded," "pitiless," and the like[35] have ensured a wide scope of death eligibility, and capital statutes have tended to grow rather than shrink over time, for reasons that we discuss in greater detail below. (See section on "Politicization.")

The conflict between guidance and individualization thus has been resolved by the Court not by Justice Stevens' suggestion of strict narrowing, but rather by reducing the requirement of guidance to a mere formality. States must craft statutes that narrow the class of the death eligible to some subset – however large and however defined – of the entire class of those convicted of the crime of murder. In contrast, the Court has enforced the requirement of individualization with greater zeal and demandingness. Consequently, the structure of capital sentencing today is surprisingly similar to the pre-*Furman* structure (bifurcation aside). The sentencer must determine whether the defendant is death eligible – today not merely by conviction of a capital offense by also by the additional finding of an aggravating factor. These factors can be numerous, broad in scope, and still quite vague; indeed, the Court has held that the aggravator can duplicate an element of the offense of capital murder (in which case the aggravator adds nothing to the conviction).[36] After this fairly undemanding finding, the inquiry opens up into pre-*Furman* sentencing according to conscience: the sentencer is asked whether any mitigating circumstances of any type, statutory or non-statutory, call for a sentence less than death. This sentencing structure, which dominates the post-*Furman* world, is not accidental, nor is it the product of deliberate undermining of constitutional norms by states; rather, it is the *product* of constitutional regulation and thus fairly impervious to all but constitutional reform.

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33. David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 268 n.31(1990).

34. *Id.* at 102.

35. Although the Court initially invalidated vague aggravators like "heinous, atrocious or cruel," it later permitted judicially imposed "narrowing constructions" of such aggravators to save them from unconstitutionality. For example, in Arave v. Creech, 507 U.S. 463 (1993), the Court upheld Idaho's aggravator of "utter disregard for human life" by a narrowing construction that asked sentencers whether the defendant acted as a "cold-blooded, pitiless slayer."

36. *See* Lowenfield v. Phelps, 484 U.S. 231 (1988).

We share Justice Blackmun's skepticism about the possibility of adequate constitutional mediation of the needs for heightened guidance and individualization in the capital context. As for Justice Steven's suggestion of the possibility of sharply narrowing the scope of capital punishment, Justice Harlan said it best in 1971, in explaining the Court's rejection of challenges to standardless capital sentencing under the Due Process clause:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.[37]

As for Justice Scalia's suggestion of abandoning the individualization requirement as a constitutional essential, we think the 1976 *Woodson* plurality explanation for why individualization is required remains compelling:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[38]

In the absence of a constitutional solution, states (and Congress) will continue to operate capital sentencing schemes that fail to adequately address the concerns about arbitrariness and discrimination that led to constitutional intervention in the first instance.

2. Racial disparities and constitutional remedies.—The failure of constitutionally mandated guided discretion to offer much in the way of guidance might be less worrisome if there were other constitutional avenues to address discriminatory outcomes. After all, the challenge to standardless capital sentencing that led to the constitutional requirement of guided discretion was premised in large part on the concern that the absence of guidance gave too much play to racial discrimination. The NAACP Legal Defense Fund, the organization that spearheaded the constitutional litigation

37. *McGautha*, 402 U.S. at 204, 208.

38. 428 U.S., 304 (plurality opinion of Stewart, Stevens, and Powell, JJ.).

challenging the death penalty that culminated in *Furman* and *Gregg*, was also involved in litigation under the Equal Protection clause directly challenging racial disparities in the distribution of death sentences. For the first few decades of constitutional regulation of capital punishment, however, the Court avoided this issue, deciding cases that raised it on entirely non-racial grounds.[39] Finally, in 1987, the Court took up the issue directly in *McCleskey v. Kemp*.[40]

McCleskey involved a constitutional challenge to the imposition of the death penalty based on an empirical study conducted by Professor David Baldus and his associates (the Baldus study) using multiple regression statistical analysis to study the effect of the race of defendants and the race of victims in capital sentencing proceedings in Georgia. The study examined over 2,000 murder cases that occurred in Georgia during the 1970's. The researchers used a number of different models that took account of numerous variables that could have explained the apparent racial disparities on nonracial grounds. The study found a very strong race-of-the-victim effect and a weaker race-of-the-defendant effect: after controlling for the nonracial variables, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks, and that black defendants who killed white victims had the greatest likelihood of receiving the death penalty.

The Court rejected McCleskey's challenge to his death sentence on both Equal Protection and Eighth Amendment grounds. The Court assumed for the sake of argument the validity of the Baldus study's statistical findings, but held that proof of racial disparities in the distribution of capital sentencing outcomes in a geographic area in the past was insufficient to prove racial discrimination in a later case. Proof of unconstitutional discrimination, held the Court, requires proof of discriminatory *purpose* on the part of the decisionmakers in a particular case. Moreover, in light of the importance of discretion in the administration of criminal justice, proof of such purpose must be "exceptionally clear."[41] In light of this heavy burden, the Court found the Baldus study's results "clearly insufficient" to prove discriminatory purpose under the Equal Protection clause.[42] As for the Eighth Amendment challenge, the Court held that the "discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in *Furman*."[43] The Court concluded that the "risk of racial bias" demonstrated by the Baldus study was not "constitutionally significant."[44]

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39. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977); Maxwell v. Bishop, 398 U.S. 362 (1970).
40. 481 U.S. 279 (1987).
41. *Id.* at 297.
42. *Id.*
43. *Id.* at 313.
44. *Id.*

In part, the Court's rejection of McCleskey's claim was informed by its concern that there might be no plausible constitutional remedy short of abolition: "McCleskey's claim . . . would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."[45] (We discuss further the difficult problem of remedies for racial discrimination below in the section on "Race Discrimination.") But the Court's requirement of exceptionally clear proof of discriminatory purpose on the part of a particular sentencer makes constitutional challenges to intentional discrimination essentially impossible to mount. Not surprisingly, there have been no successful constitutional challenges to racial disparities in capital sentencing in the more than two decades since *McCleskey*, despite continued findings by many researchers in many different jurisdictions of strong racial effects. By rendering racial disparities in sentencing outcomes constitutionally irrelevant in the absence of more direct proof of discrimination, the Court has dispatched the problem of racial discrimination in capital sentencing from the constitutional sphere to the legislative one, where it has not fared well. (See "Race Discrimination," below.) Notably, Justice Powell, the author of the 5-4 majority opinion in *McCleskey*, repudiated his own vote only a few years later, when a biographer asked him upon his retirement if there were any votes that he would change, and he replied, "Yes, *McCleskey v. Kemp*."[46]

In rejecting McCleskey's Eighth Amendment claim that the Baldus study demonstrated an unacceptable "risk" of discrimination, the Court relied in part on other "safeguards designed to minimize racial bias in the process."[47] Primary among these safeguards is the Court's *Batson* doctrine. In *Batson v. Kentucky*[48] – decided just one year prior to *McCleskey* – the Court eased the requirement for proving intentional discrimination in the exercise of peremptory strikes by shifting the burden to the prosecution to provide race neutral explanations for strikes when the nature or pattern of strikes in an individual case gave rise to a *prima facie* inference of discriminatory intent. *Batson* did in fact permit the litigation of many more claims of discrimination in the use of peremptory strikes than the earlier, more demanding *Swain* doctrine,[49] and the Court has been more vigorous in overseeing the enforcement of the *Batson* right in capital cases in recent years.[50]

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45. *Id.* at 293.

46. David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell Is Said to Favor Ending Executions*, Wash. Post, June 10, 1994 (based on interview with John C. Jeffries, Jr., Justice Powell's official biographer).

47. *McCleskey*, 481 U.S. at 313.

48. 476 U.S. 79 (1986).

49. *See* Swain v. Alabama, 380 U.S. 202 (1965).

50. *See* Snyder v. Louisiana, 128 S. Ct. 1203 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 534 U.S. 1122 (2002).

But the Court's reliance on *Batson* as a means of preventing racial discrimination in capital jury selection is profoundly misplaced. Studies of the effectiveness of *Batson* in reducing the race-based used of peremptory strikes have demonstrated only an extremely modest effect.[51] This is not surprising in light of the incentives that exist to base peremptory strikes at least in part upon the race of prospective jurors and the ease with which "race neutral" explanations for strikes can be offered.

If the race-based use of peremptory strikes depended on racial hatred or the belief in the intrinsic inferiority of minority jurors, then there would undoubtedly be much less race-based use of peremptories than is evident today. However, there is clearly a great deal of what economists call "rational discrimination" in jury selection. Counsel on both sides make decisions about the desirability of jurors from particular demographic groups based on generalizations about attitudes that the group as a whole tends to hold. There is good reason, based on polling data, to believe that blacks as a group are more sympathetic to criminal defendants and less trusting of law enforcement than whites, and that blacks as a group are less supportive of capital punishment than whites. Moreover, in cases involving black defendants, there is reason to believe that black jurors may be more personally sympathetic to the defendant than white jurors and more likely to perceive "remorse" on the part of the defendant, a perception crucial to obtaining life verdicts in capital sentencings.[52] Under such circumstances, capital prosecutors who harbor no personal racial animosity may well see strong reasons to use race as a proxy for viewpoint in using peremptory challenges, especially when they often have little other information to go on.

In implementing *Batson*, the Court has held that a prosecutor's race neutral explanation need not be "persuasive, or even plausible" – it must simply be sincerely non-racial.[53] It can be perilous for a prosecutor to offer as an explanation some aspect of a struck minority juror that is also true of white jurors whom the prosecutor failed to strike.[54] But one sort of explanation remains a virtually guaranteed race neutral explanation – an objection to a prospective juror's demeanor (e.g., the juror appeared hostile, nervous, bored, made poor eye contact, made too much eye contact, smiled or laughed inappropriately, frowned). Because no lawyer or judge can simultaneously monitor all of the prospective jurors' demeanors throughout all of voir dire, and because perceptions about the meaning of demeanor can vary, there is no way to disprove a prosecutor's claim that a particular juror

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51. *See, e.g.*, William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001).

52. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538 (1998).

53. Purkett v. Elem, 514 U.S. 765, 768 (1995) (accepting the prosecutor's professed objection to the struck jurors' hairstyle and facial hair as an acceptable non-racial reason).

54. These sorts of comparisons formed the basis for the reversals in *Miller-El v. Dretke* and *Snyder*, *supra* note 50.

appeared more "hostile" to him than the others. To reject such an explanation, a trial judge would have to make a credibility determination against a prosecutor – something judges are not prone to do lightly and in the absence of any hard evidence. Moreover, prosecutors may offer such explanations not only from a calculated attempt to preserve a dubious strike, but also in some cases from an honest perception built on the foundations of "rational discrimination." Starting from a belief that black jurors are more hostile to law enforcement or less supportive of the death penalty, a prosecutor in a capital case may genuinely believe that he or she is perceiving hostility from prospective minority jurors.

In short, there is little reason to put much faith in *Batson* as a strong protection against the racial skewing of capital juries. This skewing should concern us not merely because it inevitably affects perceptions about the fairness of the capital justice system, but because there is strong reason to believe that the race of capital jurors affects the outcomes of capital trials (just as there is reason to believe that the race of victims and defendants does).[55]

3. Innocence.—Just as *McCleskey* effectively precludes challenges to racial discrimination in capital sentencing (at least challenges based on patterns of outcomes over time), the Court's doctrine also makes virtually no place for constitutional consideration of claims of innocence. In *Herrera v. Collins*,[56] the Court rejected petitioner's claim of actual innocence as a cognizable constitutional claim in federal habeas review. The Court held that while claims of actual innocence may in some circumstances open federal habeas review to other constitutional claims that would otherwise be barred from consideration, the innocence claims themselves are not generally cognizable on habeas. The Court assumed – without deciding – that a "truly persuasive" showing of innocence would constitute a constitutional claim and warrant habeas relief *if* no state forum were available to process such a claim.[57] But, the Court found that Herrera's claim failed to meet this standard. More recently, the Court has suggested just how high a threshold its (still hypothetical) requirement of a "truly persuasive" showing of innocence would prove to be. In *House v. Bell*,[58] the petitioner sought federal review with substantial new evidence challenging the accuracy of his murder conviction, including DNA evidence conclusively establishing that semen recovered from the victim's body that had been portrayed at trial as "consistent" with the defendant actually came from the victim's husband, as well as evidence of a confession to the murder by the husband and evidence of a history of spousal abuse. The Court held that this strong showing of

55. *See* Bowers, et al., *Death Sentencing in Black and White*, supra note 51.
56. 506 U.S. 390 (1993).
57. *Id.* at 417.
58. 547 U.S. 518 (2006).

actual innocence was the rare case sufficient to obtain federal habeas review for petitioner's *other* constitutional claims that would otherwise have been barred, because no reasonable juror viewing the record as a whole would lack reasonable doubt. But even this high showing was inadequate, concluded the Court, to meet the "extraordinarily high" standard of proof hypothetically posited in *Herrera*.[59]

This daunting standard of proof suggests that even if the Court does eventually hold that some innocence claims may be cognizable on habeas, such review will be extraordinarily rare. Thus, the problem of dealing with the possibility of wrongful convictions in the capital context (like the problem of dealing with patterns of racial disparity) has been placed in the legislative rather than the constitutional arena. The reliance on the political realm to deal with the issue of wrongful convictions is less troubling than such reliance on the issue of racial disparities, because there is far more public outcry about the former rather than the latter issue. But the problem of wrongful convictions in the capital context has proven to be larger and more intractable than might have been predicted. The large numbers of exonerations in capital cases may be due in part to the fact that many of the systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases. Moreover, courts have been resistant both to providing convicted defendants with plausible claims of innocence the resources (including access to DNA evidence) necessary to make out their innocence claims, and to granting relief even when strong cases have been made. Finally, larger-scale reforms that might eliminate or ameliorate the problem of wrongful convictions are often politically unpopular, expensive, or of uncertain efficacy. (See section on "Erroneous Conviction of the Innocent," below.)

4. Counsel.—Unlike innocence, the problem of inadequate counsel has been squarely held to undermine the constitutional validity of a conviction. Despite the fact that "effective assistance of counsel" is a recognized constitutional right, the scope of the right and the nature of the remedy have precluded the courts from being able to ensure the adequacy of representation in capital cases. Perhaps in response to repeated accounts of extraordinarily poor lawyering in capital cases,[60] the Court recently has granted review and ordered relief in a series of capital cases raising ineffectiveness of counsel claims regarding defense attorneys' failure to investigate and present mitigating evidence with sufficient thoroughness[61] – a development that

59. *Id.* at 555 (quoting *Herrera*).

60. *See, e.g.*, James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2103-10 (2000); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994); Marcia Coyle, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L. J., June 11, 1990, at 30.

61. *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

might be viewed as raising the constitutional bar for attorney performance, at least in the sentencing phase of capital trials.[62] Nonetheless, constitutional review and reversal remain an inadequate means of ensuring adequate representation, both because the constitutional standard for ineffectiveness remains too difficult to establish in most cases, and because the remedy of reversal is too limited to induce the systemic changes that are necessary to raise the level of defense services.

One of the hurdles to regulating attorney competence through constitutional review is the legal standard for ineffective assistance of counsel. In crafting the governing standard in *Strickland v. Washington*,[63] the Court maintained that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system."[64] In light of the Sixth Amendment's more modest goal of ensuring that the outcome of a particular legal proceeding crosses the constitutional threshold of reliability, the Court established a strong presumption in favor of finding attorney conduct reasonable under the Sixth Amendment, in order to prevent a flood of frivolous litigation, to protect against the distorting effects of hindsight, and to preserve the defense bar's creativity and autonomy. This general deference was amplified for "strategic choices," which the *Strickland* Court described as "virtually unchallengeable."[65] Moreover, the Court declined to enumerate in any but the most general way the duties of defense counsel, instead deferring to general professional norms. Finally, the requirement that a defendant also prove "prejudice" from attorney error (a reasonable probability that the outcome of the trial would be different) necessarily immunizes many incompetent legal performances from reversal, if the guilt of the defendant is sufficiently clear.

The difficulty of meeting the legal standard, even in cases of manifestly incompetent counsel, is amplified by the procedural context in which such claims are made. Although there is often no legal bar to raising claims of ineffective assistance on direct appeal (when indigent defendants still have a constitutional right to appointed counsel), appellate review is appropriate only for record claims, where the basis for asserting ineffective assistance is a trial error evident from the transcript (such as failure to object to the

62. Compare the outcomes and analysis in *Williams*, *Wiggins*, and *Rompilla* to the Court's earlier rejections of claims of ineffective representation in capital sentencing proceedings in Strickland v. Washington, 466 U.S. 668 (1984), and Burger v. Kemp, 483 U.S. 776 (1987).

63. 466 U.S. 668.

64. *Id.* at 689.

65. *Id.* at 690. Note that often the primary source of information in ineffective assistance litigation is trial counsel him- or herself, who will often have obvious reasons to resist the implication of ineffectiveness and testify accordingly. Hence, the enormous deference to "strategic choices" allows attorneys who wish to justify their decisions at a later date an obvious means to do so, though the Court did qualify its deference by noting that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

introduction of prejudicial evidence by the state). Claims of ineffective assistance, however, routinely involve the presentation of factual evidence beyond the record – e.g., evidence about information that the defense attorney failed to discover or to introduce, evidence about the likely answers to questions that the defense attorney failed to pursue at trial, or evidence about the defense attorney's interaction with the defendant. Such evidence must be developed in collateral proceedings, where the constitutional right to counsel runs out.[66] Although almost all states formally provide for counsel for indigent defendants in capital post-conviction proceedings,[67] there is virtually no monitoring of the performance of such counsel.[68] Moreover, should post-conviction counsel fail to perform adequately, *their* ineffectiveness does not preserve the claims that they are seeking to raise from state procedural bars, because there is no constitutional right to counsel in such proceedings.[69] The inadequacy of postconviction representation is compounded by the deferential review of state court decisions under the 1996 habeas statute (AEDPA), which seeks to ensure that state post-conviction proceedings are the primary venue for the litigation of non-record claims. The decline in the number of federal habeas grants of relief in the post-AEDPA era demonstrates the impact that AEDPA has had – an impact necessarily greatest on claims, like those of ineffective counsel, that will rarely see direct review.[70]

The constitutional review and reversal of individual capital convictions is by its nature an inadequate tool for achieving the institutional changes that are necessary in the provision of indigent defense services in capital cases. On the same day that the Court announced the constitutional standard in *Strickland*, it decided a companion case, *United States v. Cronic*,[71] which rejected a claim of ineffectiveness based on the circumstances faced by the

66. *See* Murray v. Giarratano, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases).

67. Alabama is a notable exception.

68. *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 66 (although some states have informal means of monitoring the performance of postconviction counsel, only Florida requires such monitoring).

69. In Coleman v. Thompson, 501 U.S. 722 (1991), post-conviction counsel's failure to file a timely appeal from the denial of post-conviction relief barred federal habeas review of petitioner's claim regarding the ineffectiveness of his trial counsel. The Court did, however, note without deciding the question whether "there must be an exception [to *Giarratano*] in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755. The Court avoided the question by noting that the default in Coleman's case happened on appeal from a merits denial of post-conviction relief, and thus he had been afforded a forum for litigating his ineffectiveness claim.

70. *Compare* James Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-95* (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/ (40% federal habeas reversal rate in capital cases during pre-AEDPA period), with Nancy King, et al., *Habeas Litigation in U.S. District Courts* (2007) (12.5% federal habeas reversal rate in capital cases during post-AEDPA period).

71. 466 U.S. 648 (1984).

defense attorney in litigating the case (lack of time to prepare, inexperience, seriousness of the charges, etc.). The Court insisted that a defendant must identify particular prejudicial errors made by counsel, rather than merely identify circumstances that suggest that errors would likely be made. *Cronic* has widely been held by courts to preclude Sixth Amendment challenges to the institutional arrangements (fee structures, caseloads, availability of investigative or expert services, lack of training and experience, etc.) that lead to incompetent representation, except in the most extraordinary of circumstances.[72] Without any ability to directly control fees, caseloads, resources, or training, courts conducting Sixth Amendment review of convictions can only reverse individual convictions based on individual errors. And even an extended period of substantial numbers of reversals on ineffectiveness grounds has failed to produce substantial reform in the provision of capital defense services. Despite the fact that "egregiously incompetent defense lawyering" was the most common reversible error in capital cases (39%) in a more than two-decade period (1973-1995) with an overall reversible error rate of 68%,[73] there is no reason to believe that these reversals promoted systemic reform. Indeed, the absence of systemic assurance of adequate counsel in capital cases formed a cornerstone of the American Bar Association's call for a moratorium on executions in 1997, two years after the end of the studied period.[74]

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The best evidence of the inadequacies of constitutional regulation of capital punishment is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. The attempt to regulate the capital justice process through constitutional supervision is not in its infancy; the Court has had nearly four decades of experience in implementing it. Notably, two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty. Justice Blackmun did so in a long and carefully reasoned dissent from denial of certiorari, concluding twenty-two years after *Furman*, that "the death penalty experiment has failed."[75] Justice Powell did so in reviewing his career in an interview with his official biographer after his retirement. Justice Stevens, one of the three-Justice plurality that reinstituted the death penalty in the 1976 cases, this past Term has concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in

72. *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999).

73. Liebman, et al., *A Broken System*, *supra* note 70.

74. The text of the ABA moratorium and a copy of the supporting report are available at http://www.abanet.org/moratorium/resolution.html.

75. *Callins*, 510 U.S, at 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

applying the Court's precedents.[76] In explaining his own change in constitutional judgment, Justice Stevens offers a long list of concerns about the administration of the death penalty and notes that the Court's 1976 decisions relied heavily on the now untenable belief "that adequate procedures were in place that would avoid the [dangers noted in *Furman*] of discriminatory application . . . arbitrary application . . . and excessiveness."[77] Justices Scalia and Thomas have repudiated the Court's Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion. Justices Kennedy, Souter, and Breyer each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice.[78] Finally, Justices Sandra Day O'Connor and Ruth Bader Ginsburg have both given speeches questioning the soundness of the capital justice process on the ground of inadequate provision of capital defense services.[79] We can think of no other constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. Such reservations strongly suggest that the constitutional regulation of capital punishment has not succeeded on its own terms.

The question remains whether the Institute should undertake a new law reform project to ameliorate the consequences of the Supreme Court's unsuccessful regime of constitutional regulation of capital punishment, given that the Institute's prior law reform project in this area (MPC § 210.6) played a role in initiating and shaping the Court's current approach. Militating against such a course of action is the fact that the problems currently afflicting the capital justice process are not addressable in the absence of larger scale political or institutional changes that are either impossible or

76. *See* Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (Stevens, J., concurring).

77. *Id.* at 1550.

78. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2661 (2008) (emphasizing "the imprecision [in the definition of capital murder] and the tension between evaluating the individual circumstances and consistency of treatment" that plague the administration of the death penalty as a reason for not extending the penalty to cases in which the victim does not die) (majority opinion joined by Stevens, Souter, Ginsburg, and Breyer); Kansas v. Marsh, 548 U.S. 163, 207-11 (2006) (emphasizing the risk of erroneous conviction in the current capital justice process as a reason to reject a capital scheme that required a death sentence when aggravating and mitigating evidence were in equipoise) (Souter dissent, joined by Stevens, Ginsburg, and Breyer); Ring v. Arizona, 536 U.S 584, 616 (2002) (emphasizing the continued division of opinion as to whether capital punishment is in all circumstances "cruel and unusual punishment" as currently administered as grounds for requiring jury sentencing in all capital cases) (Breyer concurrence for himself alone).

79. In 2001, Justice O'Connor criticized the administration of capital punishment on the grounds of wrongful conviction and inadequate provision of defense services. *See* Associated Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001. The same year, Justice Ginsburg told a public audience that she supported a state moratorium on the death penalty, noting that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial." Associated Press, *Ginsburg Backs Ending Death Penalty*, Apr. 9, 2001, available at http://www.truthinjustice.org/ginsburg.htm.

beyond the scope of an ALI-style law reform project. The scope of these problems – which we survey below – demonstrates that a more appropriate response by the Institute would be the withdrawal of § 210.6 with a statement calling for the rejection of capital punishment as a penal option.

II. The Politicization of Capital Punishment

Perhaps the most important feature of the landscape of capital punishment administration that imperils the success of any discrete law reform project is the intense politicization of the death penalty. Capital punishment (like the rest of criminal justice in the United States) is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected (with the exception of lay jurors). At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of violent crime and as political shorthand for support for "law and order" policies generally. These two aspects of politicization ensure that the institutional actors responsible for the administration of the capital justice process are routinely subject to intense pressures, which in turn contribute to the array of problems that we review below – e.g., inadequate representation, wrongful convictions, and disparate racial impact. There is little hope of successfully addressing these problems in the absence of profound change on the politicization front.

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decisionmakers in their own small locales (counties). Rarely is there any state or regional review of local decisionmaking or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions. In Texas, for example, Dallas County (Dallas) and Harris County (Houston), two counties with similar demographics and crime rates, have had very different death sentencing rates, with Dallas County returning 11 death verdicts per thousand homicides, while Harris County returns 19. One sees an even greater disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of 12 and 27 per thousand homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from 4 death verdicts per thousand homicides in Fulton County (Atlanta) to 33 in rural Muscogee County – a difference of more than 700%. Large geographic variations exist within many other states that are similarly uncorrelated with differences in homicide rates.[80] These

80. *See generally* James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), available at http://www2.law.columbia.edu/brokensystem2/index2.html.

geographic disparities are troubling in themselves because they suggest that state death penalty legislation is unable to standardize the considerations that are brought to bear in capital prosecutions so as to limit major fluctuations in its application across the state. But these geographic disparities are also troubling because they may be one of the sources of the persistent racial disparities in the administration of capital punishment in many states. (See section on "Race Discrimination" below.)

In addition, the symbolic politics of capital punishment is very much at play in the election of local prosecutors. Candidates for local district attorney and state attorney general in a wide variety of jurisdictions have run campaigns touting their capital conviction records, even going so far as listing individual defendants sentenced to death.[81] As a practical matter, an elected prosecutor's capital conviction record should be a relatively small part of any prosecutor's portfolio, given the limited number of capital cases that any prosecutorial office will handle – a small fraction of all homicide cases, and an even smaller fraction of all serious crimes. (Remember that even Harris County, Texas, has a death verdict rate of only 1.9% of all homicides). Clearly, many prosecutorial candidates perceive that the voting public has a special interest in capital cases, both because of the fear generated by the underlying crimes that give rise to capital prosecution and because a prosecutor's support for capital punishment represents in powerful shorthand a prosecutor's "toughness" on crime. These general incentives are troubling in themselves, because they suggest that political incentives may exist to bring capital charges and to win death verdicts, quite apart from the underlying merits of the cases.[82] Even more troubling is the incentives that may exist to favor those in a position to provide campaign contributions or votes. The racial disparities in capital charging decisions favoring cases with white victims mirror the racial disparities in political influence in the vast majority of communities.[83]

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81. *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 474-75 (1999); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 Geo. J. Legal Ethics 941 (1994).

82. The federal system presents a different picture with regard to the problem of political pressures on prosecutors, because federal prosecutors are appointed rather than elected. Moreover, unlike most local district attorneys, federal prosecutors must subject their decisions to seek the death penalty to centralized review by Main Justice. While federal cases may be different in important respects from state cases (in degree of politicization, among other things), the MPC was designed as a state penal code. Thus, any such differences are not relevant to the question of how the Institute should address the capacity of § 210.6 to address the problems common to most state death penalty systems.

83. The Baldus study on racial disparities in capital sentencing, see *supra* note 33, also found evidence that charging decisions were strongly correlated with the race of murder victims. These statistical findings parallel anecdotal evidence from lawyers in the field. Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, describes an incident in a Georgia county: "In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the

Judges as well as prosecutors must face the intense politicization that surrounds the administration of capital punishment. Almost 90% of state judges face some kind of popular election.[84] Politicization of capital punishment in judicial elections has famously ousted Chief Justice Rose Bird and colleagues Cruz Reynoso and Joseph Grodin from the California Supreme Court,[85] as well as Justice Penny White from the Tennessee Supreme Court.[86] These high-profile examples are only the tip of the iceberg of political pressure, as no judge facing election could be unaware of the high salience of capital punishment in the minds of voters, especially in times of rising crime rates or especially high-profile murders. The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, after an official visit to the United States, reported that many of those with whom he spoke in Alabama and Texas, which both have partisan judicial elections, suggested that "judges in both states consider themselves to be under popular pressure to impose and uphold death sentences whenever possible and that decisions to the contrary would lead to electoral defeat."[87]

Of course, there is every hope and reason to expect that most judges will conscientiously endeavor to resist such pressures and decide cases without regard to political influences. Despite the fact that there is good reason to have confidence in the personal integrity of the individual men and women who comprise the elected judiciary, several statistical studies suggest that, in the aggregate, judicial behavior in criminal cases generally and capital cases in particular appears to be influenced by election cycles.[88] Moreover, in

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contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial. He was rewarded with a contribution of $5,000 from the contractor when he successfully ran for judge in the next election. The contribution was the largest received by the District Attorney." Stephen B. Bright, *Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 453-54 (1995). This case was part of a larger pattern of prosecutors meeting the families of white murder victims to discuss the bringing of capital charges, but not with the families of black murder victims. *See id.*

84. Matthew Streb, *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections* 7 (2007).

85. *See* Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 367 (1987) (describing television spot that encouraged voters to vote "three times for the death penalty; vote no on Bird, Reynoso, Grodin").

86. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. Rev. 308, 314 (1997) (describing opposing party's political add "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White").

87. Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, June 30, 2008. A recent political advertisement by a Texas trial court judge reflects the influence of public pressure to return death verdicts. Judge Elizabeth Coker's advertisement offers as the first reason to re-elect her the fact that she "cleared the way for the jury to issue a death sentence" in John Paul Penry's capital murder trial after it had been reversed by the U.S. Supreme Court for a second time. (A copy of the advertisement is on file with the authors.)

88. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 Am. J. Pol. Sci. 247 (2004) (finding that trial judges standing for re-election tend to impose harsher sentences as elections approach); Melinda Gann Hall, *Electoral*

many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services. These decisions, which are crucial to the capital justice process, are less visible but no less likely to be subject to political pressures.[89] Finally, in a few capital jurisdictions, elected judges actually impose sentences in capital cases through their power to override jury verdicts, and a comparison among these states strongly suggests that the degree of electoral accountability influences the direction of such overrides.[90] One potential avenue for mitigating the effect of political pressure on elected judges was foreclosed when the Supreme Court struck down, on First Amendment grounds, a state law barring a judicial candidate from announcing his or her views on disputed legal or political issues.[91] The Court's decision invalidated laws in nine states, and it has been interpreted broadly by lower courts, who have struck down other limitations on judicial candidates, including those on both fundraising and campaign promises, that were part of the law in many more states.[92]

Governors, too, are influenced by the intense politicization of capital punishment. Like prosecutors and judges, Governors have often campaigned on their support for the death penalty, emphasizing their willingness to sign

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Politics and Strategic Voting in State Supreme Courts, 54 J. Pol. 427 (1992) (finding that district-based elections influence justices in state supreme courts to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360 (2008) (finding that judicial behavior in affirming death sentences is correlated with public opinion about the death penalty only in states where judges face election and not in states where judges are appointed); *but cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465 (1999) (finding no system-wide evidence of the effect of state judicial election methods on capital case outcomes, but finding other evidence confirming the politically charged character of the death penalty in state courts).

89. For example, defense lawyers in the pool of those seeking appointments to capital cases contributed money to the election and re-election campaigns of judges in Harris County, Texas – the county responsible for the largest number of executions in the United States. *See* Amnesty International, *One County, 100 Executions: Harris County and Texas – A Lethal Combination* 10 (2007), available at http://www.amnesty.org/en/library/info/AMR51/125/2007.

90. Elected judges in Alabama and Florida have been far more likely to use their power to override jury verdicts to impose death when the jury has sentenced the convicted person to life in prison than to replace a jury verdict of death with one of life. In contrast, judges in Delaware, who do not stand for election, are far less likely to override in favor of death than to override in favor of life. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995). Moreover, in Alabama, overrides in favor of death have appeared to be more frequent in election years. *See* Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L. J. 239, 255-56 (1994).

91. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

92. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L. J. 1077, 1095-96 (2007).

death warrants.[93] While Governors are less implicated in the day-to-day workings of the capital justice process than prosecutors and judges, they play a crucial role in the exercise of clemency powers, which the Supreme Court has recognized as an important defense against conviction and execution of the innocent.[94] Some Governors, like George Ryan of Illinois, have not been afraid to use the clemency power to respond to concerns about wrongful conviction. However, the trend in the use of the clemency power in capital cases has been sharply downward in the decades since the reinstatement of capital punishment in 1976, at the same time that the trend in death sentencing and executions has been sharply upward.[95] The persistent high political salience of capital punishment, as reflected by its prominence at all levels of political discourse,[96] has no doubt affected the willingness of Governors to set aside death sentences.[97]

Finally, the politicization of the issue of capital punishment in the legislative sphere limits the capacity of legislatures to promote and maintain statutory reform. The kind of statutory reform that many regard as the most promising for ameliorating arbitrariness and discrimination in the application of the death penalty is strict narrowing of the category of those eligible for capital crimes. Justice Stevens argued that unfettered discretion to grant mercy based on open-ended consideration of mitigating evidence (which is commanded by the constitution) is not fundamentally inconsistent with guided discretion (which is also commanded by the constitution), provided that the category of the death eligible is truly limited to the "tip of the pyramid."[98] And the Baldus study reported that racial disparities were not evident in the distribution of death sentences for the category of the most aggravated murders, because death sentences were so common in this category.[99] A few states, like New York, have managed to maintain a

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93. *See* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 71 (2005) (noting examples of John K. Van de Kamp in California, Jim Mattox in Texas, and Bob Martinez in Florida).

94. See the discussion of Herrera v. Collins, 506 U.S. 390 (1993), in the "Constitutional Regulation" section, *supra* notes 55-59 and accompanying text.

95. *See* Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. Rev. 349 (2003).

96. Even presidential politics is profoundly marked by capital punishment, though the federal government in general, and the President in particular, plays a very small role in the administration of capital punishment, other than through the appointment of Justices to the Supreme Court.

97. One dramatic example of the political costs of clemency is the 1994 Pennsylvania gubernatorial race between Republican Tom Ridge and Democrat Mark Singel. Singel had been chairman of the state's Board of Pardons, which had released an inmate who was arrested on murder charges a month before the election. Overnight, Singel went from leading Ridge by 4 points to trailing him by 12: Singel's commutation recommendation lost him the election. *See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, July 16, 1995.

98. See the discussion of Stevens' opinion in Walton v. Arizona, 497 U.S. 639 (1990), in the "Constitutional Regulation" section, *supra* notes 32-36 and accompanying text.

99. See the discussion of the Baldus study in the section on "Race Discrimination," *infra* at 27-28.

relatively narrow death penalty.[100] However, most states have been unwilling to restrict the scope of the death penalty, and the continued inclusion of broad aggravators like felony murder, pecuniary gain, future dangerousness, and heinousness (or its equivalent) preclude the strict narrowing approach in most jurisdictions.

Moreover, even if a jurisdiction were able to pass a truly narrow death penalty (something more likely in an abolitionist jurisdiction reinstating the death penalty than in a retentionist jurisdiction sharply curtailing a current statute), the political pressure to expand the ambit of the death penalty over time will likely prove politically irresistible. The tendency of existing statutes, even already broad ones, to expand over time through the addition of new aggravating factors has been well documented.[101] When former Governor Mitt Romney introduced legislation drafted by a blue-ribbon commission to reinstitute capital punishment in Massachusetts, supporters of the draft emphasized the very narrow ambit of proposed statute. However, a symposium of experts organized to discuss the proposed statute noted the problem of what one of them called "aggravator creep" (an analogy to "mission creep" referred to in military contexts), in which "[a] statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added."[102] The most eloquent case for the inevitability of "aggravator creep" has been made by lawyer and novelist Scott Turow. Turow, a former federal prosecutor who supported the death penalty for most of his life, wrote a (nonfiction) book describing how his later pro bono work on the capital appeal of a wrongfully convicted man and his service on the Illinois Governor's Commission to reform the death penalty convinced him to vote as a Commission member for abolition rather than reform. As a moral matter, Turow remains persuaded that a narrow death penalty is both morally permissible and desirable. But he has come to see that expansion is inevitable, with the arbitrariness and potential for error that expansive capital statutes necessarily entail:

> The furious heat of grief and rage the worst cases inspire will inevitably short-circuit our judgment and always be a snare for the innocent. And the fundamental equality of each survivor's loss, and

100. Indeed, New York even refused to re-authorize the penalty after its highest court invalidated the state's death penalty statute on easily remediable state constitutional grounds. But states like New York and New Jersey (the only state to legislatively abolish capital punishment since its reinstatement in 1976) are outliers. They did not participate significantly in the practice of capital punishment in the modern era even while formally retaining the death penalty.

101. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in Austin Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (1999); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 Pepperdine L. Rev. 1 (2006).

102. *See Symposium: Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report. Panel One – The Capital Crime*, 80 Ind. L. J. 35, 35 (2005) (statement of Edwin Colfax).

> the manner in which the wayward imaginations of criminals continue to surprise us, will inevitably cause the categories for death eligibility to expand, a slippery slope of what-about-hims.[103]

The foregoing suggests that politicization of the death penalty, both within the capital justice process and more broadly in the realm of public policy and discourse, threatens both the integrity of individual cases and the prospects for reform. This politicization is the most far-reaching, important, and intractable reason to be dubious of the prospects for success of an ALI reform project in this area.

III. Race Discrimination

Race discrimination has cast a long shadow over the history of the American death penalty. During the antebellum period, race discrimination was not merely a matter of practice but a matter of law, as many Southern jurisdictions made the availability of the death penalty turn on the race of the defendant or victim.[104] After the Civil War, the discriminatory Black Codes were largely abandoned, but discrimination in the administration of capital punishment persisted. Discrimination permeated both the selection of those to die as well as the selection of those who could participate in the criminal justice process. African Americans were more frequently executed for non-homicidal crimes, were more likely to be executed without appeals, and were more likely to be executed at young ages.[105] Discrimination was most pronounced in Southern jurisdictions. The most obvious discrimination occurred in capital rape prosecutions, as such prosecutions almost uniformly targeted minority offenders alleged to have assaulted white victims, and the numerous executions for rape post-1930 (455) were entirely confined to Southern jurisdictions, border states, and the District of Columbia.[106] Until the early 1960s, the differential treatment of both African-American offenders and African-American victims was attributable in part to the exclusion of African-Americans from jury service, again largely (although not exclusively) concentrated in Southern and border-state jurisdictions.

When the Supreme Court first signaled its interest in constitutionally regulating capital punishment in the early 1960s, several Justices issued a dissent from denial of certiorari indicating their willingness to address whether the death penalty is disproportionate for the crime of rape.[107]

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103. Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* 114 (2003).

104. Stuart Banner, *The Death Penalty: An American History* (2002).

105. William J. Bowers, *Legal Homicide: Death as Punishment in America*, 1864-1982, 67-87 (1984).

106. Marvin E. Wolfgang, *Race Discrimination in the Death Sentence for Rape*, in William J. Bowers, *Executions in America* 113 (1974).

107. Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari).

Although these Justices did not mention race in their brief statement, they were undoubtedly aware of the racially-skewed use of the death penalty to punish rape. The NAACP Legal Defense Fund thereafter sought to document empirically race discrimination in capital race prosecutions with an eye toward challenging such discrimination in particular cases. The first significant study, produced by Professor Marvin Wolfgang and others at the University of Pennsylvania, found both race-of-the-defendant and race-of-the-victim discrimination in the administration of the death penalty for rape (after controlling for non-racial variables); African-American defendants convicted of raping white females faced a greater than one-third chance of receiving a death sentence whereas all other racial combinations yielded death sentences in about two percent of cases.[108]

The Wolfgang study did not ultimately lead to success in litigation, and the Eighth Circuit's rejection of the study as a basis for constitutional relief, authored by then-Judge Blackmun – foreshadowed the Supreme Court's subsequent denial of relief in *McCleskey*, discussed above.[109] In particular, the judicial response to the statistical demonstration of discrimination was to insist on a showing by the defendant of improper racial motivation in *his* case, a requirement that insulates widespread discriminatory practices from meaningful judicial intervention. But the Wolfgang study did contribute to the accurate perception that the prevailing administration of the death penalty was both arbitrary and discriminatory, and thus contributed to *Furman*'s invalidation of existing statutes and the "unguided" discretion they entailed.

The central question today is whether efforts to guide sentencer discretion – such as the one embodied in the MPC death-sentencing provision – successfully combat the sort of discrimination reflected in the Wolfgang study. The current empirical assessment is "no" – that race discrimination still plagues the administration of the death penalty, though the evidence suggests that race-of-the-victim discrimination is of a much greater magnitude than race-of-the defendant discrimination. The more difficult question is whether the persistent role of race in capital decisionmaking can be significantly reduced or eradicated, whether through statutory efforts to narrow the reach of the death penalty or other means.

The Baldus study, described above, found that defendants charged in white-victim cases, on average, faced odds of receiving a death sentence that were 4.3 times higher than the odds faced by similarly situated defendants in black-victim cases.[110] Other studies have similarly pointed to a robust relationship between the race of the victim and the decision to seek death and to obtain death sentences (also controlling for non-racial variables). Leigh Bienen produced a study of the New Jersey death penalty that reflected

108. Wolfgang, *supra* note 106, at 117 (Table 4-2).

109. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).

110. *See* Part I, *supra*, at p. 13-14.

greater prosecutorial willingness to seek death in white victim cases.[111] Baldus, et al, studied capital sentences in Philadelphia and found both race-of-the-victim and race-of-the-defendant discrimination.[112] Given the remarkably different histories and demographics of Philadelphia and Georgia, it is surprising that the Philadelphia study found a magnitude of race-of-the-victim effects quite similar to the magnitude found in the Georgia study addressed in *McCleskey*. A federal report issued in 1990, which summarized the then-available empirical work on the effects of race in capital sentencing (28 studies), likewise found consistent race-of-the-victim effects (in 82% of the studies reviewed), particularly in prosecutorial charging decisions.[113]

Apart from these statistical studies, a broad scholarly literature often highlights American racial discord as an important explanatory variable of American exceptionalism with respect to capital punishment – the fact that the United States is alone among Western democracies in retaining and actively implementing the death penalty.[114] Such works point to the fact that executions are overwhelmingly confined to the South (and states bordering the South), the very same jurisdictions that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms.

Professor Frank Zimring, in his recent broad assessment of the American death penalty, argued that the regional persistence of "vigilante values" strongly contributes to American retention of capital punishment.[115] Many scholars have speculated that contemporary state-imposed executions might serve a role similar to extralegal executions of a previous era, and Zimring observes that "the substantive core of the support for death as a penalty seems to be an ideology of capital punishment as community justice that appears most intensely today in these areas where extreme forms of vigilante justice thrived in earlier times."[116] A recent article in the American Sociological Review presents empirical data supporting the claim that current death sentences might be linked to such vigilante values.[117] The authors report a positive relationship between death sentences, "current racial threat" (reflected in the size of a jurisdiction's African-American population), and

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111. Leigh Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L. Rev. 27 (1988).

112. David Baldus, et al., *Race Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

113. U.S. General Accounting Office, Death Penalty Sentencing (Feb. 1990).

114. Carol S. Steiker, *Capital Punishment and American Exceptionalism, in American Exceptionalism and Human Rights*, ed. Michael Ignatieff (2005).

115. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (2003).

116. *Id.* at 136.

117. David Jacobs, et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 Amer. Soc. Rev. 656 (2005).

"past vigilantism" (reflected in past lynching activity). The authors conclude that: "our repeated findings that this relationship is present support claims that a prior tradition of lethal vigilantism enhances recent attempts to use the death penalty as long as the threat posed by current black populations is sufficient to trigger this legal but lethal control mechanism."[118]

Supporters of the death penalty would certainly resist the claim that the death penalty remains in place *because of* underlying conscious or unconscious racial prejudice. Moreover, the high level of executions in Southern jurisdictions correlates not only with racial factors (such as past race discrimination and contemporary racial tensions) but also with other potential explanatory factors such as high rates of violent crime and the prevalence of fundamentalist religious beliefs. Some empirical literature, though, modestly supports the claim that racially discriminatory attitudes may account for some of the contemporary support for the death penalty.[119]

The most significant efforts to reduce the effect of race in capital proceedings have focused on narrowing the class of death eligible offenses and guiding sentencer discretion at the punishment phase of capital trials. The first solution – restricting the death penalty to the most aggravated cases – appears promising, because the Baldus study found that race effects essentially disappear in such cases given the very high frequency of death sentences in that range (in the eighth category of cases within the study, with the most aggravation, jurors imposed the death penalty 88% of the time[120]). Indeed, the MPC death sentencing provision could be viewed as one such effort to narrow the death penalty because it requires a finding of an aggravated factor (beyond conviction for murder) to support the imposition of death.

The problem, though, played out over the past thirty years, is that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Death eligibility in prevailing statutes remains breathtakingly broad, as aggravating factors or their functional equivalent often cover the spectrum of many if not most murders. The MPC provision is representative in this regard, allowing the imposition of death based on any of eight aggravating factors, including murders in the course of several enumerated felonies,[121] and any murder deemed "especially heinous,

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118. *Id.* at 672

119. Several empirical studies have explored the subtle role of race discrimination in death penalty attitudes. *See, e.g.,* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. of Research in Crime & Delinquency 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 Social Psychology Quarterly 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

120. *McCleskey*, 481 U.S. at 325 n.2 (Brennan, J., dissenting).

121. § 210.6(3)(e).

atrocious or cruel, manifesting exceptional depravity."[122] One reading of the MPC provision is that it excludes only those murders of "ordinary" heinousness, atrociousness, cruelty, or depravity, and prosecutors and especially jurors might be reluctant to deem any intentional deprivation of human life as "ordinary" along those dimensions.

The failure to achieve genuine narrowing is partly a matter of political will in light of the constant political pressure to expand rather than restrict death eligibility in response to high-profile offenses (consider the expansion of the death penalty for the crime of the rape of a child). But the failure also stems from the deeper problem identified by Justice Harlan (discussed above), that it remains an elusive task to specify the "worst of the worst" murders in advance. Any rule-like approach to narrowing death eligibility will require jettisoning factors such as MPC's "especially heinous" provision; but those factors often capture prevailing moral commitments – some offenses are appropriately regarded as among the very worst by virtue of their atrociousness, cruelty, or exceptional depravity. At the same time, many objective factors taken in isolation seem appropriately narrow (such as MPC § 210.6(3)(c), the commission of an additional murder at the time of the offense), but collectively these factors establish a broad net of death eligibility. The breadth of death eligibility in turn invites and requires substantial discretion, particularly in prosecutorial charging decisions, which permits racial considerations to infect the process.

The prospect of a meaningful legislative remedy to address race discrimination seems quite remote. After *McCleskey*, legislative energies were directed toward fashioning a response to the discrimination reflected in the Baldus study. At the federal level, the Racial Justice Act, which would have permitted courts to consider statistical data as evidence in support of a claim of race discrimination within a particular jurisdiction, repeatedly failed to find support in the U.S. Senate. Many state legislatures have considered similar legislation (including Georgia, Illinois, and North Carolina), but to date only Kentucky has enacted such a provision. The Kentucky provision, like the failed federal bill, allows a defendant to use statistical data to establish racial bias in the decision to seek death, though the question remains whether racial bias likely contributed to the decision to seek death *in the defendant's case*.[123] To date, no death-sentenced inmate in Kentucky or elsewhere has had his death sentence reversed on such grounds.

Apart from its lack of political appeal, racial justice legislation seems inadequately suited to address the problems reflected in the empirical data.

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122. § 210.6(3)(h).

123. The Kentucky provision states: "No person shall be subject to or given a sentence of death that was sought on the basis of race. . . . A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought." Ky. Rev. Stat. Ann. § 252.3 (2001).

On a practical level, the numerous variables involved in particular cases make it difficult to demonstrate racial motivation or bias at the individual level, even if such discrimination is evident in the jurisdiction as a whole. Introducing evidence of system-wide bias might cause a court to look more closely at the facts surrounding a particular prosecution (especially with a burden-shifting provision), but the sheer "thickness" of the facts in a particular prosecution will likely permit courts to find inadequate proof of bias in case after case. Indeed, racial justice legislation risks legitimating capital systems that are demonstrably discriminatory by ostensibly providing a remedy when in fact none is forthcoming. More broadly, the litigation focus of racial justice acts fails to address the underlying problems. Many of the most troublesome cases in which race influenced prosecutorial or jury decisionmaking are those in which no death sentence was sought or obtained because of the minority status of the victim. Courts are (appropriately) powerless to compel decisionmakers to produce death sentences in such cases, and the troubling differential treatment is irremediable. Notwithstanding their increased political participation generally, minorities remain significantly underrepresented in the two roles that might make a difference: as capital jurors[124] and as elected district attorneys.[125] The combined influences of discretion, underrepresentation, historical practice, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.

IV. Jury Confusion

Another significant post-*Furman* effort to solve the problem of arbitrariness and discrimination has been to impose structure and order on the ultimate life-death decision. The universal adoption of bifurcated proceedings – with a punishment phase focused solely on whether the defendant deserves to die – was embraced in hopes of producing reasoned moral decisions rather than impulsive, arbitrary, or discriminatory ones. In this respect, the post-*Furman* experiment has been focused on rationalizing the death sentencing process through a combination of statutory precision and focused jury instructions. Such provisions would precisely enumerate relevant aggravating and mitigating factors and carefully explain burdens of proof, the role of mitigation, inappropriate bases for decision (e.g., "mere sympathy"), and the process for reaching a final decision.

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124. Empirical research has found a strong association between life verdicts and the presence of at least one African-American male on the jury in capital cases involving African-American defendants and white victims. William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 192 Table 1 (2001) (asserting "black male presence effects").

125. *See* Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors,* 83 Cornell L. Rev. 1811 (1998) (discussing significance of underrepresentation of racial minorities as District Attorneys).

As noted above, the *constitutional* requirements respecting states' efforts to channel sentencer discretion are quite minimal. Indeed, once states have ostensibly "narrowed" the class of death-eligible defendants via aggravating circumstances, states need not provide any additional guidance to sentencers as they make their life-or-death decision.[126] The central question as a matter of policy and practice is whether the post-*Furman* experiment with guided discretion has resulted in improved and more principled decisionmaking. The available empirical evidence – largely developed by the Capital Jury Project (CJP) – is discouraging along these lines.

Over the past eighteen years, the CJP has collected data from over a thousand jurors who served in capital cases with the goal of understanding the decision-making process in capital cases. CJP interviewers spent hours with individual jurors exploring the factors contributing to their decisions and their comprehension of the capital instructions in their cases. The CJP designed its questions to determine whether the intricate state capital schemes adopted post-*Furman* actually reduce arbitrariness in capital sentencing by controlling sentence discretion. Dozens of scholarly articles have been published based on the CJP data, and much of the research has documented the failure of jurors to understand the guidance embodied in the sentencing instructions and verdict forms they receive.[127] By collecting data from numerous jurisdictions (fourteen states), the CJP project has been able to identify not only idiosyncratic defects in particular state statutes but endemic flaws in jury decisionmaking, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial,[128] their frequent misapprehension of the standards governing their consideration of mitigating evidence,[129] and their general moral disengagement from the death penalty decision.[130] Jurors tend to misunderstand the consequences of a life-without-possibility-of-parole verdict, and, in jurisdictions that permit the alternative of a life-with-parole verdict, jurors consistently underestimate the

126. *See, e.g.*, Zant v. Stephens, 462 U.S. 862 (1983).

127. *See, e.g.*, Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brooklyn L. Rev. 1011 (2001); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

128. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1089-90 (1995).

129. *See, e.g.*, Bentele & Bowers, *supra* note 127, at 1041 (suggesting that mitigating evidence plays a "disturbingly minor role" in jurors' deliberations in capital cases across jurisdictions).

130. *See, e.g.*, Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447 (1997) (describing how prevailing capital sentencing practices assist jurors in overcoming their resistance to imposing the death penalty in part by diminishing their sense of responsibility for their verdict).

length of time a defendant will remain in prison if not sentenced to death.[131] A significant number of jurors serve in capital cases notwithstanding their unwillingness to consider a life verdict,[132] and many jurors who have served on capital trials simply are unable to grasp the concept of mitigating evidence.[133] Other findings of the CJP point to the skewing of capital juries through death-qualification,[134] the significance of the racial composition of the jury in capital decisionmaking,[135] and the particular problems posed in jurisdictions (such as Florida and Alabama) where juries and judges share responsibility for capital verdicts.[136]

The empirical findings of the CJP are disheartening because they reflect widespread, fundamental misunderstanding on the part of capital jurors. Perhaps some of the findings can be discounted by the fact that the jurors' explanations of their role and the governing law were offered well after their actual jury service (and perhaps the jurors' understanding of their sentencing instructions at the time of interviews did not correspond perfectly to their understanding of the instructions at the time of their deliberations). But even a superficial review of instructions given in capital cases today reveals the unnecessary technical complexity of prevailing practice.[137] Jurors are told about the role of aggravating factors, their ability (in many jurisdictions) to consider non-statutory aggravators, the role of mitigation, and so on. They are then asked to weigh or balance aggravation against mitigation or to decide whether mitigating factors are sufficiently substantial to call for a sentence less than death.

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131. John H. Blume, et al., *Lessons from the Capital Jury Project*, in *Beyond Repair? America's Death Penalty* 167 (Stephen Garvey, ed. 2003); *see also* Theodore Eisenberg, et al., *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001) (discussing jurors' misperceptions about the meaning of life sentences).

132. Blume, et al., *supra* note 131, at 174.

133. Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1229 (1995) (reporting that "less than one-half of our subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in 10 was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411, 420-21 (1994)).

134. *See, e.g.*, Marla Sandys and Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *America's Experiment with Capital Punishment*, James Acker, et al., ed.(2nd ed. 2003).

135. Bowers, et al., *supra* note 124.

136. Wanda D. Foglia and William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 Crim. L. Bulletin 663 (2006).

137. In Alabama, for example, the allocation of burden regarding proof of mitigating circumstances is explained as follows: "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." Ala. Code § 13A-5-45(g).

These sorts of efforts to tame the death penalty decision do not necessarily ensure more principled or less arbitrary decisionmaking. Casting the decision in terms of "aggravation" and "mitigation" and requiring jurors to "balance" or "weigh" these considerations might falsely convey to the jurors that their decision is a mechanical or mathematical one, rather than one requiring moral judgment. As one commentator lamented, "giv[ing] a 'little' guidance to a death penalty jury" poses the risk that "jurors [will] mistakenly conclude[] that they are getting a 'lot' of guidance" thus diminishing "their personal moral responsibility for the sentencing decision."[138]

More fundamentally, the problem identified by Justice Harlan in *McGautha* casts a shadow over any effort to rationalize the decision whether to impose death. In many jurisdictions, jurors are permitted to consider both statutory and non-statutory aggravating factors (including victim impact evidence), making the grounds for their ultimate decision virtually limitless. At the same time, every jurisdiction – responding to the Supreme Court's direction – currently permits unbridled consideration of mitigating factors, which likewise undercuts any effort to structure the death penalty decision. In the thirty-five or so years of constitutional regulation since *Furman*, states have reproduced the open-ended discretion of the pre-*Furman* era, but have packaged it in the guise of structure and guidance. In the absence of *substantive* limits on sentencer discretion, the complicated and confusing *procedural* means of implementing that discretion cannot reduce arbitrary or discriminatory decisionmaking. It can only obscure the jury's current responsibility for deciding, essentially on any criteria, whether a defendant should live or die. In this respect, reform of contemporary capital statutes should focus on reducing complexity and communicating clearly the sentencer's awesome obligation to make an irreducible moral judgment about the defendant's fate. The states' failure to make such reforms is largely attributable to their misguided belief that the complicated overlay of instructions is somehow constitutionally compelled. It is also partly attributable to the fact that such reform efforts – and the return to the pre-*Furman* world that they would represent – would amount to a concession that Justice Harlan was right: that statutory efforts (like the MPC death-sentencing provision) are likely unable to reduce the arbitrary imposition of the death penalty.

V. The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases

Capital prosecutions are expensive. A number of studies have tried to ascertain the relative expense of capital prosecutions vis-a-vis non-capital

138. Joseph L. Hoffman, *Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1159 (1995).

prosecutions, using a variety of methodologies.[139] What emerges from these studies is a consensus that capital prosecutions generate higher costs at every stage of the proceedings, and that the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life imprisonment (or other lengthy prison terms), even when the costs of incarceration are included. Although the data are often incomplete or difficult to disaggregate, it appears that the lion's share of additional expenses occur during the trial phase of capital litigation, as a result of a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, more investigative and expert services, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. Appellate and especially post-conviction costs are also considerably greater than in non-capital cases, though they tend to make up a smaller share of the total expense of capital litigation.

Despite the very large costs that are currently incurred in the administration of capital punishment, there is also good reason to believe that the capital process remains substantially under-funded, especially in the area of defense counsel services. The best reference point for what constitutes minimally adequate defense counsel services in capital cases has been provided by the American Bar Association. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, offer specific guidance on such matters as the number and qualifications of counsel necessary in capital cases, the nature of investigative and mitigation services necessary to the defense team, and the performance standards to which the defense team should be held. The *Guidelines* also instruct about the need for a "responsible agency" (such as a Public Defender organization or its equivalent) to recruit, certify, train and monitor capital defense counsel. In addition, there are separate Guidelines regarding the appropriate training for capital counsel, the need to control capital defense caseloads, and the need to ensure compensation at a level "commensurate with the provision of high quality legal representation."[140] The Supreme Court has repeatedly endorsed the ABA's performance standards for capital defense counsel as a key

139. *See, e.g.*, 2008 study of "The Cost of the Death Penalty in Maryland" by the Urban Institute; 2008 study of "The Hidden Death Tax: The Secret Costs of Seeking Execution in California," by the ACLU of Northern California; 2006 study by the Death Penalty Subcommittee of the Committee on Public Defense of the Washington State Bar Association (no title); 2004 study of "Tennessee's Death Penalty: Costs and Consequences," by Comptroller of the Treasury; 2003 Study of "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections" by the Legislative Division of Post Audit, State of Kansas; 2003 "Study of the Imposition of the Death Penalty in Connecticut" by the Connecticut Commission on the Death Penalty; 2002 study of "The Application of Indiana's Capital Sentencing Law," by the Indiana Criminal Law Study Commission; 2001 "Case Study on State and County Costs Associated with Capital Adjudication in Arizona" by the Williams Institute.

140. Guideline 9.1B

benchmark for assessing the reasonableness of attorney performance in a series of recent cases addressing claims of ineffective assistance of counsel in capital cases.[141]

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close. In response to concerns about the lack of fairness and accuracy in the capital justice process, the ABA called in 1997 for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. In 2001, the ABA created the Death Penalty Moratorium Implementation Project, which in 2003 decided to examine several states' death penalty systems to determine the extent to which they achieve fairness and provide due process. Among other things, the Project specifically investigated the extent to which the states were in compliance with the ABA *Guidelines* for capital defense counsel services. The first set of assessments were published near the end of 2007, and the record of compliance with the ABA *Guidelines* was extremely low: of the 8 states studied,[142] not a single state was found to be fully "in compliance" with any aspect of the ABA *Guidelines* studied. For the 5 guidelines that were studied over the 8 states, there were 15 findings of complete noncompliance and 23 findings of only partial compliance (in 2 cases, there was insufficient information to make an assessment).

For example, the assessment described Alabama's indigent defense system as "failing" due to the lack of a statewide indigent defense commission, the minimal qualifications and lack of training of capital defense counsel, the failure to ensure the staffing required by the Guidelines (2 lawyers, an investigator, and a mitigation specialist), the failure to provide death-sentenced inmates with appointed counsel in state post-conviction proceedings, and the very low caps on compensation for defense services.[143] While Alabama had the worst record of compliance among the states studied, Indiana had the best record. Nonetheless, the Project founded that Indiana, too, "falls far short of the requirements set out in the ABA *Guidelines*." In particular, the report pointed to inadequate attorney qualification and monitoring procedures, unacceptable workloads, insufficient case staffing, and lack of an independent appointing authority (such as a Public Defender office). Indiana is not alone in this latter failing, as fewer than 1/3 of the 36

141. *See Williams*, 529 U.S. at 396 (citing ABA Standards for Criminal Justice); *Wiggins*, 539 U.S. 510 (citing 1989 ABA death penalty Guidelines); *Rompilla*, 545 U.S. 374 (citing 1989 and 2003 death penalty Guidelines).

142. The 8 states assessed by the ABA Moratorium Implementation Project were Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. The reports are available at http://www.abanet.org/moratorium/.

143. The caps for capital defense services in Alabama are $2,000 for direct appeal, and $1,000 for state post-conviction proceedings.

states that currently retain the death penalty have statewide capital defense systems as called for by the ABA.[144]

The 2003 revisions to the ABA *Guidelines* insist that the Guidelines are not "aspirational" but rather are the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process. Unfortunately, the record of compliance with the Guidelines even among the states most committed to providing adequate defense services remains poor. New York, which provided for generous levels of capital defense funding when it reinstated capital punishment in 1995, slashed that allocation by almost a third three years later, and then maintained funding at the reduced rate until its capital statute was judicially invalidated in 2004.[145] When the New York State Assembly held hearings that year on whether to again reinstate the death penalty, experts warned that the invalidated statute failed to comply with the ABA *Guidelines* for the appointment of counsel in postconviction proceedings.[146] The record of state compliance with the *Guidelines* overall suggests that the states agree with the ABA that the *Guidelines* are not aspirational – not because the states believe that they are required, but rather because they simply do not aspire to meet them.

Failure to meet (or even to aspire to meet) the ABA *Guidelines* should not necessarily be written off as simple intransigence. The costs involved in providing the resources necessary for a minimally fair capital justice process can be staggering. Instructive in this regard is the Brian Nichols prosecution in Atlanta. Nichols was charged in a 54-count indictment for an infamous courthouse shooting and escape that killed a judge, a court reporter, a sheriff's deputy, and a federal agent. In the investigative stage of the case, Nichols' appointed counsel quickly generated costs totaling $1.2 million, wiping out Georgia's entire indigent defense budget and requiring the postponement of the trial.[147] Note that this price tag covered only the early investigative costs and did not include the costs of Nichols' trial or the years of appellate and post-conviction costs that will follow if a death sentence is imposed (note: Nichols has been convicted and the sentencing phase is ongoing as of this writing, Nov. 20, 2008). The provision of the resources necessary for fair capital trials and appeals may simply not be possible, or at least not possible without substantial diversion of public funds from other sources – something state legislatures have shown themselves again and again unwilling to do in the context of providing indigent defense services. Moreover, when excellent defense services are provided to capital defendants

144. *See* Shaila Dewan, *Executions Resume, as Do Questions of Fairness*, N.Y. Times, May 7, 2008.

145. James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 Vermont L. Rev. 683, 752 (2008).

146. *Id.*

147. *See* Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N.Y. Times, Nov. 4, 2007.

at every stage of the criminal process, the process may become endlessly protracted. As Frank Zimring has most aptly observed, "A nation can have full and fair criminal procedures, or it can have [a] regularly functioning process of executing prisoners; but the evidence suggests it cannot have both."[148]

The ABA's Moratorium Implementation Project should sound two significant cautionary notes for the ALI. First, the ABA has already done the important work of promulgating norms and standards for the capital justice process. After a great deal of study, reflection, and consultation with experts, the ABA has made comprehensive and sensible recommendations for the reform of capital sentencing proceedings, and there seems little that an ALI study could usefully add. Second, even if the ALI came up with different or additional reform proposals, the lack of resources or the political will to generate the necessary resources stands in the way of any substantial reform of the capital justice process. The widespread failures to adequately fund defense counsel services, which are foundational for the implementation of most other reforms, should make the ALI dubious of the prospects for success of a large-scale law reform project in this area.

VI. Erroneous Conviction of the Innocent

Although there is debate about what constitutes a full "exoneration," it is beyond question that public confidence in the death penalty has been shaken in recent years by the number of people who have been released from death row with evidence of their innocence. The Death Penalty Information Center, an anti-death penalty organization, keeps a list of exonerated capital defendants that now totals 129 for the years since 1973.[149] While it is difficult to extrapolate from the number of known exonerations to the "real" rate of wrongful convictions in capital cases (for the same reason that it is difficult to extrapolate from the number of professional athletes who test positive for steroids to the rate of steroid use among athletes), reasonable estimates range from 2.3% to 5%.[150]

Because exonerations of death-sentenced prisoners are such dramatic events, they have generated extensive study of the causes of wrongful convictions, in capital cases and more generally. There is widespread

148. Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment*, in Stephen P. Garvey, ed., *Beyond Repair? America's Death Penalty* 228 (2003).

149. For inclusion on DPIC's innocence list, a defendant must have been convicted and sentenced to death, and subsequently either: a) their conviction was overturned AND i) they were acquitted at retrial or ii) all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence. *See* http://deathpenaltyinfo.org/node/70.

150. *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* (forthcoming 2008 J. Empirical Legal Stud.); Samuel R. Gross, *Convicting the Innocent* (forthcoming 2008 Ann. Rev. L. & Soc. Sci.); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* 97 J. Crim. L. & Criminology 761 (2007).

consensus about the primary contributors to wrongful convictions: eyewitness misidentification; false confessions; perjured testimony by jailhouse informants; unreliable scientific evidence; suppression of exculpatory evidence; and inadequate lawyering by the defense.[151] Professor Samuel Gross of Michigan has studied wrongful convictions in both capital and non-capital cases, and he has made a convincing case that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the "death qualification" of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilt phase to avoid death during the sentencing phase, and the lessening of the perceived burden of proof because of the heinousness of the offense.[152]

In light of the well-known causes of wrongful convictions and the great public concern that exonerations generate, especially in capital cases, one might expect that this would be an area in which remedies should be relatively easy to formulate and achieve without much resistance in the judicial or legislative arenas. In fact, remedies have proven remarkably elusive, despite the clarity of the issues and degree of public sympathy. First, it did not prove easy for those who were eventually exonerated by DNA to get access to DNA evidence or to get relief even *after* the DNA evidence excluded them as the perpetrators of the crimes for which they were convicted. A recent study of the first 200 people exonerated by post-conviction DNA testing revealed that approximately half of them were refused access to DNA testing by law enforcement, often necessitating a court order. After being exonerated by DNA evidence, 41 of the 200 required a pardon, usually because they lacked any judicial forum for relief, and at least 12 who made it into a judicial forum were denied relief from the courts despite their favorable DNA evidence.[153]

Second, these early difficulties cannot be written off as preliminary kinks that have been worked out of the system. While the vast majority of states have now passed legislation requiring greater preservation of and access to DNA evidence, the ABA Moratorium Implementation Project's recent assessment of 8 death penalty states included an assessment of how well these states were complying with the ABA's recommendations

151. The Innocence Project at Cardozo Law School tracks the causes of wrongful conviction in cases of DNA exonerations. *See* http://www.innocenceproject.org/understand/.

152. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 Buff. L. Rev. 469 (1996).

153. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008).

regarding preservation of and access to biological evidence, and the provision of written procedures, training and disciplinary procedures for investigative personnel. As in the context of the provision of defense counsel services, findings of complete non-compliance or only partial compliance with the ABA's recommendations were commonplace, while full compliance was rare. Similar resistance can be found to implementing reforms aimed at preventing some of the most common causes of wrongful conviction, such as videotaping police interrogations to prevent false confessions, changing photo identification procedures to avoid misidentification, subjecting jailhouse snitch testimony to greater pretrial scrutiny, and performing external independent audits of crime labs. Resistance to providing adequate funding for capital defense services has already been documented above,[154] and the failure of defense lawyers to challenge misidentifications, false confessions, and unreliable scientific evidence has been an important element in the generation of wrongful convictions.

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services.

Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion). Moreover, a number of the factors catalogued by Samuel Gross that render capital prosecutions more prone to error are simply inherent in the nature of capital crimes and not obviously subject to amelioration by changing the capital justice process. These circumstances militate against the undertaking of a reform project by the ALI and support the suggestion that the ALI instead call for the rejection of capital punishment as a penal option.

VII. Inadequate Enforcement of Federal Rights

The preceding sections discuss the limits of constitutional regulation of the death penalty to counter many of the institutional and structural challenges of the American death penalty. Some of the challenges are simply beyond the reach of courts and "law," such as the difficulties described above in guiding sentencer discretion and combating the influence of race in

154. See discussion in "Resources" section, *supra* at 34-37.

discretionary decisionmaking; other institutional problems, such as the inadequate level of resources at capital trials and the failure to safeguard against wrongful convictions, require the involvement and leadership of political branches. The constitutional edifice that remains secures only limited benefits, and, regrettably, those limited benefits are frequently undermined by inadequate enforcement mechanisms, particularly the stringent limitations on the availability of federal habeas review of state capital convictions.

Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court-crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.

The case for strong federal habeas review of state criminal convictions is rooted in experience. During the early part of the 20th century, state trial courts, especially in the South, often made little pretense of ensuring basic fairness, and state appellate courts appeared more than willing to ratify those truncated proceedings. After the infamous denial of habeas relief to Leo Frank,[155] whose mob-dominated murder trial led to his death sentence despite his likely innocence, the Court granted habeas relief to five African Americans who had been convicted of murder and sentenced to death following a race riot in Arkansas.[156] The Arkansas case illustrated the potential for state hostility to federal rights: the five defendants were represented by a single lawyer who never consulted with them, and the forty-five minute trial before an all-white jury, in front of an angry white mob, included no defense motions, witnesses, or defendant testimony.[157] As the Court extended most of the constitutional criminal protections in the Bill of Rights to state criminal defendants in the 1950s and 1960s, the Court adjusted the scope of federal habeas as well. Perceived state court hostility to federal constitutional protections, especially those rights newly-recognized and extended to state proceedings, led the Court to expand the federal habeas forum and to relax procedural barriers to federal review of federal claims.

Beginning in the1970s, though, the availability of federal habeas review was significantly limited. Most importantly, the Court tightened the federal enforcement of defaults imposed in state court, so that the failure of state inmates to preserve federal claims within state court forecloses later consideration of those claims in federal court as well – with extremely

155. Frank v. Mangum, 237 U.S. 309 (1915).

156. Moore v. Dempsey, 261 U.S. 86 (1923).

157. Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus*, in *Beyond Repair? America's Death Penalty* 65 (Stephen Garvey, ed. 2003).

narrow exceptions.[158] Strict enforcement of state procedural default rules has significantly limited the effectiveness of the federal forum. Indeed, some courts have even applied stringent default rules against fundamental claims of excessive punishment – including the prohibition against executing persons with mental retardation.[159] The enforcement of procedural defaults in this context means, as a practical matter, that the execution of all persons with mental retardation is not constitutionally prohibited; the prohibition extends only to those persons with mental retardation who have successfully navigated state procedural rules and preserved their claim for state or federal review. In this respect, limitations on the availability of federal habeas review promote misconceptions about prevailing capital practices; the public is likely to believe that the Court's decisions announcing absolute prohibitions – such as the *Atkins* exemption – effectively end the challenged executions, whereas the reality is more qualified and complicated.

The near blanket prohibition against litigating claims defaulted in state proceedings encourages state courts to resolve claims on procedural grounds, and state courts have occasionally imposed defaults opportunistically to deny enforcement of the federal right. Moreover, strict enforcement of defaults in federal courts is particularly troublesome in cases involving claims defaulted on state postconviction review (typically claims alleging ineffective assistance of counsel at trial or prosecutorial misconduct). As noted above, because state inmates have no constitutional right to counsel on state habeas, they have no right to *effective* assistance of counsel in that forum. Ordinarily, in cases involving attorney error at trial, the one avenue for reviving a procedural defaulted claim is for the inmate to demonstrate that he had been denied constitutionally adequate representation; but if the attorney error occurs on state habeas, the inmate is held to his attorney's mistakes and cannot seek relief under the Sixth Amendment. Given the inadequate resources and monitoring of state postconviction counsel, it is not uncommon for death-sentenced inmates to forfeit substantial claims on state habeas, and the current regime of federal habeas review permanently forecloses consideration of such claims. The strict enforcement of procedural defaults ensures that many death-sentenced inmates will be executed notwithstanding constitutional error in their cases.

The Court has also crafted limitations on the ability of inmates to benefit from "new" law on federal habeas. The Court's nonretroactivity doctrine, set forth in *Teague v. Lane*,[160] is ostensibly designed to prevent excessive dislocation whenever the Court identifies a new constitutional rule; its roots are traceable to the Warren Court era, when the Court's vast expansion of constitutional criminal procedure threatened to throw open the

158. *See* Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

159. *See, e.g.*, Hedrick v. True, 443 F.3d 342 (4th Cir. 2006) (defaulting defendant's claim of ineligibility for the death penalty based on mental retardation).

160. 489 U.S. 288 (1989).

jailhouse doors. But in its more recent incarnation, the nonretroactivity doctrine has blocked retroactive application of many decisions far less dramatic or path-breaking than the Warren Court rulings which had given rise to the doctrine. The Supreme Court, as well as lower federal courts, have rejected as impermissibly "novel" claims that are barely distinguishable from previously decided cases.[161] Apart from generating extraordinary time-consuming and complex litigation, *Teague* has thwarted the development and evolution of constitutional principles surrounding the administration of capital punishment. Federal habeas courts are discouraged from modestly extending or refining established precedents, so all constitutional realignment must come from the Supreme Court itself (on direct review of state criminal convictions). This institutional arrangement is a built-in headwind against adaptation to changing circumstances, and given the Eighth Amendment's focus on "evolving standards of decency," the *Teague* doctrine is at cross-purposes with the underlying substantive law of the death penalty.

The most significant reform of federal habeas is embodied in AEDPA's unprecedented limitations on the availability and scope of federal review. AEDPA imposes a strict statute of limitations for filing in federal court,[162] stringent limitations on successive petitions,[163] and restrictions on the availability of evidentiary hearings to develop facts relating to an inmate's underlying claims.[164] These procedural barriers have proven formidable, and many inmates have lost their opportunity for federal review of their federal claims on these grounds. The most far-reaching of AEDPA's provisions, though, has been the elimination of de novo review for federal claims addressed on their merits in state court. In its place, AEDPA requires, as a condition for relief, that the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[165] This statutory revision essentially requires federal courts to defer to wrong but "reasonable" decisions by state courts. It insulates from review all decisions but those that demonstrably flout established rules. In many areas of constitutional doctrine, this "reasonableness" standard of review amounts to "double deference" on federal habeas. Numerous constitutional doctrines, including the Court's standards for reviewing the effectiveness of counsel or a prosecutor's alleged discriminatory use of peremptory challenges, already require deferential review of the underlying conduct; state courts are not expected to grant relief unless trial counsel's performance

161. *See, e.g.*, Butler v. McKellar, 494 U.S. 407 (1990) (holding that the rule prohibiting police-initiated interrogation concerning a separate offense in the absence of counsel, Arizona v. Roberson, 486 U.S. 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation, Edwards v. Arizona, 451 U.S. 477 (1981)).

162. 28 U.S.C. § 2244(d)(1).

163. 28 U.S.C. § 2244(b).

164. 28 U.S.C. § 2254(e)(2).

165. 28 U.S.C. § 2254(d)(1).

wildly departed from established norms or a prosecutor's race-neutral explanation defies belief. When these cases get to federal habeas, AEDPA imposes an *additional* level of deference. For Sixth Amendment claims concerning the right to effective counsel, the question is not whether trial counsel's performance was unreasonably deficient – it is whether the state court's determination of reasonableness was *itself* unreasonable. This relaxation of federal review of state decisionmaking essentially insulates all but the most egregious denials of rights in state court.

AEDPA's significance in curtailing federal enforcement of federal rights is reflected in the substantial decline in habeas relief since AEDPA's enactment.[166] It is also reflected in numerous federal habeas decisions that explicitly recognize that relief might be required under de novo review. For example, the Fifth Circuit Court of Appeals recently reversed a District Court grant of relief on a claim of impermissible judicial bias.[167] The state court judge, at petitioner's capital trial, had indicated in open court that he was "doing God's work to see that [Petitioner] gets executed;" the judge also taped a postcard to the bench depicting the infamous "hanging judge" Roy Bean, altering it to include his own name and self-bestowed moniker, "The Law West of the Pedernales;" and the judge engaged in extensive ex parte contacts with the prosecution, threatened to remove petitioner's attorneys, and laughed out loud during the defense presentation of mitigating evidence at the punishment phase. The panel opinion recognized that such conduct might require relief under de novo review, but reversed the District Court because it could not find the state court's rejection of the bias claim unreasonable.[168] AEDPA's mandated deference, which ratifies unconstitutionally obtained death-sentences absent gross negligence on the part of the state court, removes the strongest incentive for state courts to toe the constitutional mark and allows executions to go forward despite acknowledged constitutional error.

Unlike several of the institutional and structural obstacles to the fair and accurate implementation of the death penalty described above, the scope of federal habeas is subject to legislative and judicial revision. But it seems unlikely that meaningful reform or restoration of federal habeas will be forthcoming. The politicization of criminal justice issues makes it extraordinarily difficult to expand review, and all of the pressures run in the other direction. In the absence of reform, though, the Court's minimalist constitutional regulation becomes virtually irrelevant; though enormous resources are expended in federal habeas, and the litigation results in delayed executions, most of the energies are directed toward overcoming procedural

166. *See supra*, note 70.

167. Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008).

168. *Id.* at 67 ("Although we might decide this case differently if considering it on direct appeal, given our limited scope of review under AEDPA, we are limited to determining whether the state court's decision was objectively unreasonable.").

barriers rather than enforcing the underlying substantive rights of death-sentenced inmates.[169] Despite the articulation of many constitutional protections, the enforcement is relegated to state courts, and at least some of those courts, particularly in active executing states, are notably unsympathetic to the Court's regulatory efforts. Indeed, in a Texas case recently twice reversed by the Court, Texas judges repeatedly voiced their prerogative to disagree with the Court's constitutional conclusion.[170]

The inadequacy of federal habeas review to enforce federal rights is lamentable in itself; but it also generates the same legitimation problem described above. Despite the Court's seeming regulation of the American death penalty via its declaration of substantive rights, the procedural mechanisms currently in place under-enforce those protections. Casual observers of the death penalty will likely regard the death sentences and executions that emerge from the current process to be the product of careful, extensive review by many courts. The reality, though, is much different. States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become. Thus, even if increased constitutional regulation of the death penalty could solve many of the deficiencies of the prevailing system, which appears unlikely, the inadequate mechanisms for enforcing that regulation would in any case undermine the effort.

VIII. The Death Penalty's Effect on the Administration of Criminal Justice

The preceding sections highlight the constitutional, institutional, and structural obstacles to the fair and accurate administration of the death penalty. But the problems with the American death penalty are not confined to the capital system. The current battles over the scope of the death penalty may have consequences for the broader American criminal justice scheme. In particular, the presence of the death penalty may tend to normalize and stabilize the extremely punitive sanctions prevailing on the non-capital side; the constitutional regulation of the death penalty – with its explicit death-is-

169. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. L. Forum 315.

170. Ex parte Smith, 132 S.W.3d 407, 427 (Tex. Crim. App. 2004) (Hervey, J., concurring) ("[H]aving decided that no federal constitutional error occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (summarily reversed in Smith v. Texas, 543 U.S. 37 (2004)); Ex parte Smith, 185 S.W.3d 455, 474 (Tex. Crim. App. 2006) (Hervey, J., concurring) ("[W]e are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (on remand from summary reversal) (reversed in Smith v. Texas, 127 S. Ct. 1686 (2007)).

different caveat – has further insulated non-capital practices from significant scrutiny; concerns about inefficiencies in the capital system – particularly delays between trial and sentence – have led to significant restrictions on the habeas rights of non-capital inmates; and the demands of the capital system drain resources from the non-capital defense system and the state and federal judiciaries more generally. A decision about the Institute's stance on capital punishment must take account of these spillover costs imposed by the current capital regime.

Capital punishment constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007, while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade, the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide) and executions hovering close to 100 (per year, nationwide).

At the same time, the non-capital system has experienced extraordinary growth. Over the past three decades, the country has embarked on an unprecedented experiment with mass incarceration. The jail and prison population of the United States has grown eight-fold over the past 35 years. In addition to imprisoning the most inmates in absolute terms worldwide, the United States also has an incarceration rate that is five to eight times higher than other Western industrialized nations; the United States has recently achieved the dubious distinction of imprisoning more than one out of every hundred of its adults. Much of the expansion of the prison population is attributable to more punitive sentencing regimes, especially for non-violent offenders. National spending on incarceration has reached unprecedented levels, with estimates that states and the federal government spend over $65 billion annually to house the more than 2.3 million inmates held nationwide. Moreover, the rate of incarceration in minority populations is particularly high, with one in nine black males between the ages of 20 and 34 behind bars.

Despite the enormous social and political costs of our mass incarceration policies, reform efforts have been unable to reverse the remarkable trends. The presence of the death penalty, especially the recent focus on the possibility of executing innocents, might well undermine the prospects for non-capital reform. First, the very existence of the death penalty blunts arguments about the excessive punitiveness of non-capital sanctions. Indeed, death penalty opponents approvingly argue in *favor* of harsh incarceration sanctions (including life without parole) as a way of undermining support for the death penalty. In this respect, the death penalty

deflects arguments about the ways in which lengthy incarceration (and the absence of alternative sanctions) imposes substantial costs and undermines human dignity: lengthy incarceration is viewed as a "lesser" evil instead of as an evil in itself. Second, the innocence focus wrought by the death penalty and projected on to the rest of the criminal justice system tends to emphasize the *selection* of those to be incarcerated rather than on the normative underpinnings of our incarceration policy. Tinkering with the investigation and prosecution of crime will leave untouched the prevailing punitive framework. The one important link between wrongful convictions and excessive punitiveness is frequently missed in public and professional debate: the presence of extremely harsh sanctions encourages plea-bargaining, and when the plea-bargain discount is sufficiently high, excessive punishments encourage false confessions. But few advocates of reform have sought to attack the problem of wrongful convictions by reducing the harshness of our current sanctions. The focus on innocence in contemporary death penalty discourse also tends to legitimate and entrench the justice of harshly punishing the guilty. The more precariously-held values of fairness, non-discrimination, adequate representation, and procedural regularity are endangered by equating injustice with inaccuracy.

The death penalty's deflection of policy-based criticisms of our extraordinarily punitive non-capital system is exacerbated by the Court's highly-visible constitutional regulation of the death penalty. Over the past decade, the Court has issued three landmark decisions limiting the reach of the death penalty. Two of the decisions, *Atkins v. Virginia*[171] and *Roper v. Simmons*,[172] held that the death penalty was disproportionate as applied to particular offenders – juveniles and persons with mental retardation. The third decision, *Kennedy v Louisiana*,[173] held that the death penalty was constitutionally disproportionate as applied to a particular offense – the rape of a child – though the Court's reasoning was considerably broader, indicating that the death penalty is disproportionate as applied to any non-homicidal ordinary crime (distinguishing offenses against the State such as espionage and treason). Together, these decisions reflect a considerable broadening of the criteria available to discern evolving standards of decency, including evidence of elite, professional, and world opinion. Two of the cases – *Atkins* and *Simmons* – overruled relatively recent decisions, and, along with *Kennedy*, the decisions signal an unprecedented willingness of the Court to rein in capital practices deemed excessive.

But at the same time the Court has demonstrated a willingness to protect against disproportionate punishment on the capital side, it has wholly deferred to states in their imposition of harsh terms of incarceration. In between its pronouncements in *Atkins* and *Simmons*, the Court upheld the

171. 536 U.S. 304 (2002).
172. 543 U.S. 551 (2005).
173. 128 S. Ct. 2641 (2008).

operation of California's "three-strikes-you're-out" law that resulted in a 25-years-to-life sentence for a repeat offender convicted of attempting to steal three golf clubs from a golf course pro shop.[174] In a choice of quotation that reveals just how difficult the non-capital proportionality test is meant to be, the Court reached back to repeat its observation from an earlier case that the proportionality principle might "come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."[175]

There may be strong institutional and practical reasons for providing robust proportionality review in capital cases while deferring to extremely punitive and rare non-capital sentences. But the death-is-different principle might contribute to a false sense of judicial oversight, especially in light of the enormous visibility and salience of the death penalty both within the United States as a symbol of crime policy and in the broader world as a symbol of American punitiveness. In this respect, the Court's capital jurisprudence offers a means to legitimate American penal policy by ameliorating some of its harshest aspects and portraying the Court as a counter-majoritarian scrutinizer of state penal policy, while leaving the fundamental pillars of America's true penal exceptionalism intact. The United States' status as the world's leading incarcerator remains untouched by the constitutional regulation of capital punishment, yet such regulation gets a disproportionate degree of attention because of the power of the death penalty as a symbol in numerous different arenas. As a result, constitutional regulation of capital punishment both obscures and normalizes the excesses of American penal policy. The problems of mass incarceration, racial disparities in punishment, and the endless war on drugs are obscured because they inevitably fall into the shadows when the spotlight of national and world attention are focused by the Court on highly dramatic issues regarding American death penalty practices. Moreover, extremely lengthy sentences are normalized by capital litigation: successful capital litigants, after all, are almost always "rewarded" with sentences of life without possibility of parole. Even the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant. In these ways, the narrow successes of capital litigants under the Eighth Amendment offer little comfort to and indeed likely limit the chances of successful challenges by the vastly larger group of non-capital litigants. Of course, a proponent of our severe non-capital policies would not find worrisome any reinforcement of such policies. But the many critics of our current trend toward mass incarceration should pay attention to the ways in

174. Ewing v. California, 538 U.S. 11 (2003).

175. *Id.* at 21 (internal quotation marks omitted) (quoting Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a life sentence with possibility of parole for a repeat offender convicted of obtaining $120.75 by false pretences)).

which the retention of capital punishment may entrench and legitimate that trend.

As noted above, concerns about the administration of the death penalty – particularly the length of time between the imposition of death sentences and executions – led to stringent procedural and substantive limits on the availability of federal habeas for state prisoners. Although the title of the legislation – the Antiterrorism and Effective Death Penalty Act – suggests a purpose unrelated to the status of non-capital inmates, the restrictions were made to apply globally. In addition, many of the restrictions imposed by AEDPA – its one-year statute of limitations, its absolute ban on same-claim successive petitions, its higher bar for filing new-claim successive petitions, its onerous exhaustion provisions, and its restrictions on the availability of federal evidentiary hearings – actually impose special hardships on non-capital inmates; unlike those sentenced to death, indigent non-capital inmates have no statutory right to counsel in state or federal habeas proceedings. As difficult as it is for death-sentenced inmates to navigate AEDPA's procedural maze, the burdens on non-capital inmates are virtually insurmountable. The already low-rate of relief for non-capital inmates pre-AEDPA (1 in 100) has apparently dropped considerably post-AEDPA (1 in 341) according to a recent study.[176] Thus, concerns about the skewed incentives on the capital side – in which inmates have every reason to delay seeking relief in federal court – have generated restrictions for the vastly larger group of non-capital inmates whose incentives are quite different. More generally, this example illustrates the risk of capital litigation driving broader criminal justice policy, and the peculiar dynamic of a small subset of American prisoners framing the debate over the appropriate operation of larger institutional frameworks.

Although death penalty inmates are a small fraction of the overall prison population, the death penalty extracts a disproportionately large share of resources at every stage of the proceedings. As discussed above, capital trials are enormously more expensive than their non-capital counterparts, and the decision to pursue a capital sentence often has significant financial consequences for the local jurisdiction. Indigent defense is notoriously underfunded in both capital and non-capital cases, and the resources devoted to the capital side often come directly at the expense of the rest of the indigent defense budget. In this respect, death penalty prosecutions threaten to compromise an already over-burdened and under-funded indigent defense bar, in addition to imposing daunting costs on local prosecutors and their county budgets. The political pressures and high emotions in capital cases can sometimes overwhelm sober assessments. The famous Texas litigation involving John Paul Penry reflects this dynamic, as his three capital trials

176. *See* Nancy J. King, Fred L. Cheesman II, & Brian J. Ostrom, *Habeas Litigation in U.S. District Courts: An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, National Center for State Courts, Aug. 21, 2007, at p. 9.

generated millions in county expenses before he pled to a life sentence (after three reversals of his death sentences). Following the Supreme Court's invalidation of his first sentence, the local District Attorney declared to the press, "if I have to bankrupt this county, we're going to bow up and see that justice is served."[177] More recently, the Chair of the Florida Assessment Team for the ABA Death Penalty Moratorium Implementation Project reported that "all members of the Assessment Team, including those representing the state, were deeply worried that the expenditure of resources on capital cases significantly detracts from Florida's ability to render justice in *non*-capital cases."[178]

In addition to these financial costs, the death penalty places enormous burdens on state and federal judicial resources. In some states, such as California, the burdens imposed by capital cases on appellate courts compromise the ability of those courts to manage their competing commitments on the civil and non-capital side. The burdens imposed are not merely a function of the sheer time required for capital litigation; the frenetic, last-minute litigation in active executing states exacts its own toll on judges and court personnel and likely negatively affects the courts' fulfillment of their non-capital obligations. The possibility of even greater disruption along these lines looms with the increased likelihood that AEDPA's "opt-in" provisions[179] will become operative. Those provisions give fast-track status to death-sentenced inmates from states that create a system for the appointment and compensation of competent counsel in state postconviction. Under the opt-in provisions, once a state has satisfied the opt-in requirements, the state receives the benefit of a shorter statute of limitations for death-sentenced inmates filing in federal habeas (six months instead of one year) and the federal courts are under strict deadlines for ruling on claims, including the congressionally-imposed requirement that capital cases take priority over the rest of the federal docket. A literal reading of the opt-in provisions would require federal courts to halt on-going proceedings (trials, hearings, etc.) until capital habeas petitions are resolved ("The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters."[180]). In this respect, the death penalty makes extraordinary demands on the American courts and threatens the quality of justice for all litigants, including those outside the capital process.

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177. Steve Brewer, *Penry likely to face retrial, officials say*, The Huntsville Item, Jul. 1, 1989, p.3A.

178. Christopher Slobogin, *The Death Penalty in Florida*, Vanderbilt University Law School Public Law and Legal Theory Working Paper 08-51 (November, 2008).

179. 28 U.S.C. § 2261.

180. 28 U.S.C. § 2266(a).

Conclusion

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.

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Book Review

The New Intellectual Property of the Nineteenth Century

WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930. By Catherine L. Fisk. Chapel Hill: The University of North Carolina Press, 2009. $45.00.

COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY. By Isabella Alexander. Oxford and Portland: Hart Publishing, 2010. $110.00.

Oren Bracha*

Sitting in the Scottish Court of Session in 1774, Lord Gardenston observed that "property, when applied to ideas, or literary and intellectual compositions, is perfectly new and surprising."[1] He asked the reader to imagine "a law-tract upon this species of property" and concluded that "the division of its subjects would be perfectly curious; by far the most comprehensive denomination of it would be, a property in nonsense."[2] We have come a long way since then. Intellectual property has not only pervaded our commercial, technological, and cultural spheres and (as of late) invaded the everyday lives of ordinary individuals; it has also been naturalized and normalized as a conceptual construct. Not many today, even among its critics, express curiosity or surprise at the notion of intellectual property. We have

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1. THE DECISION OF THE COURT OF SESSION, UPON THE QUESTION OF LITERARY PROPERTY; IN THE CAUSE HINTON AGAINST DONALDSON 25 (Edinburgh, James Boswell 1773), *reprinted in* THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764–1774 (Stephen Parks ed., 1975).

2. *Id.* To be sure, by the time that Lord Gardenston was writing there already was voluminous literature advocating the claim that intellectual property is an ordinary species of property like any other and justified by the same principles. Most of this literature was generated by what is known as the literary property debate—a series of litigations in the English and Scottish courts that revolved around the question of copyright as a common law property right. *See, e.g.*, RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 115–210 (2004) (presenting a comprehensive history of the literary property debate paying particular attention to *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.), and *Donaldson v. Becket*, (1774) 98 Eng. Rep. 256 (H.L.)); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 67–112 (1993) (reviewing the factual, scholarly, and legislative history of the literary property debate in England and Scotland); BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911, at 19–42 (1999) (summarizing the three historical arguments posited against the idea of perpetual common law literary property).

come to take for granted a certain concept of the legal ownership of ideas. The history of how this concept came into being and how it evolved within the Anglo-American legal tradition during the last three centuries is still being written. The works of Catherine Fisk and Isabella Alexander reviewed here are invaluable and much needed contributions to this history.

Until recently there was a glaring gap in the history of Anglo-American intellectual property. With some notable but few exceptions,[3] the nineteenth century was neglected in the historiography of Anglo-American intellectual property law. The neglect was stronger in regard to copyright by comparison to patent and, in the American context, by comparison to the British one. This situation was puzzling. One would expect the nineteenth century to be one of the crucial formative eras in the development of the modern conceptual scheme of intellectual property. It was the age of industrialization and rapid technological innovation; of the spread of literacy and the creation of national and then international mass markets for books; of the appearance of a new consumer society and big business dominated by the corporate form; and of the rise of new patterns of technological research and development as well as the antecedents of what would come to be known as the entertainment industry. The list could be easily extended. One does not have to subscribe to a crude reductionism of legal forms to material or social conditions in order to observe the importance of all those factors for the shaping of modern intellectual property. Indeed, the developments of the nineteenth century left a deep imprint not just on the legal doctrines and practices of intellectual property, but also on the fundamental concepts and assumptions embedded in them.

Perhaps the puzzling neglect of such a crucial period could be attributed in part to the general dearth (until recently) of historical work about intellectual property. It is also possible that other periods offered more readily apparent allurements to those doing historical work in the field. In the context of British copyright, the eighteenth century saw the legislation of the Statute of Anne,[4] often referred to as the first copyright act, and the struggle over common law copyright—known as the literary property debate—which became one of the most dramatic and visible moments in the annals of

3. *See, e.g.*, MOUREEN COULTER, PROPERTY IN IDEAS: THE PATENT QUESTION IN MID-VICTORIAN BRITAIN (1991) (tracing the history of the patent question in Britain through the nineteenth century); H.I. DUTTON, THE PATENT SYSTEM AND INVENTIVE ACTIVITY DURING THE INDUSTRIAL REVOLUTION, 1750–1852 (1984) (discussing the development and operation of the patent system in England during the industrial revolution); CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT (1999) (chronicling Serjeant Talfourd's efforts to reform copyright law in England, resulting in the Copyright Act of 1842); SHERMAN & BENTLY, *supra* note 2 (chronicling the emergence of modern British intellectual property law); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 456 (analyzing "incoherencies of copyright doctrine from several external perspectives—most notably, modern literary theory").

4. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.).

copyright.[5] The birth of English patent law in the seventeenth century amid the struggle over royal monopolies and the more general political and ideological upheavals of that period attracted most of the attention of traditional patent history.[6] Similarly, American history of both patent and copyright had been focused on the late eighteenth century.[7] This was the time of the genesis of these earliest and two most important regimes of intellectual property in the United States.[8] Perhaps most importantly, in American terms it was the "originalist" moment in which these two fields were anchored in the text of the U.S. Constitution.[9]

Whatever the exact reasons, for a long time the nineteenth century remained largely unexplored in the historiography of Anglo-American intellectual property. The last decade saw the beginning of a process of filling up this gap,[10] but much work still needs to be done. Fisk and Alexander

5. *See supra* note 2 and accompanying text. The undeniable importance of the Statute of Anne and of the literary property debate may have overshadowed other developments and periods especially for the scholars who saw the ideology of romantic authorship as the central motivating force in the shaping of modern western copyright. *See, e.g.*, ROSE, *supra* note 2, at viii (placing his own work within a "collective enterprise" of historians who put romantic authorship at the center of the development of intellectual property law); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984) (arguing that the modern understanding of the "author" as an individual is the product of the initial rise in the eighteenth century of a professional class of authors, who had to "redefin[e] the nature of writing" to make their profession economically viable); Martha Woodmansee, *On the Author Effect: Recovering Collectivity* (arguing that the "notion that the author is a special participant in the production process" is a "by-product" of Romanticism's emphasis on originality), *in* THE CONSTRUCTION OF AUTHORSHIP 15, 16 (Martha Woodmansee & Peter Jaszi eds., 1994).

6. *See generally, e.g.*, BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); HAROLD G. FOX, MONOPOLIES AND PATENTS: A STUDY OF THE HISTORY AND FUTURE OF THE PATENT MONOPOLY (1947); ARTHUR A. GOMME, PATENTS OF INVENTION: ORIGIN AND GROWTH OF THE PATENT SYSTEM IN BRITAIN (1946); E. B. INLOW, THE PATENT GRANT (1950); CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM 1660–1800 (1988); E. Wyndham Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 12 L. Q. REV. 141 (1896); Ramon A. Klitzke, *Historical Background of the English Patent Law*, 41 J. PAT. & TRADEMARK OFF. SOC'Y 615 (1959); Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents*, (pts. 1–4), 76 J. PAT. & TRADEMARK OFF. SOC'Y 697 (1994), 76 J. PAT. & TRADEMARK OFF. SOC'Y 849 (1994); 77 J. PAT. & TRADEMARK OFF. SOC'Y 771 (1995), 78 J. PAT. & TRADEMARK OFF. SOC'Y 77 (1996).

7. *See generally, e.g.*, BUGBEE, *supra* note 6; EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE (2002); EDWARD C. WALTERSCHEID, TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION, 1787–1836 (1998); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y USA 675 (2002); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

8. *See* Patent Act of 1790, ch. 7, 1 Stat. 109 (1790) (repealed 1793) (granting the first federal patent protections); Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831) (granting the first federal copyright protections).

9. U.S. CONST. art. I, § 8, cl. 8.

10. *See, e.g.*, DORON S. BEN-ATAR, TRADE SECRETS: INTELLECTUAL PIRACY AND THE ORIGINS OF AMERICAN INDUSTRIAL POWER 78–103 (2004) (discussing a young America's efforts to smuggle in foreign technological knowledge in the late eighteenth and nineteenth centuries); B.

each map an important and hitherto mostly unexplored area of these uncharted waters. The focus of both works is the nineteenth century, although their exact coverage extends to what might be called the very long nineteenth century.[11] The works differ from each other greatly, and not just in regard to the subject matter and jurisdictions they cover. Fisk's is a deep-drill study. It is closely focused on the development of one fundamental feature of the American intellectual property framework: the ownership of intellectual innovation produced in the employment context. Fisk supplies a rich, detailed, and nuanced account of how legal rules and concepts structuring this area transformed in a period of over a century, a process that unfolded at the intersection of at least four doctrinal fields: patent law, trade secrets law, copyright, and (as we would call it today) employment law. Alexander employs a different perspective. Hers is a broad survey of British copyright law during the nineteenth century. The book supplies a comprehensive account of the development of a large variety of copyright doctrines in the legislative and judicial arenas. Alexander weaves into this account an equally comprehensive discussion of the ways in which arguments and modes of thinking about the fundamental principles and the underlying purposes of the copyright system had evolved during this era. Despite the differences, the two works join together to make an illuminating and intriguing image of the consolidation of the legal and conceptual structure that, to a large extent, is still at the heart of modern Anglo-American intellectual property law today.

This Book Review proceeds in three parts. Each of the first two parts reviews the core arguments of the two works and discusses some of their implications and open questions entailed by them. Part III concludes by briefly arguing that one implicit common theme that emerges from both works is the ideological structure of modern Anglo-American copyright law.

I. To Secure to Authors and Inventors?

To call to mind the constitutional grant of power to Congress to secure the rights of "Authors and Inventors,"[12] *Working Knowledge* is about how, in

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ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920, at 8 (2005) (describing the role of intellectual property in shaping U.S. economic growth in the nineteenth century); Lionel Bently, *Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI.-KENT L. REV. 1181, 1182 (2007) (examining the history of copyright law in India during the nineteenth century); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 186 (2008) (focusing on "copyright law and discourse in nineteenth-century America"); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 689 (2007) (reporting that nineteenth-century courts often protected patents by application of the Takings Clause).

11. The term "the long nineteenth century" is associated with the historian Eric Hobsbawm. In his trilogy about the period, Hobsbawm used the term to refer to the period between 1776 and 1914. *See* E. J. HOBSBAWM, THE AGE OF EMPIRE, 1875–1914, at 8 (1987) (coining the term).

12. U.S. CONST. art. I, § 8, cl. 8.

regard to a wide swath of the most significant and valuable intellectual innovations, authors and inventors ceased being rights owners. Fisk offers a compelling account of how the legal and conceptual treatment of workplace knowledge was transformed during a period of 130 years beginning at the dawn of the nineteenth century. Brutally reduced to a bottom line, it tells the story of how workplace knowledge created by employees, originally seen as part of the personal attributes and, to an extent, the property of its creators, came to be conceived of as a corporate asset. The book, however, offers much more than this bottom line. It richly and skillfully weaves together legal history, business history, history of technology, and labor history. Fisk is nuanced and somewhat guarded about the implications of her thesis. She rejects a reading of her work "as a depressing chronicle of how judges and industrialists, or more vaguely, law and industrialization, steadily squashed the working person, turning self-reliant, skilled, and inventive artisans into unimaginative drones who clock into their R & D jobs from nine to five just like their colleagues at assembly lines or desks."[13] Nevertheless, the narrative she weaves is unmistakably one of decline. It chronicles how, in regard to the product of his mind, the employee was transformed from an independent entrepreneur, to a large extent the master of his own fate, into the corporate-dependent "man in the gray flannel suit."[14] As Fisk acknowledges, in this respect her work fits within—while adding an important dimension to—a rich literature produced by labor historians who documented the disempowerment and decline of independence of skilled laborers during the late nineteenth century.[15]

Fisk describes her project as a "history of the origins of corporate ownership of employee knowledge as a legal construct and as a business practice."[16] Attaining this dual perspective is no small achievement. On the "legal construct" side Fisk covers the classic sources of legal history: case law and related materials, legal treatises and commentary, and to a lesser extent, legislative materials. Using these sources, she constructs a coherent genealogy of the legal doctrines and concepts as they developed in the

13. CATHERINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930, at 5 (2009).

14. *Id.* at 243.

15. *See* HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 3–4 (1975) (exploring the "transformation of work in the modern era," including the shrinking "industrial working class"); BRUCE LAURIE, ARTISAN INTO WORKERS: LABOR IN NINETEENTH CENTURY AMERICA 15 (1989) (arguing that a trend existed in 1785 that would eventually reduce self-sufficient skilled laborers into wage-earning workers); DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES 4 (1979) (examining "the battle for control of the workplace" during the late 1800s until the mid-twentieth century); DANIEL NELSON, MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES, 1880–1920, at ix (1975) (addressing "the increasing influence of the management over the factory and its labor force" around the turn of the twentieth century).

16. FISK, *supra* note 13, at 2.

intersection between employment law and various branches of intellectual property law—although both terms are anachronistic in regard to much of the period covered. At the same time, Fisk mines materials from corporate archives and other primary and secondary sources in order to tell the story of how the formal legal changes interacted with the actual practices of relevant social actors: businessmen, managers, lawyers, inventors, creators, and others. Here, too, a large and diverse terrain is covered: from Du Pont's changing stages of business and innovation organization;[17] through the emergence of the corporate research laboratory at Eastman Kodak;[18] to theatre, music, map making, and law reporting.[19] Fisk manages to merge these two perspectives into one (at its best parts) seamless account of the mutually constitutive relationship between law and social practices that demonstrates the "heavy traffic back and forth across the bridge of causation between the legal and the material."[20]

The main thesis of the book divides the treatment of workplace knowledge produced by employees during the relevant period into three stages. In the first stage, lasting approximately until the Civil War, any rights in such knowledge, to the extent they existed at all, were clearly vested in the employee who created it. Copyright cases firmly established the rule that, absent an express assignment to the employer, the actual author of the protected work was its owner.[21] Patent law similarly identified the employee–inventor as the patent owner, subject to a development of a limited shop right based on the principle of reliance that permitted the employer to continue a previously allowed use of an employee invention.[22] Furthermore, courts were generally hostile to wholesale assignments of future inventions—especially to assignments that extended beyond the employment period. Such contractual agreements were interpreted narrowly and often were found

17. *See id.* at 196–206 (describing the transformation, beginning in 1902, of Du Pont from a small, family-controlled company to a large firm with increasingly bureaucratic policies on employee patents and trade secrets).

18. *See id.* at 188–96 ("The aggressive use of emerging intellectual property law combined with the aggressive effort to develop new technologies makes the [Eastman Kodak] company an excellent case study of how a combined legal and R & D strategy transformed both the law and the practice of corporate control of workplace knowledge.").

19. *See, e.g.*, *id.* at 138–40 (discussing repercussions, on New York theater, of courts' recognition in the 1860s of employer rights in the copyrighted works of employees); *id.* at 226–28 (recognizing Rand McNally's practice of crediting employee–authors for their innovations in cartography as a means of fostering loyalty in a business dependent on the intellectual property and innovations of multiple actors); *id.* at 63–67, 221–23 (discussing copyright and law publishing in the nineteenth century).

20. *Id.* at 6.

21. *See id.* at 59–63 (describing how the few courts to address the issue before the Civil War only granted an employer ownership of a copyright if there had been an express assignment by the employee–author).

22. *See* McClurg v. Kingsland, 42 U.S. (1 How.) 202, 205–11 (1843) (recognizing that an employee was the patent owner for an invention he had developed at work, but that an implied license to the employer also existed because the employer had been freely permitted to use the invention for a number of years).

unenforceable on various grounds.[23] Trade secret law did not exist at all. Outside of special duties imposed on apprentices and a narrow category of occupations seen as entailing confidential relationships (such as an attorney or a household servant), there was no general legal duty of confidentiality imposed on employees toward their employers.[24]

The main shift in the second stage, which lasted from after the Civil War roughly until the last decade of the nineteenth century, was recasting the employment relationship in general and particularly questions of workplace knowledge in contractual terms. Courts relied on a construct of an implied contract between the employee and the employer in order to infer their mutual rights and duties and allocate ownership between them.[25] While the early cases decided under the new implied-contract paradigm tended to keep ownership in the hands of employees, signs of change soon appeared. Judicial constructions of implied contracts that vested ownership in employers first appeared in dicta[26] or in cases that for various formal reasons were seen as distinct from the main body of copyright and patent law,[27] but they gradually penetrated holdings within the mainstream.[28] In a parallel move, general trade secret law developed in the last three decades of the century until, by the end of that period, it covered a broad range of firm-specific information.[29]

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23. *See* FISK, *supra* note 13, at 112–13 (discussing the early trend, which carried over into the 1860s, of courts' reluctance to enforce employee agreements to assign future inventions to their employers).

24. *Id.* at 29.

25. *See* Fuller & Johnson Mfg. Co. v. Bartlett, 31 N.W. 747, 752–54 (Wis. 1887) (finding that the employee retained ownership of the patent, but the employer was entitled to a license for use of the invention because its expenditures allowed the creation).

26. *See* Green v. Willard Improved Barrel Co., 1 Mo. App. 202, 204 (Mo. Ct. App. 1876) (expressing doubt that an employee could obtain a legitimate patent on one of his employer's machines "about which he was employed").

27. *See* Keene v. Wheatley, 14 F. Cas. 180, 185–87 (C.C.E.D. Pa. 1861) (No. 7,644) (recognizing the rights of a theater owner in an adapted play produced by one of her actors based on equitable principles rather than copyright).

28. *See, e.g.*, Wireless Specialty Apparatus Co. v. Mica Condenser Co., 239 Mass. 158, 163 (Mass. 1921) (holding that the patents in emloyee inventions developed within the scope of the employment belonged to the employer because "the nature of the employment impresses on the employee such a relationship of trust and confidence as estops him from claiming as his own property that which he has brought into being solely for the benefit and at the express procurement of his employer"); Colliery Eng'r Co. v. United Correspondence Sch. Co., 94 F. 152, 153 (C.C.S.D.N.Y. 1899) (holding that given an employment contract that made it the duty of an employee to prepare a literary work the copyright in the work was the property of the employer); *see also* Catherine L. Fisk, *Removing the 'Fuel of Interest' from the 'Fire of Genius': Law and the Employee-Inventor*, 65 U. CHI. L. REV. 1127, 1133 (1999) (stating that beginning in the 1880s, employers were able to claim a shop right and sometimes full ownership of an employee's invention based on the employment relationship).

29. *See* Tabor v. Hoffman, 23 N.E. 12, 12–13 (1889) (identifying an individual's common law right to exclusive property in an invention until it becomes property of the general public through publication so long as a second individual does not discover the secret to the invention); *Peabody*, 98 Mass. at 452 ("One who invents or discovers, and keeps secret, a process of manufacture . . . has

In the third stage, which began in the last decade of the nineteenth century and stretched until 1909 in the case of copyrightable subject matter and the 1930s in regard to technological innovation, the pendulum completed its swing. Courts deciding copyright cases flipped the default rule of ownership by vesting ownership in employers on the basis of general factors inherent in the employment relationship such as supervision of the employee's work, or expenditure by the employer.[30] This trend was crystallized in the 1909 Copyright Act and its general "works made for hire" doctrine, which vested ownership of employee works in their employers.[31] Patent law took some time to catch up, but courts gradually came around to the position that an employee had a duty to assign all patents for inventions developed as part of the employment relationship.[32] This was accompanied by a growing willingness to enforce contracts for wholesale future assignments of employee patents. Complementing these developments, trade secret law came to attach to the employment relationship as such a general duty of confidentiality applying to a plethora of commercial and technological information.[33] Employees' mobility and ability to transfer workplace knowledge was further curtailed by an increasingly accommodating approach by courts toward noncompete agreements.[34] By the third decade of the twentieth century, all of these legal developments, together with the changes in corporate employers' organizational and legal practices with which they interacted, deprived employees of their former status as owners and masters of the knowledge they produced in the course of their employment.

When it comes to the question of causation, Fisk adamantly rejects the temptation of a "provocative and elegant monocausal explanation."[35] Instead of such an explanation, she locates her account of legal change within the context of several interrelated social developments—material and ideological. Some of the important pieces of this contextual mosaic are worth mentioning here. First, Fisk assigns a heavy weight to free-labor

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a property therein which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use or disclose it to third persons.").

30. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903) ("There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things.").

31. Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, 1088 (1909), *superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 7 U.S.C.).

32. *See, e.g.*, Dinwiddie v. St. Louis & O'Fallon Coal Co., 64 F.2d 303, 306 (4th Cir. 1933) (holding that the patent belonged to the employer when the employees were hired to make the invention at issue).

33. *See* FISK, *supra* note 13, at 97–111 (describing the demise of craft-worker control over workplace knowledge as a result of the development of trade secret law).

34. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 442–43 (2001).

35. FISK, *supra* note 13, at 5–6.

ideology that played a major role in mid- and late-nineteenth-century America as a moral and political ideal.[36] At its heart was the image of the independent, self-reliant, and enterprising worker contrasted with both chattel slavery and factory-wage labor. The dominance of this ideology in the earlier period manifested itself in the general antipathy of courts toward what Justice Bradley called "a mortgage on a man's brain"[37] and the obvious implications of such arrangements on employee independence and mobility. This attitude was later eroded as free-labor ideology transformed and declined under the two other forces to be mentioned: free-contract ideology, and the rise of corporate power. The result was greater willingness of courts to reassign ownership of workplace knowledge away from employees and to validate private schemes for achieving that end.

Another central theme in Fisk's account is the rise of the contractual paradigm in the late nineteenth century. Here Fisk turns on its head Henry Maine's famous characterization of the shift from status to contract as the march of progress and freedom.[38] Fisk describes the reconceptualizing of the employment relationship of skilled craftsmen from a status to a contractual one not as a shift from "bondage to freedom"[39] but rather as a move from "entrepreneurship to dependence."[40] The shift to a contractual paradigm that was expressed in the rise of implied-contract analysis advanced and eased the dispossession of skilled workers. It did so by packaging the flip of ownership default rules as merely giving effect to the autonomous wishes of free individuals[41] and by discrediting the former reluctance of courts to enforce wholesale contractual assignments of rights.[42] This argument potentially sheds somewhat new light on the freedom of contract paradigm that dominated American legal and political thought around the turn of the twentieth century and came to be associated with the Supreme Court's decision in *Lochner v. New York*.[43] The classic progressive critique of so-called Lochnerism was that its imagined world of arm's length transactions between willing and autonomous individuals was disconnected from the social realities of stark disparities in bargaining power and background conditions of individuals—a fictitious image that was used to hinder much needed social

36. *Id.* at 6–8.

37. Aspinwall Mfg. Co. v. Gill, 32 F. 697, 700 (C.C.D. N.J. 1887).

38. SIR HENRY MAINE, ANCIENT LAW 100 (J. M. Dent & Sons 1972) (1861) ("[W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract." (emphasis omitted)).

39. FISK, *supra* note 13, at 2.

40. *Id.*

41. *See id.* at 82 (noting the assumption of contract rhetoric that employees voluntarily assumed and were compensated for their loss of workplace autonomy).

42. *See id.* at 81–82 (describing the judicial shift to a highly formalistic, laissez-faire theory of contract).

43. 198 U.S. 45 (1905); *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 511 (Kermit L. Hall et al. eds., 1992) (outlining cases during the Lochner era in which courts invalidated laws that limited freedom of contract).

reform.[44] In Fisk's account, the use of the implied contract imagery by turn-of-the-century courts has a similarly fabricated quality. Here, however, the fiction of free contracts was used in the service of a massive transformation of judge-made legal rules resulting in significant redistribution.[45] The ideological device of freedom of contract, in other words, did not only ignore the social reality of power disparities, it played an active role in bringing about that reality.[46]

A third element, perhaps the most important one, in the causal web described by Fisk is the rise of the modern business corporation. Although Fisk does not explicitly draw the distinction, her account demonstrates clearly that this factor had a material and an intellectual dimension. On the material side, the spread of the corporation as a dominant form of business organization, beginning in the late nineteenth century, profoundly changed economic life.[47] Much of the economic activity came under the control of "the visible hand"[48] in the form of gigantic, centralized, and bureaucratized organizations, controlled by hierarchical, professional management, and operating on a large scale. As technological and creative innovation migrated to the corporate laboratory and studio, a growing part of it became

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44. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 33–34 (1992) (describing the Progressive critiques of freedom of contract doctrine as based on attacking the traditional assumption of relatively equal bargaining power). The classic statement of this progressive critique is: Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); *see also* RICHARD T. ELY, STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY 406 (1903) ("The coercion of economic forces is largely due to the unequal strength of those who make a contract, for back of contract lies inequality in strength of those who form the contract. Contract does not change existing inequalities and forces, but is simply the medium through which they find expression.").

45. *See* FISK, *supra* note 13, at 81 ("Once courts embraced the notion that idea ownership was governed by contract, and accepted the objective theory of contract under which courts could imply contract terms, . . . it was a relatively simple process to determine that the implied contract allocated most rights to the employer.").

46. Fisk's argument is very much in line with the general insight of early-twentieth-century legal realists that legal rules, including private law rules, distribute resources and power in society. *See, e.g.*, Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933) ("The law of contracts . . . through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party."); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 13 (1927) ("[T]he ownership of land and machinery, with the rights of drawing rent, interest, etc. determines the future distribution of the goods that will come into being—determines what share of such goods various individuals shall acquire."); Robert L. Hale, *Bargaining Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 625 (1943) ("The market value of a property or a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others."). My claim is that Fisk's description of freedom of contract as a device for dynamic redistribution at the turn of the twentieth century adds a new aspect to the earlier progressive critique of *Lochner* and its line of thought, which focused on freedom of contract's obliviousness of background social conditions.

47. *See* FISK, *supra* note 13, at 177–79 (recounting the late-nineteenth-century shift among entrepreneurs from small firms to large corporations).

48. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 5–11 (1977).

coordinated projects of a collective and collaborative nature. The corporate organizational and cultural patterns exerted constant pressure for rationalization, predictability, and strong control of employee activity and of the firm's assets.[49] This produced a strong demand for corporate legal entitlements to employee-produced knowledge, accompanied by managerial eagerness to convert such entitlements into schemes of supervision and control.[50] Judges, for their part, began to see corporate employees not as independent authors or inventors but rather as subordinate agents who executed orders or contributed to a large project that was not theirs.[51]

The rise of the corporation was not just an economic phenomenon. It affected all spheres of life and it posed a deep challenge to the dominant liberal worldview. The coherence of the liberal categories, with their built-in individualism and sharp distinction between the public sphere of state power and the private one of individual freedom, came under increasing strain from the proliferation of private, large-scale, bureaucratic, and hierarchical organizations.[52] The ensuing legitimacy crisis resulted in the mutation of the liberal worldview into a fundamentally new version that could better accommodate the new reality: corporate liberalism.[53] The reflection of corporate liberalism in the legal field was an adjustment of a host of legal categories as to make corporations the equivalents of individuals.[54] In the words of a contemporary, corporations were recognized as "the bearers of legal rights and duties."[55] The reallocation of rights in workplace knowledge was a variant of this process. Corporations, instead of the individuals employed by them, came to be seen by the law as the authors and inventors to which intellectual property law applied.[56] This is an extremely important and previously little-explored dimension of modern intellectual property law. Illuminating the extent to which modern intellectual property law was shaped

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49. *See* FISK, *supra* note 13, at 179 (recounting the shift toward control of employee knowledge by managers).

50. *See id.* at 181–82 (describing the struggle of corporations to maintain ownership and managerial control while fostering innovation among employees).

51. *See, e.g.*, Barton v. Nev. Consol. Copper Co., 71 F.2d 381, 385 (9th Cir. 1934) (holding that the employer could use the employee metallurgist's process for making abrasive-resistant metal because that was precisely the task for which the employee was retained).

52. FISK, *supra* note 13, at 178–88 (noting how the rise of labor unions alongside the development of corporate ownership of information, designs, and patents threatened "liberal individualist conception[s]").

53. On corporate liberalism, see generally R. JEFFREY LUSTIG, CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890–1920 (1982).

54. *See generally* Oren Bracha, Corporate Theory Tilt and Legitimation: The Historical Narrative Reexamined 53–60 (unpublished manuscript) (on file with author). For a study of the extension of individual rights to corporations in the context of the Bill of Rights, see generally Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

55. W.M. Geldart, *Legal Personality*, 27 L. Q. REV. 90, 97 (1911).

56. FISK, *supra* note 13, at 212.

by the paradigm of corporate liberalism within which it emerged is one of the most important contributions of the book.

Fisk's rich and persuasive thesis does leave a few points obscured or underdeveloped. One such issue is the exact relationship between two distinct categories of changes in intellectual property law. Although Fisk never clearly makes the distinction, her account encompasses such two distinct categories. One relates to the identity of the owner. The other relates to the scope of the subject matter that could be owned and to the degree of protection. The direct subject of the book is the former, namely the changes in rules allocating ownership.[57] But much of Fisk's description about the development of intellectual property law relates to the expansion of copyright, trade secrets, and to an extent, patent law and thus falls within the second category.[58] Analytically the two categories are distinct. In the abstract, the rules defining the scope and strength of protection could change without affecting or determining those allocating ownership, and vice versa. Unfortunately, Fisk never discusses in depth the relationship between these two types of changes.

Of course, the absence of logical connection does not preclude the possibility that in a specific historical context the two changes were causally related. Trade secret law seems a case in point. In the abstract, protection of the kind of subject matter protected by trade secret law could be created and expanded without necessarily allocating property rights to the employer as against the employee, especially in cases where the employee generated the protected information. One could imagine a variety of alternative allocations of entitlements: straight-out employee ownership, joint employer–employee ownership enforceable against third parties, or employer ownership subject to employee privilege to use the information (a reverse shop right), to name just a few. In context, however, the specific way that trade secret law was framed and justified at its genesis made such alternatives unlikely. One of the main normative and conceptual foundations on which trade secret law was founded was the notion of duties of confidentiality owed to an employer by employees in regard to information of commercial value to the firm.[59] This framing of the field made the expansion of subject matter protected by trade secrets and the creation of employers' entitlements enforceable against

57. *Id.* at 2.

58. *See, e.g.*, *id.* at 235–38 (discussing the expansion of subject matter that could be protected by intellectual property rights).

59. This was the main foundation for trade secret law but not the only one. Another avenue for the development of trade secret law was the protection of commercially valuable information against misappropriation by third parties using improper means, irrespective of employee breach of confidentiality. *See* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 258 (1998) (evaluating the late-nineteenth-century "property-based theory" of trade secret law, which held strangers liable for obtaining secret information through wrongful conduct on the basis of "violation of a property right rather than a breach of contract or confidence").

employees almost synonymous. There could also be softer forms of contextual connections between subject matter expansion and allocation of ownership. Take, for example, the plethora of informational and commercial advertisement-oriented subject matter that was brought within the fold of copyright by a minimalist judicial construction of the originality threshold in the few decades bracketing the turn of the twentieth century.[60] It is hard to locate an intimate connection between the conceptual and normative underpinning of this trend and employer's ownership as in the case of trade secrets. But it is quite possible that expansion and ownership allocation were related in more indirect ways. For example, much of the new copyrightable subject matter of this kind was likely to be produced in settings of collective, distributed, and hierarchically supervised creation that made courts more amenable to allocating ownership away from employees. Similarly, it is possible that the minimally creative character of the new subject matter inclined courts to see employee–creators of such materials less as romantic authors and more as routine laborers and thus facilitated depriving them of ownership. In some other cases of expanding intellectual property subject matter, contextual connections to the allocation of ownership seem less readily apparent.

Fisk certainly develops arguments of the sort suggested here about the changing image of employees as authors or inventors in the eyes of judges, or about the effect of collective and supervised modes of production.[61] But one is left wishing for a somewhat more elaborated account tracing the different threads that connect (or do not connect) the various kinds of expansions in intellectual property rights to the shift in ownership rules. This is reinforced by the fact that some of the elements of Fisk's causal and contextual story seem more relevant to the expansion category rather than the ownership one. Thus, for example, Fisk imputes some importance to the rapid expansion of a new "consumer culture."[62] On its face, however, this part of the context seems more directly relevant to the expansion in coverage of intellectual property rights and less apparently so to the reallocation of rights. Tying together more closely expansion and allocation of ownership could have helped to better integrate this element into the main argument.

The most important set of issues that is left somewhat open for debate by the book relates to the "so what?" question. This question is particularly important because Fisk's clear framing of the story as one of decline is likely to attract some fire. The gold standard in the field of legal history for

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60. *See* Bracha, *supra* note 10, at 200–01 (observing that in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), "Justice Holmes reduced copyright's originality requirement to almost nothing" by holding that a circus advertisement poster—"the antithesis of the image of an original work in the romantic sense"—merited copyright protection).

61. FISK, *supra* note 13, at 212–19 (chronicling the shift from romantic notions of human authors and creators to corporate ownership of intellectual property developed through increasingly complex management structures).

62. *Id.* at 251.

provoking fierce attacks and enraged reactions is set by Morton Horwitz's 1977 *The Transformation of American Law*.[63] *Working Knowledge* is likely to attract a much milder share of rage, mainly thanks to its narrower scope and its nuanced and careful framing of the thesis. Within the scope of its coverage, however, Fisk's book has a very similar pattern to Horwitz's: it is an account of regressive redistribution through the transformation of a set of technical, mainly common law, rules. Such an account is bound to invite resistance. Criticisms of Fisk's thesis are likely to focus not on its doctrinal and conceptual core story but on the implications that are assumed or implied as following from it.

One objection of this sort is questioning in a Coasian fashion[64] that the reallocation of ownership rights chronicled by Fisk had any significant distributive effect at all. Intellectual property ownership rules, one could argue, are merely default rules. Parties who did not find the default set by the new rules to be to their mutual benefit could contract around it. Indeed, since the employment contract is fashioned at the outset of the employment relationship before any valuable knowledge is created, the initial default will have no effect, not just on the final allocation of entitlements but also on the way the value of future creations is distributed between employee and employer.[65] At this initial point each potential employee could insist on owning his intellectual production (or on being free to use it) thereby taking the risk attached to his somewhat unknown future production and presumably foregoing some compensation he could extract for locating the rights in the hands of the employer. Alternatively, the employee could agree to let the employer have the rights for his future intellectual production, thereby presumably enjoying a compensation premium for allowing the employer to enjoy this prospect. In the happy, imagined world of minimal transaction

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63. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); *see also, e.g.*, John Phillip Reid, *A Plot Too Doctrinaire*, 55 TEXAS L. REV. 1307, 1321 (1977) (book review) (calling on legal historians and lawyers to "be alarmed" and "react more strongly" to the introduction of Horwitz's book in legal education because with it, "[t]he iconoclasts have invaded the temple of legal history. They have smashed the fetishes, blotted out the frescoes, and desecrated the tombs. If we do not force them to the evidence, they will even desacralize Clio"). *See also* Grant Gilmore, *From Tort to Contract: Industrialization and the Law*, 86 YALE L.J. 788, 788–91 (1977) (book review) (summarizing Horwitz's thesis as asserting that the "erosion of property rights" and "rewriting of liability law" were accomplished by lawyers and judges who were "enthusiastic allies" to "entrepreneurs who became the masters of our industrialized society"); Charles J. McClain, Jr., *Legal Change and Class Interests: A Review Essay on Morton Horwitz's* The Transformation of American Law, 68 CALIF. L. REV. 382, 382–97 (1980) (book review) (asserting that Horwitz's thesis concerning the development of an "amoral system of rules that promoted economic growth at all costs" was not "adequately supported by the evidence offered").

64. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–15 (1960) (arguing that, with costless market transactions, efficient allocation of resources will be achieved independent of the initial legal allocation of ownership rights).

65. For a critical examination of this claim in the context of the history of nineteenth-century employment law, see John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 640–57 (2000).

cost, the same outcome with the same distribution would obtain irrespective of the initial allocation of entitlements.

Such an objection is far from being a fatal blow to Fisk's claim that the change in legal rules she describes mattered. To begin with, a significant part of the doctrinal change was not simply a flip of default rules. As explained, some major developments—the emergence of trade secret law comes to mind—consisted of a double move: creating altogether new entitlements and allocating them to employers. In other cases—the decline of the rule against enforceability of wholesale assignments of future inventions, for example—the change was about the very nature of the entitlements as default rules that could be contractually bypassed. Bracketing for the moment any normative evaluation, as a descriptive matter—when one realizes that a substantial part of the legal transformation consisted of creating new entitlements and converting rules that restricted assignability into default rules—the claim for absence of change in the final allocative and distributive results loses much of its force. In addition, the common observation that in the real world, where transaction cost is seldom trivial, default rules matter is particularly applicable in the context at hand where direct, ex ante negotiations over assignment of ownership may have been particularly costly or undesirable for many of the parties (in ways that may not always be perfectly captured by the terminology of "transaction cost").[66] As Fisk points out, in many contexts involving authorship and invention there are many reasons why parties are likely to avoid negotiating around default rules, including cost to the relationship, unequal legal sophistication, information disparities, and uncertainty about the value of future productions.[67] Add to that the trend toward bureaucratization and standardization, especially in the corporate context, and the possibility of pervasive individual tailoring of entitlements irrespective of default entitlements seems unlikely.[68] In short, under scrutiny the objection that the legal change documented by Fisk was merely a flip of defaults that is unlikely to have had a significant effect seems much less convincing than on first glance.

But conceding change, as a normative matter, was it necessarily for the worse, as at a minimum, is implied by Fisk's lamenting tone? Here the avid efficiency theorist may argue that employer ownership of workplace

66. *See* Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1159, 1173–76 (2000) (arguing that ex ante agreements for dividing rights in future products are particularly difficult and costly to reach in the innovation context due, among other reasons, to the unpredictability of the objectives and outcomes of the ventures in this field).

67. FISK, *supra* note 13, at 152–53.

68. *See* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 813–14 (1995) (showing in the corporate context that when a use of a contractual term becomes widespread, the value of the term rises and deviation from it becomes less likely even when the term is not inherently optimal in regard to specific parties involved).

knowledge produced by employees was (and is) the efficient rule.[69] Given the reasonable prediction that typically the party better suited for commercially exploiting the knowledge would be the employer,[70] a default rule of employee ownership seems to be a burdensome generator of transaction cost, a problem that is compounded when the relevant innovation involves the combination of multiple contributions by numerous employees. Worse still, in such cumulative innovation settings the need to obtain assignments from all contributing employees may cause holdout problems and other strategic behavior. The result of the mounting transaction cost might be, at a minimum, social waste, or in more serious cases the frustration of socially valuable innovation.[71] In short, given the very contextual developments described by Fisk—the shift to more complex and cumulative innovation whether in Eastman Kodak's corporate lab[72] or in Rand McNally's map production operation[73]—employee ownership became a stick in the wheels of progress interfering with the production and exploitation of technological and creative innovation. The move to employer's ownership by removing this impediment embodied the progressive march of efficiency.

Fisk summarily dismisses this line of argument by pointing out that, at least in regard to technological innovation, "the rules cementing employer control of intellectual property were solidly in place only in the 1920s, a generation after the development of the large corporation and the corporate research lab."[74] This suggests that robust and rapid innovation existed even prior to the shift in the ownership rules. This is an important observation, but it is hardly conclusive. From the fact that the wheels of technological innovation never approached coming to a screeching halt, it does not follow that they could not have turned more smoothly or efficiently. Furthermore, it is not inconceivable that reaching the tipping point took a whole generation from the moment the relevant social conditions making the new rule efficient first appeared, especially if these conditions deepened and intensified during that period.

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69. *See* Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 8–9 (2004) ("[O]ne may argue that by vesting firms with control of such intangible assets, the exclusive intellectual property rights found in patent, copyright, and trade secrecy may serve to prevent opportunism and promote coordination of intangible resources."); Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1, 12 (1999) (listing the problems arising from widespread employee ownership of inventions).

70. *See* Michael D. Birnhack, *Who Owns Bratz? The Integration of Copyright and Employment Law*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 95, 140 (2009) (distinguishing between a "content business" and a "non-content business," and arguing that an employer who is in the business of producing "content," such as a music label, a Hollywood studio, a software company, or a publishing house, is better situated to spread the risk and market the work than an employee).

71. *See* Merges, *supra* note 69, at 12–37 (describing transaction costs, such as holdups and shirking, that might be avoided by employer ownership).

72. FISK, *supra* note 13, at 188–96.

73. *Id.* at 226–27.

74. *Id.* at 4.

Thus, the question of the extent to which, if at all, the shift to employer's and corporate ownership was necessary to ensure efficient innovation in the technological and cultural fields is likely to remain open. Economic efficiency, however, is not the only vantage point from which one could assess the changes documented in the book. The shift in patterns of workplace knowledge ownership was more than a legal technicality or even a determinant of economic performance. In regard to creative people, Fisk argues, this shift played an important role in the creation of a "new middle class,"[75] defined in both material and symbolic terms. On the material side, creative employees traded or were forced to trade independence and opportunities for entrepreneurship as well as upper mobility for the security of corporate employment. Symbolically, the shift from an inventor to a member of a corporate research team involved a loss of internal stature within the firm, decline of control and supervisory powers in regard to one's own work, and the dissolution of what used to be the distinctive trait separating the middle class from the working class: freedom from being wage earners dependent on others. In Fisk's words: "What could be a more acute experience of the loss of self than being told that your ideas, your inventions, and even your knowledge were your employer's, not yours?"[76] Fisk, in short, supplies a rich and nuanced chronicle of the transformation of the material and symbolic status of the creative working person and of the role played in this transformation by the changing legal rules of intellectual property ownership. For some, even as the question of effect on economic efficiency remains undecided, this may constitute ample basis for forming normative attitudes about the historical process described.

II. For the Encouragement of Learning?

It is often observed that the focus of Anglo-American copyright law is the promotion of the public interest, a purpose that is traced back to the 1710 Statute of Anne and its professed aim of the "Encouragement of Learning."[77] *Copyright Law and the Public Interest*[78] is about the many different, sometimes conflicting, meanings that the "encouragement of learning" goal took in various contexts within British copyright discourse. More accurately, Alexander weaves together two valuable undertakings. The book is, first and foremost, a much needed comprehensive survey of the development of British copyright law from the beginning of the nineteenth century until the 1911 Imperial Copyright Act.[79] Secondly, the survey is organized around the theme of public interest discourse, thereby powerfully demonstrating the

75. *Id.* at 246.

76. *Id.* at 248.

77. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.).

78. ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY (2010).

79. Copyright Act of 1911, 1 & 2 Geo. 5, c. 46 (Eng.).

isomorphic and shifting nature of the concept as it operated within copyright public debates and legal reasoning for over a century. Alexander buttresses her account with illuminating discussions of the book trade, the market for books, and related social and ideological developments. Apparently she does so not in the hope of providing causal explanations—which are, by and large, missing from the work—but rather in order to provide helpful context for understanding the meaning and significance (or sometimes relative insignificance) of the legal developments.

The survey aspect of the book is an extremely valuable contribution in its own right. Some of the nineteenth-century landmarks of British copyright law were covered in other works before,[80] but none of those other works presented a systematic and comprehensive account of the kind offered by Alexander. Such an account allows the reader to conceive and appreciate the fundamental transformation of British copyright law over the course of a century. The result of this transformation was not just the adjustment of technical legal doctrines but a deep change in fundamental principles and concepts constituting copyright. Alexander is right to observe that the development "was not an inevitable progression"[81] and to emphasize throughout the book that particular copyright arrangements often expressed compromises between various interests and claims as opposed to "simple victories"[82] of one worldview. Her account also makes clear that many of the changes were gradual and slow.[83] Nevertheless, when one compares the starting and end points of the survey, clear patterns emerge and the cumulative doctrinal and conceptual change is revealed to be radical. In 1800, copyright was still a narrow regulatory regime focused on the book trade and on its commodity—books—notwithstanding some secondary subject matter extensions to engravings, calico designs, and sculptures.[84] Its scope of protection was focused on the concept of a reprint, extended to only a thin penumbra beyond the core area of verbatim reproduction, and allowed a large variety of secondary uses.[85] The duration of the right was, at most, twenty-eight years and the regime was strictly a domestic one.[86] By 1911, copyright became a universal regime governing the field of cultural production[87] and extending to "every original literary dramatic musical and

80. *See generally* SEVILLE, *supra* note 3 (examining the history of the process of reform that led to the 1842 Copyright Act); SHERMAN & BENTLEY, *supra* note 2 (looking at the developments in British copyright law from 1760 to 1911).

81. ALEXANDER, *supra* note 78, at 298.

82. *Id.* at 293.

83. *Id.* at 15.

84. *Id.* at 292.

85. *Id.* at 182–86.

86. *Id.* at 292. The extension of copyright protection on the colonial and international level only happened gradually during the nineteenth century. *See id.* at 100–05, 142–53 (describing the gradual development of colonial and international copyright).

87. *Id.* at 292.

artistic work."[88] The scope of protection was extended to encompass increasing degrees of partial similarity on the basis of an abstract concept of the intellectual work as transcending any specific medium or concrete material form.[89] Many secondary markets came under the exclusive right through a host of entitlements such as public performance, dramatization, and translation.[90] Copyright's baseline was flipped from the traditional principle, under which all secondary uses were allowed unless treading too close to being a reproduction of the work that interfered with its primary market, to a comprehensive prohibition on secondary uses tempered by a narrow fair-dealing defense and several other limited exceptions. Duration was lengthened to fifty years after the death of the author.[91] The regime ceased being strictly a domestic one. It came to have a significant international dimension and served as a general model within British-controlled territories, although the exact mechanism of application varied according to the territory's status.[92] This doctrinal and conceptual framework, strikingly different than that of the end of the eighteenth century, was the basis of modern copyright as we know it today. In this sense Alexander is correct when she refers to the nineteenth century as the "vitally constitutive" century of copyright.[93]

As Alexander points out, her exploration of "the historical pedigree"[94] of the concept of the public interest in copyright law is an important complement to existing scholarly work about the origins of the conceptual foundations of copyright.[95] To date, such work has tended to focus on the elements of property and authorship.[96] Alexander does not deny the central role played by these two elements in constituting the modern notion of copyright. Her aim is to place alongside them the concept of the public interest and illuminate the various ways in which it served as a counterweight and was combined with, or was integrated into arguments about authorship and property. The thesis is straightforward: the public interest was a powerful and influential trope in shaping copyright, but it had no unitary or single

88. Copyright Act of 1911, 1 & 2 Geo. 5, c. 46, § 1 (Eng.).

89. ALEXANDER, *supra* note 78, at 289.

90. *Id.* at 275.

91. *Id.* at 268.

92. *See* Copyright Act of 1911, 1 & 2 Geo. 5, c. 46, §§ 25–28 (Eng.) (detailing the 1911 Act's application to "British Possessions").

93. ALEXANDER, *supra* note 78, at 3.

94. *Id.*

95. *See id.* at 4–11 (placing her exploration of the concept of the public interest within the larger framework of existing scholarship about the origins of the conceptual foundations of copyright).

96. *See* Jaszi, *supra* note 3, at 455 (examining the ways in which the "authorship construct" has been mobilized in legal discourse). *See generally* DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT (1992) (tracing the history of constructions of authorship as a legal reality); Bracha, *supra* note 10 (discussing the integration of the ideology of authorship into copyright law in the nineteenth century).

meaning. Instead, the exact content of the concept varied greatly, depending on the interest deemed to be of importance, on the construction of the relevant public, and, not the least, on the identity and the specific agenda of the parties employing the concept.[97] Thus, it was not an uncommon occurrence that competing concepts of the public interest were pitted against each other in a single debate or dispute.

The real power of Alexander's public interest thesis is in her detailed and comprehensive account of the various forms assumed by the concept in specific contexts. Thus we are reminded that the canonic framing of the late-eighteenth-century literary property debate, as a clash between proponents of perpetual common law copyright speaking in the name of property rights and authorship (and working to promote the private interests of the London booksellers) and opponents representing the public interest in the free dissemination of knowledge and learning,[98] is not completely accurate. Proponents of common law copyright constructed their own array of public interest arguments, extolling the social virtues of protecting property rights, and appealing to the encouragement of arts and sciences that supposedly would follow from perpetual protection.[99] The early-nineteenth-century debates over the extensive statutory deposit requirements similarly created two opposing versions of public interest arguments. Publishers and their allies attacking the deposit requirements again conjured up arguments about property and authorship.[100] But they also supplemented them with public interest arguments, claiming that the substantial burden laid by deposit discouraged authors, raised the price of books, and made the publishing of serious valuable works that often sold fewer copies unprofitable for publishers.[101] Defenders of deposit, on the other hand, praised the public role carried out by the university and public libraries that were the beneficiaries of the requirement, warned against the adverse effect on the accessibility of knowledge in case it was abolished, and argued that authors, as consumers of existing works, were net beneficiaries of it.[102] The debates around the rule that denied copyright protection to immoral, seditious, and blasphemous publications early in the century exposed other divisions within the notion of the public interest. A patrician and paternalistic view of the public encouragement of learning sought to protect the masses from immoral and dangerous ideas and saw learning as properly restricted to an educated elite.[103] An assortment of reformist and radical views, by contrast,

97. ALEXANDER, *supra* note 78, at 16.

98. *See* Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 79–80 (2003) (chronicling the debate between proponents and opponents of perpetual copyright).

99. ALEXANDER, *supra* note 78, at 32–33.

100. *Id.* at 51–53.

101. *Id.*

102. *Id.* at 54–55.

103. *Id.* at 65–66.

emphasized the interest in broad exposure of the populace to information, concerns over the freedom of the press, and aversion to the concentration of semi-censorial power in the hands of the court of equity.[104] The prospects of internationalization of copyright law gave rise to competing claims about the public interest in local protectionism or in achieving uniform and reciprocal international trade standards.[105] The various deliberations in judicial and legislative fora over the scope of copyright protection provided yet another arena for clashing versions of public interest arguments.[106] Alexander meticulously excavates and catalogs the various forms in which public interest arguments were employed in all of those contexts and others. The result is a historical tour de force of the concept of the public interest in British copyright that amply supports the main thesis.

Alexander's core thesis about the malleability of the public interest concept in copyright law is convincing and well supported, but her findings are probably not as surprising as, at times, she seems to imply. Judges and policy makers sometimes refer to the public interest as an immutable and fixed principle embedded in copyright law and capable of generating clear results in specific cases.[107] However, when one considers the open-ended nature of the concept that allows it to encompass a large variety of normative outlooks, adds the notorious difficulty in ascertaining the empirical connection between specific copyright doctrines and concrete, real-world effects, and tops it off with the fact that arguments based on the concept were often fashioned and employed in the service of specific private interests, it hardly comes as a shock that the concept of the public interest had been neither fixed nor determinate. Indeed, contemporary copyright policy debates often exhibit a similar phenomenon. One conspicuous example is the indeterminacy of modern economic efficiency theory as applied to copyright questions.[108] The abstract criterion of economic efficiency may encompass many different normative and theoretical assumptions, and specific analysis based on this criterion often proceeds by making hard-to-verify empirical assumptions about the connection between legal rules and social-economic effect.[109] The result is that modern economic efficiency arguments in

104. *Id.* at 75.

105. *See id.* at 148–49 (summarizing the different conceptions of the public interest advanced by both supporters and opponents of increased copyright protection).

106. *See, e.g., id.* at 32–33 (describing public interest arguments by booksellers advocating perpetual copyright to the courts); *id.* 96–97 (describing opposition to the 1864 Bill of Copyright employing of public interest rhetoric).

107. *See id.* at 1 (citing *IceTV Pty Ltd. v. Nine Network Pty Ltd.* (2009) 239 CLR 458, 471, 485 (Austl.)).

108. This example is in line with Alexander's main argument. Contemporary economic efficiency theory is a member of the family of public interest justifications of copyright on which Alexander focuses.

109. *See* William Fisher, *Theories of Intellectual Property* (describing competing versions of the efficiency criterion), *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168,

copyright law often display the same isomorphic quality described by Alexander by producing many competing variants in various contexts or, not uncommonly, within a single debate.[110] To a large extent, this is true of all the available normative theories for justifying copyright law including those that do not belong to the public-interest camp. Lockean labor-desert theories,[111] personality-based theories,[112] and justifications based on the role of copyright in a democratic society and culture[113] all have different variants consisting of significantly different interpretations and assumptions at crucial junctures.[114] As a result, each of these normative theories, especially when molded in the hands of interested parties, is capable of producing competing arguments and justifying conflicting results in specific contexts. The concept of the public interest seems to be, at most, a particularly extreme case of this phenomenon, which is attributable to its exceedingly abstract character.

If the malleable character of the public interest concept is neither surprising nor unique, what is the significance of this aspect of the book's thesis? Alexander rejects any intention of dismissing "the language of public interest as being mere empty rhetoric."[115] This seems appropriate for several reasons, which also provide a partial answer to the above question. First, rhetoric matters. Whatever the merit and coherence of public interest arguments, they played and still play an important role in the shaping of copyright law. At least at times, various actors were able to construct and employ such arguments in ways that proved effective and persuasive. Documenting the various strategies developed by these actors—what Alexander, paraphrasing Mark Rose,[116] calls "the *discourse* of public interest" as opposed to "the fact of public interest"[117]—is important. Among

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177 (Stephen R. Munzer ed., 2001); *id.* at 180 (describing the lack of empirical information necessary to apply utilitarian theories).

110. *Id.* at 177–84 (discussing different variants and criticisms of utilitarian theories of intellectual property).

111. *See* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property* (explaining that such theories confer property rights to those who remove goods from their natural state and add labor to those goods), *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra* note 109, at 138, 138. In Locke's words: "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*." JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

112. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–50 (1988) (explaining that the main tenet of personality theory is that "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self").

113. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (describing how copyright law can help to foster civil society by creating incentives for diverse creative expressions).

114. Fisher, *supra* note 109, at 184–94.

115. ALEXANDER, *supra* note 78, at 299.

116. *See* Rose, *supra* note 98, at 77 (distinguishing between the fact of the public domain and the discourse of the public domain).

117. ALEXANDER, *supra* note 78, at 4.

other things, it seems to reveal that during a crucial formative era those who advocated various expansions of copyright were more adept at co-opting and employing the theme of public interest by comparison to their opponents' ability to similarly press the themes of authorship and property into their own service. Second, sometimes Alexander's account reads as a call for more rigor in copyright policy discourse (a call that stands in some tension with rejecting the characterization of public interest language as empty rhetoric).[118] Opacity may be useful sometimes, but policy makers, jurists, and others who are interested in making coherent copyright policy arguments should be expected to locate their public interest arguments within a more elaborate and specific normative context. Finally, the historical exploration of the elusive and shifting nature of public interest arguments in copyright reflects on what one could expect of history in this field. History of intellectual property is often appealed to by participants in contemporary debates in the hope of retrieving immutable and constant principles that could be used to guide or criticize current choices. In former times this was a popular move among intellectual property maximalists who mined the past for an enduring commitment to expansive intellectual property rights.[119] Today it is more common to find similar appeals to history by those who seek timeless restrictive and limiting principles—the public interest being a main example.[120] A serious study of history is more likely to lead one into what Alexander calls "the abyss at the heart of copyright law,"[121] namely, the lack of a universally acceptable, uniform, and consistent normative foundation. Intellectual property history has its uses, as the two works reviewed here demonstrate. For better or worse, retrieving timeless, universal, and foundational principles for deciding contemporary choices is not one of them.

III. Conclusion: The Ideological Patterns of Anglo-American Intellectual Property

Despite the great difference in subject matter and scope of the two works reviewed, one common theme that emerges as one juxtaposes them is the ideological structure of central components of Anglo-American intellectual property law as it consolidated at the beginning of the twentieth century. I use the adjective "ideological" here in a way that loosely (but only loosely) corresponds to its meaning within the neo-Marxist tradition.[122] Elements of intellectual property law are ideological in the sense that they construct and

118. *Id.* at 299 (observing that the book has sought to make the use of public interest language "more accurate, to advocate its use more carefully and, in consequence, to make it richer and more valuable to copyright debates today").

119. *Id.* at 4.

120. *See id.* at 9 (highlighting recent scholarship focusing on public interest arguments).

121. *Id.* at 298.

122. *See* TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 93–123 (1991) (examining various Marxist interpretations of ideology); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 290–96 & 391 nn.58–67 (1997) (defining "ideology" in the neo-Marxist context).

depict a relevant segment of social reality in ways that are shared by a wide spectrum of actors, notwithstanding their difference of opinions on specific controversial issues.[123] This depiction does not necessarily form false consciousness in the crude sense, but it does have a mystifying effect in the sense of obscuring certain fundamental issues or allowing actors to hold contradictory or incoherent views.[124] The mystification has a legitimating effect in that it makes the status quo harder to criticize or change.[125] A final trait of an ideological element is that its structure could be traced to a configuration of material power relations and interests that produced it.[126]

Although Fisk never uses the term, her account of the rise of corporate ownership in intellectual property is almost explicitly one of the creation of ideology in the sense explained above. From the genesis of the modern idea of intellectual property a fundamental defining element of it was the principle of ownership of authors and inventors of the product of their mind. Fisk chronicles the obliteration of this principle in regard to a substantial part of the field. Legal actors are aware, of course, of the relevant legal rules, but the fact that, to a large extent, intellectual property is no longer about authors' and inventors' rights is often obscured for insiders and outsiders alike. In part this is caused, especially in regard to insiders, by the variety of legal mechanisms that constitute the doctrine of employers' ownership: the implied contract construct; the construction of certain rights such as trade secrets as if employer's ownership is the inevitable and natural option even when the information was created by employees; and the proliferation of concepts from the conceptual world of authorship in copyright law even in contexts where authorial ownership ceased to exist.[127]

Alexander's survey of nineteenth-century British copyright covers a large and diverse ground that cannot all be made to fit one mold. Nevertheless, the most elaborate and rich part of her account, relating to the radical transformation in the scope of copyright protection, demonstrates the consolidation of yet another ideological pattern in intellectual property law. The advent of the idea of intellectual property as ownership of ideas in the eighteenth century gave rise to an anxiety that kept accompanying the notion like a shadow ever since: the specter of control over ideas and knowledge. During the literary property debate many of the opponents of common law copyright expressed the fear of "[k]nowledge and science" being bound in

123. *See* KENNEDY, *supra* note 122, at 290 ("Ideology is an interpretation of reality that is either consciously or unconsciously shared across the whole social and political spectrum . . . .").

124. *Id.* at 292.

125. *Id.* at 293.

126. But not to a coherent deep structure or base such as the relations of production or the needs of a certain stage of capitalism. *Id.*

127. *See* Bracha, *supra* note 10, at 261–63 (discussing the significance of the authorship trope in copyright).

"cobweb chains."[128] Proponents of common law copyright expressed the same anxiety, but dismissed it with the observation that copyright protection is limited to reproduction of the protected text and thus "all the knowledge, which can be acquired from the contents of a book, is free for every man's use."[129] In the late eighteenth century the premise of this argument was true. As Alexander documents in great detail, over the course of the long nineteenth century the scope of copyright was expanded dramatically. Protection was gradually expanded to an ever-increasing domain of partial and abstract similarity, the rules that shielded various secondary uses demised, and the array of entitlements had grown long. Copyright came to be seen as protection of the value of the work in all secondary markets irrespective of change of medium or form, limited only by a narrow fair dealing rule and a few other narrow exceptions. Copyright ownership never became absolute, but it had become very similar to the image of pervasive private control of information feared or dismissed a century earlier. Copyright law became a field deeply committed to the free flow of information and knowledge that erected an unprecedented array of private rights that could obstruct and inhibit this free flow. Copyright doctrine, as it developed by the dawn of the twentieth century, again played an ideological role in dealing with this deep tension. The fair dealing doctrine came to play the role of the ultimate guarantor of the freedom to access, use, and exchange ideas and information. To be sure, to an extent, it performed that function. But it also obscured the fact that, given the previous baseline, the new copyright framework of expansive protection tempered only by narrow categories of exceptions represented a far-reaching extension of control over knowledge resembling closely the condition that was described as absurd and dangerous a century earlier. The new structure of rule and exception also constructed a latent image of protection as the universal and natural baseline principle. Any diversion from the principle came to be seen as exceptional and requiring special justification.

The history of intellectual property, as was mentioned above, should not be expected to retrieve immutable and constant principles that could directly guide contemporary choices. The light shed, perhaps unintentionally, by the works of Fisk and Alexander on the patterns of modern Anglo-American intellectual property law demonstrates some of the gains that could be expected from good historical work in this field. Such work can illuminate the structure and the latent assumptions of our current framework of intellectual property by tracking the process in which this structure evolved and by uncovering the different and often unfamiliar concepts that preceded it. It can also trace the relations of power and the configuration of interests that helped

128. Charles Pratt, 1st Earl Camden, Speech During Proceedings in the Lords on the Question of Literary Property for Donaldson v. Becket (Feb. 22, 1774).

129. Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.) 216 (quoting Justice Willes); *see also* SHERMAN & BENTLY, *supra* note 2, at 31 (explaining that early literary property proponents argued that copyright prohibits only the printing and reprinting of protected works).

shape our current framework. In these and other ways, the two books significantly contribute, each in its own different style, to our understanding of the modern institution of intellectual property and of the ways it was shaped during the formative era of the nineteenth century.

Book Review Note

More Than a Poor Lawyer: A Study in Poverty Law*

CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY. By Abbe Smith. New York, New York: Palgrave Macmillan, 2008. 246 Pages. $24.95.

NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE. By Corey S. Shdaimah. New York, New York: New York University Press, 2009. 225 Pages. $45.00.

I. Introduction

"Unfortunately, law school teaches students to focus on money rather than on justice."[1] This sentiment, though bold in proclamation, is keenly felt by students and faculty interested in poverty law.[2] Every year, law schools receive thousands of applications from interested candidates avowing that their sole purpose in coming to law school is to seek justice on behalf of the poor and marginalized.[3] The statistics collected at graduation, however, paint a much different picture.[4] At my own law school, The University of

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* I would first like to thank Professor Eden Harrington for her invaluable input on how to best develop this Review. Thanks as well to Sarah Hunger, Omar Ochoa, Anthony Arguijo, and the entire staff and Editorial Board of the Texas Law Review whose skill and effort saved me from committing numerous sins of academic writing. I would also like to thank my summer employers, Orleans Public Defenders and The Bronx Defenders, for exemplifying the ideals of poverty law practice. Finally, it is with deepest appreciation that I thank the William Wayne Justice Center, particularly Professors Mary Crouter and Eden Harrington, for their unceasing support and devotion to public interest students.

1. Robert C. Owen, Co-Dir., Capital Punishment Ctr., Univ. of Texas Sch. of Law, Introduction to Keynote Address at the Capital Punishment Center at the University of Texas School of Law Symposium: Imprisoned by the Past (Apr. 16, 2009).

2. I utilize the term *poverty law* throughout this paper in lieu of *public interest law* to more precisely pinpoint the subject of this Review. Public interest law is a broad term that can encompass a wide variety of legal paths, including government work, impact litigation, direct services, and lobbying. Similarly, public interest law does not have one client base. The clients can range from a welfare recipient to the environment, or from a pro-choice advocacy group to a pro-life advocacy group. Poverty law, on the other hand, is a field found underneath the umbrella of public interest law. Although poverty law is itself diverse, its clients are united by their economic status. By poverty law this Review simply means legal practice that is focused on serving indigent clients.

3. In order to simplify the analysis and speak accurately, this Review is focused solely on the "top-twenty" law schools when discussing law schools. This limitation is not meant to imply anything beyond its stated purpose of simplification. For a list of schools in the "top-twenty," see *Schools of Law: The Top 100 Schools*, U.S. NEWS & WORLD REP., Aug. 31, 2009, at 22.

4. *See* DEBORAH KENN, LAWYERING FROM THE HEART 3 (2009) ("[S]ome studies conclud[e] that up to 76 percent of law students *intending* to go into public interest or government jobs do not

Texas School of Law, which has seen a significant warming to public interest work in recent years,[5] only 4% of the 2007–2009 alumni are working in legal aid offices, community organizations, policy and advocacy organizations, or public defenders offices.[6] These statistics also show that 63% are in firm jobs.[7] This trend is not limited to The University of Texas. At Stanford Law School, known for its public interest work, only eleven members of the 172-person class worked in public interest post-graduation.[8] At the University of Chicago Law School, a school known for not having students enter public interest, 2–3% entered public interest post-graduation.[9] Despite varying reputations for public interest work, it appears that the number of students entering the field post-graduation is universally low. At the outset, we must consider why this is. When law students show such an initial attraction to public interest work, why do they turn so sharply in just three years?

Many scholars and practitioners have wrestled with this question and come up with a number of potential answers.[10] Insurmountable debt, the lure

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end up doing so." (emphasis added) (citing Christa McGill, *Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear*, 31 LAW & SOC. INQUIRY 677, 698–701 (2006))).

5. In 2004, The University of Texas School of Law created the William Wayne Justice Center for Public Interest Law. WILLIAM WAYNE JUSTICE CENTER FOR PUBLIC INTEREST LAW, http://www.utexas.edu/law/centers/publicinterest/. It has also recently awarded a scholarship to cover full tuition for one student per class year who commits to three years in public interest work post-graduation. *Id.* Further, it has introduced a loan forgiveness program (LRAP) and a Justice Corps program that provides funding for select graduates who create public interest projects. *Id.*

6. *Employment Statistics*, CAREER SERV. OFFICE, UNIV. OF TEXAS SCH. OF LAW, http://www.utexas.edu/law/depts/career/prospective/stats.html. Note that government work is not included in this statistic, nor will it be included in the realm of public interest law in the context of this Review. While a commendable profession, I do not include prosecutors and the like because they represent the people of the United States or their state, rather than directly serving the poor. While this statistic does include "impact" public interest lawyers, this Review will not, as both books deal solely with direct-representation lawyers, who are in a class of their own. *See* KENN, *supra* note 4, at 5 (describing direct-services lawyers as "the lowest common denominator of public interest" lawyering).

7. *Employment Statistics*, *supra* note 6. This percentage is misleading, however, as 13% are working in judicial clerkships, which last one to two years. *Id.* The individuals who clerk are heavily biased towards law firm work afterward. Additionally, it is important to note that 76% of those in firm jobs are at firms with more than 50 attorneys. *Id.* It may also falsely inflate the number of graduates working in public interest law long-term, as many people who start in the sector leave after a short time. *See, e.g.*, AM. BAR ASS'N COMM'N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 28 (2003) [hereinafter LIFTING THE BURDEN]; Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1205 (2004).

8. *Facts & Statistics*, CAREER SERV., STANFORD LAW SCH., http://www.law.stanford.edu/experience/careers/ocs/prospective/statistics/.

9. *Career Services Statistics*, CAREER SERV., THE UNIV. OF CHICAGO, THE LAW SCH., http://www.law.uchicago.edu/prospective/careerstats.

10. *See, e.g.*, LIFTING THE BURDEN, *supra* note 7, at 17–18 (citing the growing debt and disparities between law school tuition and public interest salaries); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004) (describing the disharmony between the image of the American adversarial

of plush firm jobs with high salaries and prestige, and socialization during law school are the commonly cited culprits. One study found that "debt prevented 66% of student respondents from considering a public interest or government job."[11] The toll that student loan debt takes on law students' job prospects is a well-worn path.[12] However, debt only tells part of the story. Firm jobs are coveted, particularly jobs with large, national firms. Money certainly accounts for part of this.[13] However, law school also socializes students to think that the greatest achievement upon graduation is securing a job at a large corporate—"BigLaw"—firm.[14]

This socialization is not restricted to career goals. Rather, it entails a shifting of ideals and thought processes through legal education.[15] It begins on the first day of law school and has the effect of changing students' values and expectations so that they: (1) have a lessened desire to use their positions as attorneys to help others and work for social change; (2) do not believe poverty law jobs can adequately accomplish such help or change; (3) do not believe poverty law enhances long-term career prospects by providing necessary experience, knowledge, and contacts; and (4) believe the opportunity to do innovative, creative, and challenging work at corporate law firms will lead to job satisfaction.[16] This socialization is pervasive among prestigious law schools, but its existence ultimately reflects the determination of priorities made by the faculty and administration of each school.

Therefore, law schools,[17] through their high tuitions and socialization, are, at least in part, to blame for the disconnect between the natural

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lawyer, which includes a wall of separation between the lawyer's own beliefs and the cases the lawyer fights, and the reality of the "cause lawyer," who fights because of those very beliefs); ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (Howard S. Erlanger ed., 1989) (devoting an entire book to exploring this question in detail, based on his own studies as a law student at Denver University); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, *in* LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 9 (2004) (condemning the laissez-faire economics taught in law school courses and the hierarchies within law schools as pernicious engines of hierarchy in society at large).

11. LIFTING THE BURDEN, *supra* note 7, at 9.

12. *See, e.g.*, KENN, *supra* note 4, at 90 (singling out debt as a culprit); LIFTING THE BURDEN, *supra* note 7, at 14–16 (asserting that a shortcoming of the financing system is the disparity between the large amount of debt and the low salaries of public interest jobs).

13. For disparities in compensation of recent graduates, see *Employment Statistics*, *supra* note 6 (listing the average firm salary at $146,570 and the average public interest salary at $45,293).

14. *See* SCHEINGOLD & SARAT, *supra* note 10, at 54, 64 (blaming law schools for representing corporate jobs as the ultimate reward for academic success).

15. *See* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 47–50 (1992) (blaming the severe decline in numbers of students interested in poverty law from orientation to graduation on socialization); STOVER, *supra* note 10, at 5 ("I found considerable evidence that my classmates' view of the world, and of the legal world in particular, was altered in ways that diminished their desire to practice public interest law, by markedly changing their expectations concerning certain types of jobs.").

16. STOVER, *supra* note 10, at xix.

17. Again, note that this is the "top-twenty" law schools; it is not only The University of Texas School of Law. In fact, even at schools such as New York University School of Law, which has a

disposition toward public interest work and the dearth of law graduates actually pursuing it as a career.[18] This assertion seems counterintuitive if one looks at admissions marketing at top law schools, as they spend great amounts of ink and paper describing their public interest focus and clinical programs.[19] These admissions claims are not baseless. It is true that administrations have made great strides in promoting public interest. For example, robust clinical programs are now the norm at most top law schools.[20] Competitive law schools have also dealt with concerns of large student debt, at least partially.[21] Nevertheless, the fact remains that prestigious law schools are pumping the large majority of their students into prestigious law firms.

It would seem that the aforementioned initiatives demonstrate that law schools have adequately fulfilled their obligation to serve public interest students. If students are not now flocking to public interest jobs after graduation, one is left wondering, "What more could be done?" However, such a stance assumes too much. These steps are admirable in their approach to reducing concerns of large debt; however, they ignore the more subtle issue of socialization. Socialization is essentially an issue of perspective. Currently, the popular sentiment in law schools is that large firms are the brass rings of legal careers and that poverty law is not serious work. Similarly, law school tends to treat the doctrinal faculty as the "real" professors and clinical faculty as secondary in intellect and respectability.[22]

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stellar reputation among the premier law schools for supporting public interest, only ten to fifteen percent of each graduating class enters a public service job immediately after graduation. *Recent Graduate Placement*, NYU LAW, http://www.law.nyu.edu/publicinterestlawcenter/recentgraduateplacement/index.htm.

18. *But see* STOVER, *supra* note 10, at 87 (blaming the practicing bar more than law schools for perpetuating the "myth of public interest ineptitude and marginality").

19. *See, e.g.*, UNIV. OF VA. SCH. OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW 2010–2011, *available at* http://www.law.virginia.edu/html/prospectives/brochure.htm (celebrating the Loan Forgiveness Program, Public Service Center, and Pro Bono Project, which requires students to complete seventy-five hours of pro bono service); YALE LAW SCH., J.D. PROGRAM 2011–2012, *available at* http://www.law.yale.edu/documents/pdf/Admissions/Viewbook.pdf (describing summer public interest fellowships and career fairs); *Why Harvard?*, HARVARD LAW SCH., http://www.law.harvard.edu/prospective/jd/why/index.html (claiming that public service is "at the [h]eart of the [e]xperience").

20. *See, e.g.*, *Clinical Education at UT Law*, UNIV. OF TEXAS SCH. OF LAW, http://www.utexas.edu/law/clinics/ (enumerating twenty-four clinics and internships); *Clinical Training*, VA. LAW, http://www.law.virginia.edu/html/academics/clinics.htm (identifying twenty clinics); *Clinics*, HARVARD LAW SCH., http://www.law.harvard.edu/academics/clinical/clinics/index.html (listing twenty-four clinics, including the Harvard Legal Aid Bureau and the International Human Rights Clinic).

21. Law schools have taken steps such as implementing LRAPs, full- and partial-tuition scholarships based on commitment to public interest work, stipends for summer internships, and postgraduate scholarships to cover costs of bar-test preparation and resettling costs. *See, e.g.*, *Loan Repayment Assistance Program*, WILLIAM WAYNE JUSTICE CTR. FOR PUB. INT. LAW, UNIV. OF TEXAS SCH. OF LAW, http://www.utexas.edu/law/centers/publicinterest/lrap/.

22. *See* Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM.

This Review intends to show that such simplifications are false. In order to combat such erroneous views, schools need to create a culture that validates public interest work.[23] Providing the resources for students to pay their law school debt is a wonderful step, but until professors and career services legitimize public interest work as desirable and prestigious it will remain the career path of only the most unwavering students.[24]

The lack of respect for public interest lawyering is due in great part to misunderstanding and lack of exposure. This Review endeavors to remedy this confusion by highlighting what Abbe Smith and Corey Shdaimah have done in their books: provide the reader a glimpse into poverty law practice. It attempts to remove the shroud from the enigmatic practice to allow people to appreciate its complexity and difficulty. In doing so, this Review attempts to begin a conversation in law schools about the importance and validity of poverty law.

The books are a delight to read. I must confess at the forefront of this Review that it is an unapologetically positive review of both. Smith and Shdaimah present dedicated poverty lawyers in "situated practice"[25]—shattering many of the commonly held misperceptions regarding their work.[26] They give the reader a window into the practice with all of its glory and disappointment (and there seems to be much of both).

MITCHELL L. REV. 1057, 1059–61 (2009) (indicating that Justice Scalia's remarks relating to poverty law courses buttress the general sentiment that poverty law is a "second-class" citizen within law school curricula and academia).

23. I have personally encountered many misconceptions about the field during my brief time in law school: "She is going into public interest because she couldn't get a job anywhere else."; "Why are you studying for exams if you are going to work for the poor? Grades don't matter for you, right?"; and "Poverty law is so boring. You don't deal with interesting issues, not like in antitrust." These paraphrased statements highlight the fact that there is great confusion concerning who goes into poverty law and the type of work the practice entails.

24. *See* GRANFIELD, *supra* note 15, at 168–97 (describing the obstacles of Northeastern University School of Law as it sought to establish a different pedagogical focus).

25. I borrow this phrase from Shdaimah. *See* COREY S. SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE, at xiii (2009) ("By [situated practice], I refer to the way lawyers and clients practice within the context of their daily routines, personal and professional opportunities and constraints, and existing social and political arrangements.").

26. This Review does not purport to describe all poverty law lawyers; indeed, many of the categorical misperceptions of poverty law are based on individual, unfortunate truths. It is a fact that many lawyers in this field are of suspect quality. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 56–60 (1970) (Harlan, J., concurring in part and dissenting in part) (describing a Legal Aid Society attorney's lack of preparation for trial due to the fact that he met the client for the first time on the morning of the trial); Miranda v. Clark Cnty., 319 F.3d 465, 470–71 (9th Cir. 2003) (en banc) (holding that a capital murder defendant stated a section 1983 claim against the head of the public defender's office based on that office's policies of allocating resources according to whether or not the defendant passed a polygraph test and of assigning inexperienced lawyers to capital murder cases). The lower salaries coupled with the great need for lawyers ensure that people turn here when they cannot find other work. However, this does not have to be the case, should not be the case, and is not reflective of the entire field. This Review, when speaking of poverty law lawyers, implores the reader to consider that it is speaking of skilled and zealous advocates who, despite severe obstacles, do everything in their power for their clients.

The books are different. Abbe Smith is a respected academic in the clinical field and an indigent-defense attorney who works exclusively with accused or convicted criminals. Shdaimah, while also a lawyer by training, has a doctorate in social work, focusing much of her energy on academic contributions to the law. One book deals with criminal law; the other with civil legal services. One book is deeply personal; the other is unabashedly academic. One is from the perspective of a seasoned practitioner in her field; the other is from an observer studying others' work.

While the books are quite different in content, the authors share a commitment to poverty law, client-centered practice, and narratives. Both books also deal with issues of idealism clashing with reality and theory versus practice. There is too much substance in either book for each to be given a fair review in so few pages, much less in a combined review. Therefore, this Review will limit its focus to the unifying chords of both works.

In Part II of this Review, I will briefly discuss the contents of each book, highlighting key themes, providing a broader context for the books, and presenting a snapshot of the material left unanalyzed. I will also discuss what I perceive to be their weaknesses. Part III of this Review looks at client empowerment and autonomy in the poverty law setting. I highlight these themes in order to distinguish poverty law from conventional-firm practice. Part IV will then analyze how these books present the struggles and rewards of poverty law practice. Finally, Part V concludes the Review by turning to the question of what applications we can draw from these books.

II. Surveying Smith and Shdaimah

A. Case of a Lifetime

Case of a Lifetime: A Criminal Defense Lawyer's Story is a fearless depiction of an indigent defender's life, framing it through the case she sees as most impactful on her, which coincided with most of her legal career. This memoir of her "case of a lifetime" tells of how she related to her client in the face of gross injustice while simultaneously developing as a lawyer.[27] Her story is a worthwhile read for a seasoned public defender or an aspiring law student; it is engaging enough for a layperson but touches on themes that all public defenders encounter.[28] I would especially recommend this book to anyone considering a career in criminal defense.

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27. Smith's title seems to be inspired by Atticus Finch's statement in *To Kill a Mockingbird*: "[S]imply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one's mine, I guess." HARPER LEE, TO KILL A MOCKINGBIRD 86 (1960). Smith places this quotation on the page immediately preceding the table of contents. She often cites reading Harper Lee's book "too many times as an impressionable child" as the reason she became a defender. ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY 29 (2008).

28. SMITH, *supra* note 27, at 11.

Abbe Smith is one of the premier criminal defense lawyers in the nation.[29] She uses this book as a platform to air grievances about the system that she finds fundamentally unfair.[30] Despite her exasperation, she explores the role of criminal defense lawyer within such a system, particularly focusing on troublesome issues such as "The Question,"[31] defending the innocent,[32] plea deals,[33] prosecutorial misconduct,[34] the slipperiness of truth,[35] professional boundaries,[36] and the challenge of living with injustice.[37] Additionally, Smith educates the uninformed reader about the little-known realities of the criminal justice system. She explains that innocent people *do* get convicted, often as a result of intentional misconduct by police and prosecutors,[38] that the overwhelming majority of cases end in guilty pleas,[39]

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29. Smith co-directs the esteemed E. Barrett Prettyman Fellowship Program, serves on the board of directors of The Bronx Defenders and the National Juvenile Defender Center, publishes regularly, and has taught and worked at some of the most prestigious universities and public defender offices in the nation. *Abbe Smith*, GEORGETOWN UNIV. LAW CTR., http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Facutly&ID=327; *Professor Abbe Smith Describes Her "Case of a Lifetime,"* GEORGETOWN UNIV. LAW CTR., http://www.law.georgetown.edu/news/releases/July.21.2008.html. Smith self-identifies as a "criminal defense attorney" rather than insisting on the term "indigent defender," though she contends they are mostly one and the same. *See* SMITH, *supra* note 27, at 32 ("I went to law school to represent the poor, and prisons are the land of the poor."); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 454–58 (1999) ("Criminal [l]awyers are [p]oor [p]eople's [l]awyers").

30. *See* SMITH, *supra* note 27, at 24–25, 129 ("[Y]ou don't have to spend much time in criminal, housing, or family court to witness the routine abuse of power, randomness of justice, and ravages of poverty and inequality."); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 374 (2001) ("The government has devoted an arsenal of resources to a mean-spirited and misguided criminal justice policy . . . . There is no redemption under this policy . . . ."); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 128 (2003) (lamenting the design of an unjust indigent-defense system that is only concerned with processing the maximum number of defendants for the lowest cost).

31. "The Question" refers to the inquiry invariably asked of criminal defense lawyers once a nonlawyer discovers what they do—usually framed as, "How can you defend people you know to be guilty?" SMITH, *supra* note 27, at 19. While not discussed in detail in this Review and not the focus of Smith's book, she devotes considerable energy to the topic—likely because the discussion is so prevalent in her line of work. Smith, in a span of a few pages, rattles off fifteen potential answers to the Question, ranging from constitutional to instrumental to symbolic reasons. *Id.* at 19–22, 28. She criticizes none and explicitly endorses only a select few, concluding that ultimately there is no one *right* answer and one's particular answer is in the eye of the beholder. *See id.* at 23, 126 ("The best answers inevitably reflect the personality, philosophy, and experience of the individual lawyer."). For further discussion of this topic, see SMITH, *supra* note 27, at 115–16 (and citations within); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 950 (2000) (and citations within).

32. SMITH, *supra* note 27, at 23–25.

33. *Id.* at 40–51.

34. Prosecutorial misconduct *here* principally means seeking victories in convictions rather than fulfilling one's professional obligation to seek justice. *Id.* at 50.

35. *Id.* at 66–70.

36. *Id.* at 192–95.

37. *Id.* at 199.

38. *Id.* at 24 (relying on a study of exonerated death row inmates showing two-thirds of the wrongful convictions were a result of prosecutorial and police misconduct).

that eyewitness identification is widely used but exceptionally unreliable,[40] that jailhouse informants are prevalent yet untrustworthy,[41] and that incarceration in this country has grown exponentially in the last thirty years.[42] Although these ruminations provide illustrative context to her book, academically Smith's most novel contribution is her focus on the representation of an undoubtedly innocent person.[43] *Case of a Lifetime* is primarily a story about the relationship between Smith and her client, Kelly Jarrett, and Smith's devotion to Jarrett's case.

Patsy Kelly Jarrett is now out of prison. However, she spent approximately thirty years (1977–2005) of her life behind bars for a crime that she did not commit.[44] It is a tragic story of a broken system. The tragedy is amplified by its sharp juxtaposition to Jarrett, who comes across—resilient through it all—as kindness and innocence personified. A devout Catholic lesbian from the South who was given a life sentence for unwittingly making friends with a violent criminal masquerading as a simple country boy, Jarrett does not easily fit into any preconceived category.[45] Likewise, her story is anything but typical.

In 1973, Billy Ronald Kelly, a recent acquaintance, convinced Jarrett to go on a summer excursion to Utica, New York.[46] There they spent a carefree summer making friends and enjoying the change of scenery. Kelly and Jarrett made a deal that he would work and she would lend him her car.[47] After a few months, the summer ended and they returned home. Their relationship had soured over the trip, and they split ways.[48] Jarrett did not realize it at the time, but her "friend" had used her car to rob and kill a teenage gas station attendant in Utica.[49] Two years after Jarrett had returned to North

39. *Id.* at 74 ("95 percent are resolved by guilty pleas . . . .").

40. *Id.* at 89–92.

41. *Id.* at 156.

42. *Id.* at 177 (citing statistics showing a 400% growth between 1977 and 2004).

43. This contribution is novel in the sense that there is very little scholarly literature dealing with representing the innocent. *Id.* at 23. This is not a wholly novel concept, however, as Smith wrote about defending the innocent in a 1999 law review article before Kelly Jarrett's story was complete. *See generally* Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000) (chronicling her experience defending a client whom she believed to be innocent).

44. *See* SMITH, *supra* note 27, at 8 ("Kelly served 28–1/2 years in prison before she was finally released on June 13, 2005.").

45. *See id.* at 42, 158 (noting that Jarrett converted to Catholicism in prison and became increasingly devout over the years); *id.* at 16 ("She never had any doubt about her sexual orientation and considered herself gay through and through."); *id.* at 13 (describing Jarrett's upbringing in North Carolina); *id.* at 8 ("[S]he was sentenced to life in prison.").

46. *Id.* at 16–18.

47. *Id.* at 18.

48. *See id.* ("Their time in Utica came to an end in mid-August . . . [s]he and Billy Ronald parted ways when they got home. During their time in Utica and especially on the ride back home, Kelly saw some things in Billy Ronald she didn't like. He was not who she thought he was.").

49. *See id.* at 5 (explaining that the car Billy Ronald had used during the murder had been matched to Jarrett's car); *id.* at 37 (recounting Billy Ronald's prison affidavit that he had used

Carolina, the police came to her door and arrested her as an accomplice to the crime.[50] While she had not been present during the slaying, a witness at trial testified that he had seen her sitting in the car, despite his initial testimony that he could not see the passenger's face or even determine whether the passenger was male or female.[51] In fact, the first time the witness made a positive identification of Jarrett was at her trial.[52] On this evidence alone, she was convicted and sentenced to life in prison.[53]

Smith narrates the complete story, from her first encounter with Jarrett in 1980 to Jarrett's ultimate release on parole in 2005. Smith was a clinical student at New York University in their first meeting and had become a clinical professor at Georgetown by the time of Jarrett's release.[54] She began working on the case in the clinic as a habeas corpus petition.[55] The habeas petition was ultimately successful.

When the petition was granted in 1986, Jarrett was given the chance to accept a plea deal to time served.[56] Smith had been out of law school for about three years when the prosecutor made the plea offer to Jarrett and thus had minimal involvement with the case at the time. Smith's clinical professor, Claudia Angelos, was Jarrett's primary lawyer.[57] Angelos believed Jarrett would lose on appeal if she did not take the plea, and she advised her client of such.[58] However, Jarrett did not take the advice and rejected the plea offer.[59] Standing on her principles, Jarrett refused to admit to a crime she did not commit. The prosecution appealed the lower court ruling and the appellate court reversed.[60] Jarrett was destined to spend the next two decades in prison for her principled stance.

After Jarrett turned down the plea offer, Smith lost touch with her for a few years. Then, in the mid-1990s, Smith decided to take the case back on after learning that another lawyer was negligent in her representation of Jarrett.[61] The case was by then being pursued as a clemency petition. Smith tried and failed numerous times and with various creative means to win

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Jarrett's car during the time the murder was committed and that she had not known of his whereabouts or actions).

50. *Id.* at 18–19.

51. *Id.* at 5.

52. *Id.*

53. *Id.* at 8. Smith thoroughly develops the details of Jarrett's story in the book, including her trial. *Id.* at 5–8, 25–27, 29–31.

54. *Id.* at 2–3, 9.

55. *Id.* at 34–36.

56. *Id.* at 40. This was about ten years after her conviction.

57. *Id.* at 39–41.

58. *Id.* at 40.

59. *Id.*

60. *Id.*

61. *See id.* at 134–35 (recounting Smith's decision to represent Jarrett personally after learning that Jarrett's other lawyer was not visiting her in prison and was not following up on Jarrett's case).

clemency for Jarrett.[62] Eventually, Jarrett was released on parole in 2005 with the combined efforts of Smith and a colleague.[63] Smith worked on the case for about twenty-five years.

Smith does not just tell the facts of the case and her representation but exposes herself to the reader with vulnerability and boldness rarely seen in a lawyer of her stature. Her honesty resonates with the reader and allows him to connect with her as an individual, casting out any belief that defense attorneys are callous, amoral beings.

As laudable as Smith's work is, this Review is not without critique. My principal discomfort is with the book's insinuation that Smith's perspective is paramount. It seems too dismissive of values Smith's client holds as very dear. Rather than deal with this issue here, I will discuss it in detail in Part III of this Review. Notwithstanding this weakness, Smith's book is an enjoyable and quality work throughout.

B. Negotiating Justice

Corey Shdaimah's intriguing work *Negotiating Justice: Progressive Lawyering, Low-Income Clients, and the Quest for Social Change* is an academic piece based in the context of practical experience. Unlike Smith, Shdaimah does not tell her own story, but rather tells the stories of other lawyers on the ground. Her book is essentially multiple interview excerpts buttressed by in-depth analyses. The purpose behind her writing is to provide a detailed and accurate picture of poverty law practice. While Shdaimah hopes that practitioners benefit from this book,[64] it seems her target audience is other progressive lawyering academics. Indeed, one of her main arguments is that there is a nonsensical disconnect between progressive lawyering academics and practitioners,[65] which she concludes is counterproductive.[66] Shdaimah's most novel contribution is that she examines situated practice,

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62. *See* SMITH, *supra* note 27, at 163–71 (cataloguing Smith's endless efforts to secure clemency, including updating and revising Jarrett's statement; directly contacting the New York State Clemency Bureau and the New York State Attorney General's Office; seeking positive press from the *New Yorker*, the *New York Times*, National Public Radio, *20/20*, *Dateline NBC*, and *Boston Globe Magazine*; and publishing three law review articles about Jarrett's case).

63. *Id.* at 204–07.

64. SHDAIMAH, *supra* note 25, at 18.

65. Shdaimah is quite particular about the scope of the term "progressive lawyering," limiting it to a "subset of left-activist lawyers." Corey S. Shdaimah, *Dilemmas of "Progressive" Lawyering: Empowerment and Hierarchy*, *in* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 239, 240–41 (Austin Sarat & Stuart A. Scheingold eds., 2005). While Shdaimah is well within her prerogative to define the term as narrowly as she likes, I do not agree with this limitation if she accepts Polikoff's description of the term as "'all those who use their legal skills to end poverty, racism, patriarchy, imperialism, and other impediments to social, economic, and political justice.'" SHDAIMAH, *supra* note 25, at 21–22 (quoting Nancy Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 443 n.1 (1996)). As I interpret Polikoff's quotation, it does not preclude conservative poverty lawyers whose goals are analogous, as Shdaimah expressly does. SHDAIMAH, *supra* at 25.

66. SHDAIMAH, *supra* note 25, at 17–19.

not theoretical practice.[67] In order to accomplish this, she interviewed lawyers *and* clients of a legal service agency.[68] Surprisingly, scholarship in this area has largely neglected client input.[69] Providing client perspective develops a more comprehensive view of poverty law practice.

Shdaimah's study takes place at one civil legal-services agency, Northeast Legal Services (NELS).[70] Acknowledging that all legal-services programs are not created equal, Shdaimah describes NELS as one of the largest public interest organizations in the city.[71] NELS has two offices: a centrally located main office and a neighborhood-based branch office.[72] It is a "highly regarded, sought-after public interest law practice."[73] The organization engages in both individual and impact work, though Shdaimah focuses her study on those lawyers doing "bread-and-butter" legal services with extensive client interaction.[74] All NELS clients are poor.[75] NELS handled almost 17,000 cases in 2006, and assisted many more.[76] Each of these cases fell into one of the organization's operational divisions, such as Social Security benefits, employment, housing, and elder law, among others.[77] In summation, NELS is a large civil legal-services organization composed of highly credentialed lawyers[78] dealing with large caseloads in specialized areas—typical of legal aid offices in urban settings. Shdaimah interviewed over fifty NELS attorneys and clients in the course of her observation.[79]

One of Shdaimah's greatest strengths is the number of interviews she conducted. With such a sample, she illustrates the myriad perspectives that progressive lawyers possess, enabling the reader to conclude that there is no one way to handle the difficult issues of poverty lawyering, such as paternalism, coping with hardship, or professionalism. She neither condemns nor validates a particular perspective.[80] Rather, she focuses on the tensions inherent in working within the current structure. Consequently, *Negotiating Justice* is quite an apt title. The book deals with the compromises clients and lawyers are forced to make in pursuing their goals

67. *Id.* at xiii, 11 ("[R]igid theoretical prescriptions for practice are bound to fail.").

68. *Id.* at 11–12.

69. *Id.* at 22.

70. NELS and the names of all individuals are pseudonyms. Shdaimah did this to respect confidentiality and to engender frank conversations. NELS is located in a large city with multiple legal service providers. *Id.* at ix n.2.

71. *Id.* at 4.

72. *Id.* at 1.

73. *Id.* at 4.

74. *Id.* at 5, 11.

75. *See id.* at 5 ("All clients must meet NELS's means test of having an income of no more than 125 percent of the federal poverty line.").

76. *Id.*

77. *Id.*

78. *Id.* at 4.

79. *Id.* at xiii.

80. *Id.* at 19.

and in defining those goals. In order to move forward and meet pressing needs, clients and attorneys must forgo certain ideals.

For example, suppose *X* is a perfectly just system and *Y* is our current justice system. While progressive lawyers want the world to be *X* for their clients, it is *Y*. *Y* resists change to the point of making any changes difficult and a transformation to *X* Sisyphean. Therefore, progressive lawyers can either wait until they change *Y* into *X*, or they can work within *Y* to meet the immediate needs of their client and hopefully bring *Y* a little closer to *X*, all the time realizing the risk of fortifying *Y*.[81]

Shdaimah has multiple themes that run throughout her book, particularly the concept of "the master's tools," borrowed from Audre Lorde.[82] This illustration signifies that lawyers are fighting against the system by using the system, and this is a complex and potentially dangerous relationship.[83] Like Smith, Shdaimah's interviewees take as a given that the system is unfair, particularly so for those living in poverty.[84] However, the lawyers at NELS agree with Lorde that, despite the dangers of preserving the system, the master's tools can be useful for their commandeered purpose.[85]

At its heart, *Negotiating Justice* is concerned with the relationships between clients and attorneys, the stresses of poverty law practice, and the reasoning undergirding the lawyers' behavior. Shdaimah concludes that idyllic visions of poverty lawyering ultimately fail because they do not take into account the "messy" nature of the practice.[86] Clients and lawyers learn how to be flexible and fight within a system that is resistant to accommodating their interests.[87] She asserts that academics have not acknowledged this reality enough and that, in order to effect change, theorists must take "reflective practice" seriously.[88]

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81. *See id.* at 58–59 (discussing the dichotomy between systemic challenges and "individual or incremental work," which may relieve immediate client suffering but addresses only the symptoms of an unjust system while requiring lawyers to acquiesce to the conventions of the present system, thereby conferring additional legitimacy on it).

82. *See id.* at xii ("The master's tools will never dismantle the master's house." (quoting AUDRE LORD, SISTER OUTSIDER: ESSAYS & SPEECHES 112 (2007))).

83. *See id.* at 59 (suggesting that lawyers' efforts to work within the current system are subject to criticism because such efforts are both insufficient due to lack of resources and dangerous due to their tendency to unintentionally legitimize the system).

84. *See id.* at xii ("I explore the meanings that legal services lawyers and clients . . . give to their work within systems that they perceive as fundamentally inequitable and hostile to the claims of poor people.").

85. *Id.* at xii–xiii.

86. *Id.* at 173.

87. This system refers primarily to the legal system, but it also includes the bureaucratic agencies that many of NELS's clients have claims against. *See, e.g.*, *id.* at xi–xii (describing a client's struggles with a private lender).

88. Reflective practice is a term of art Shdaimah employs to denote study based in lawyers' and clients' knowledge. It is not disembodied theory of the ideal, but theory that is grounded in the realities of practice. It is not reactionary or unthinking, but reflects on current practices in an imperfect and complex reality. *Id.* at 171–72.

Shdaimah conducted a commendable number of interviews; however, her sample appears too narrow. Shdaimah acknowledges that the sample was not ideal.[89] However, her awareness of the possibility for error does not diminish the likelihood that this is, in fact, a biased interview group. The concern that NELS is unrepresentative does not derive from the fact that it is a legal-service organization that engages in best practices and is composed of only high-quality lawyers.[90] Rather, the concern with the sample is that it was completely self-selected and NELS attorneys referred all of the interviewed clients to Shdaimah. This method is ripe for criticism because it is highly unlikely that a dissatisfied client would want to expend time and energy at the behest of an attorney she never wanted to hear from again. Further, lawyers who were overwhelmed by work or depressed at their job would have been less likely to answer a call to interview with a social scientist examining their performance. Therefore, the sample is probably skewed towards people with positive experiences at NELS, providing an incomplete picture of the office.

While this criticism does not invalidate Shdaimah's general conclusions, it does show that her study may not provide the full picture, particularly regarding negative experiences working in or receiving legal services. However, as she forcefully argues in her book, the lack of perfect data should not paralyze her from completing the study with the information she has.

III. Client Empowerment and Autonomy

> As a rule, if my client says, "What do I think you should do?" I respond back, "You have to make this decision yourself." . . . If they still won't decide or if they ask my opinion after that, I will give them my opinion but I once again try to stress that it's ultimately their decision, I mean it's their life.[91]

> We talked about a study in [my] professional responsibility [class] that says clients don't want autonomy. They came to you because they don't know what to do and they want you to give them some sort of advice .... Maybe clients don't want this autonomy that somebody's forcing it upon them.[92]

Much of professional responsibility and law practice in general is devoted to the attorney–client relationship.[93] Lawyers are supposed to

89. *Id.* at 33.

90. This Review is unabashedly solely concerned with such a group.

91. SHDAIMAH, *supra* note 25, at 71.

92. *Id.*

93. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) ("A lawyer shall provide competent representation to a client.").

represent their clients' interests.[94] For purposes of this Review, these relationships are the best way to distinguish the complexity of poverty law practice from conventional firm practice. While much of poverty lawyers' time is spent, like private practitioners, behind desks looking for legal precedent or writing briefs, their interactions with clients bring a host of issues that are singular to this field.

Poverty lawyering stresses the importance of client-centered representation, according to Shdaimah.[95] While lawyers in most practice areas would consider their representation client centered, the concept has more complicated implications in the poverty law arena. Most poverty lawyers argue that in order to be client centered, they must empower their clients to make critical decisions about their cases.[96] However, the dual goals of striving to empower a client and wanting to obtain a good outcome for a client often clash with one another. When representing large corporations or wealthy individuals, there is little concern about empowering the client; however, in representing the poor and marginalized, ignoring the tension between positive case disposition on the one hand and client empowerment on the other hand may be counterproductive to the goal of truly serving one's client. As one of Shdaimah's interviews indicates, "we . . . are respectful to our clients . . . . That's incredibly important because . . . one of the worst things I think . . . that happens to poor people is they're dehumanized. And if I can treat my clients respectfully, that is not as important as winning their case, but it's pretty damn important."[97] Lawyers in this field perceive that their job is more than simply winning cases. They understand that their clients face frequent and severe hardship and that in the context of their legal dilemma, clients often need to be reminded that they still have dignity.

This Part will explore how the issue of client autonomy fits within the normative ideal of client-centered representation in the poverty law context. Both authors share their take on the subject. Shdaimah devotes an entire chapter to the idea of client autonomy. Smith discusses the topic when Jarrett rejects the plea deal.[98] In presenting Smith's perspective, I will also clarify my critique of her work.

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94. *Id.* R. 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

95. SHDAIMAH, *supra* note 25, at 131.

96. *See id.* ("The basis for client-centeredness is respect for clients, client autonomy, and decision making.").

97. *Id.* at 117.

98. It is worth noting that in criminal law, defendants have an absolute right to decide three things concerning their case: whether to have a jury or a bench trial; whether to testify; and whether to take an offered plea. MODEL RULES OF PROF'L CONDUCT R. 1.2. In civil legal services, clients are only guaranteed the right to accept or reject a settlement offer. *Id.* If nothing else, the client has complete autonomy over these decisions.

Lawyers generally enter into poverty law practice with the goal of pursuing social justice and/or working on behalf of the poor.[99] Impoverished individuals live in a world where they frequently encounter disrespect, bureaucratic arbitrariness, and a lack of options. Poverty lawyers often feel it is incumbent upon them to temper this maltreatment with avenues for empowerment, often by encouraging autonomy. As expressed by Shdaimah, "[a]utonomy is both a value and a goal espoused by most theories of progressive lawyering, which are rooted in the presumption that most clients are competent and entitled to make informed decisions."[100] However, balancing this value with other goals and determining what exactly autonomy looks like clouds this simplistic prescription.

Shdaimah's chapter on client autonomy gives perspectives of both lawyers and their clients, often using autonomy interchangeably with decision making.[101] While most poverty lawyers buy into the idea of autonomy, they are cognizant that not all clients desire to make their own decisions about their case.[102] Further, the lawyers realize that many of their clients are in legal difficulty because of bad decision making.[103] Therefore, for lawyers there is an uncomfortable tension between enabling client autonomy and adequately representing their client. Often, clients are not uncomfortable with delegating duty, frequently wanting to abdicate all decision-making responsibility to their lawyer, even nonlegal problems.[104] This exemplifies how clients and attorneys often have conflicting goals in the poverty law context.

Poverty law attorneys, particularly in civil legal services, often desire to empower their clients and effect social change, but their clients want assistance in dealing with the issue at hand. "[Clients] were less likely than the lawyers to perceive their reliance on lawyers' advice (rather than just neutral information) as undermining their own decision-making power or as a form

99. *See, e.g.*, SMITH, *supra* note 27, at 32 (explaining that she had entered into poverty law practice because she was "drawn to the struggles of the poor and marginalized"); Lynn C. Jones, *Exploring the Sources of Cause and Career Correspondence Among Cause Lawyers* (discussing interviews with cause lawyers where "[m]ost described their activism, or that of cause lawyers in general, as being involved in 'protecting individual rights' and 'social change' or 'justice'"), *in* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE, *supra* note 65, at 203, 224–33; Shdaimah, *supra* note 65, at 244 (maintaining that in her interviews with NELS lawyers she found that "[n]early all [interviewees] chose their careers out of a commitment to some notion of social justice or social change"); Douglas Thomson, *Negotiating Cause Lawyering Potential in the Early Years of Corporate Practice* (asserting that "[c]ause lawyering presupposes public interest commitment"), *in* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE, *supra* note 65, at 274, 276.

100. SHDAIMAH, *supra* note 25, at 67.

101. *See generally id.* at 67–98.

102. *See id.* at 78 (explaining that many clients prefer to navigate the legal system with a lawyer).

103. *See, e.g.*, *id.* at 90–96 (finding that a number of the lawyers surveyed recounted dilemmas created by their clients' bad decisions).

104. *Id.* at 87–89.

of manipulation."[105] Instead, clients tried to delegate their needs based on expertise and resource constraints.[106] "Clients seek lawyers to help them deal with discrete problems in order to relieve stress and to free them up to deal with other aspects of their lives."[107] Simply retaining a lawyer and using her expertise in their struggles is a means of empowerment for many clients.[108] In situated practice, attorneys often address the autonomy question on an ad hoc basis—making their decision based on individual client sophistication, difficulty of the legal issue, time availability, and degree of need.[109]

Shdaimah concludes that poverty lawyers need a broader view of autonomy that can adapt to client realities.[110] Academic theory emphasizing the importance of autonomy has too often demanded an exacting standard that is inconsonant with clients' abilities or desires.[111] This theory focuses too narrowly on traditional conceptions of client autonomy. It suggests that in order for clients to be empowered, they must make all of the important decisions in their cases.[112] As it is, "we hold poor clients to a higher standard than we do paying clients."[113] People hire lawyers to be their counselors and advocates. While poverty lawyers need to be watchful not to cross into the realm of paternalism, it should not prevent them from assuming the voice of their disempowered client.[114] To do otherwise would limit the effectiveness of poverty law in pursuit of some quixotic ideal of client autonomy.

Smith acknowledges the difficulty in balancing autonomy and positive case disposition in the context of plea deals. Clients are often initially reluctant to consider plea offers, but indigent defense attorneys—in order to effectively represent their clients—must counsel them to do so when it seems to be in their best interest.[115] "The lawyer must balance respect for client autonomy against his or her professional obligation to counsel the client."[116] Smith advocates for a downplaying of autonomy in the face of other, more pressing goals. When Jarrett rejected the plea offer in 1986, Smith was very upset. She blames her clinical professor's overvaluation of autonomy and

105. *Id.* at 78.

106. *Id.* at 86–87.

107. *Id.* at 86.

108. *See id.* at 83 (relating that without lawyers, many agencies will not listen to clients).

109. *Id.* at 78.

110. *Id.* at 97–98.

111. *See id.* at 77 (providing an example of a lawyer who believes that the concerns originating in academia are out of touch with those that are most pressing to her clients' daily lives and desires); *id.* at 89 (presenting the argument that despite certain academics' views, self-help should not be the chief criterion of autonomy).

112. *Id.* at 71–73 (describing three theories of autonomy used to justify encouraging, or even forcing, clients to make unwanted decisions).

113. *Id.* at 87.

114. Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 155 (2002).

115. SMITH, *supra* note 27, at 55–56.

116. *Id.* at 40–41.

client-centeredness for Jarrett's refusal to take the plea.[117] In order to buttress her argument, Smith cites one of the preeminent lawyers of our time, Anthony Amsterdam, who has written that "[c]ounsel may and must give the client . . . professional advice . . . often . . . by using a considerable amount of persuasion."[118] I certainly concur with such venerable advocates and scholars; however, my uneasiness is with Smith's definitiveness in labeling Jarrett's plea rejection a failure of lawyering. Smith's assertion that sometimes you have to lean hard is correct in thinking; however, I think her assessment of Jarrett's situation is an extreme example of taking the concept too far.

Smith points to her professor's remorse as evidence of her mistake.[119] However, Jarrett herself refuses to concede as much and does not regret her decision to reject the plea.[120] Smith tells Jarrett that she "would have made her take such a plea if [she] had had the chance."[121] This suggests Smith has thrown the balance out the window, abandoning any notion of client autonomy and has presumed that her own values trump those of her client. Jarrett is a devout Catholic who believes that lying is not just wrong but is a sin.[122] Smith and her professor both place freedom as the utmost value. This is a very understandable perspective, especially coming from a prison lawyer and a criminal defense attorney, but it is only one perspective.[123] Jarrett chose to place her moral beliefs higher than her independence. Jarrett's decision is not outlandish; her position is historically consistent with her faith, in which people have endured prison and even death for refusing to compromise their religious convictions.[124]

My main qualm with Smith is that because she cannot accept the legitimacy of Jarrett's faith-informed stance, she seems to dismiss it as

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117. *Id.* at 43.

118. *Id.* at 41.

119. *Id.* To illustrate that Smith does not exaggerate her professor's rhetoric see *Frontline: The Plea* (PBS television broadcast June 17, 2004), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/plea/.

120. SMITH, *supra* note 27, at 42.

121. *Id.* at 44.

122. *See Exodus* 20:16 (English Standard) ("You shall not bear false witness against your neighbor.").

123. For another perspective from an innocent man who regrets taking a plea see *Frontline: The Plea*, *supra* note 119.

124. *See, e.g.*, *Daniel* 3:1–23 (describing the death sentence given to three men for not worshipping the god or golden image of their king); *Philippians* 1:13 (English Standard) ("[M]y imprisonment is for Christ."); 2 *Corinthians* 6:4–10 (English Standard) ("[A]s servants of God we commend ourselves . . . by great endurance, in afflictions, hardships, calamities, beatings, imprisonments, riots, labors, sleepless nights, hunger . . . by truthful speech . . . . We are treated as impostors, and yet are true . . . ."); 2 *Corinthians* 11:23–27 (English Standard) (recounting the hardships and abuse endured by the author as a "servant[] of Christ"); *see also Our Mission*, OPENDOORSUSA.ORG, http://www.opendoorsusa.org/about-us/our-mission ("Serving persecuted Christians worldwide."); *The Voice of the Martyrs*, PERSECUTION.COM, http://www.persecution.com/public/aboutVOM.aspx ("A Global Perspective on the Persecution of God's Children").

nothing short of ludicrous.[125] I obviously have to tread very carefully here, as this is Smith's case of a lifetime and she has been thinking about it for four years longer than I have been alive on this earth. However, based on the facts given to us in her book and the interview on *Frontline*, I do not believe Smith could have convinced Jarrett to take the plea, nor would she have been acting rightly if she had.[126]

Despite this criticism, Smith's rhetoric does shed light on the difficulty of applying academic notions of autonomy to situations in which a client's decision has far-reaching consequences. If Smith is correct in her belief that she could have convinced Jarrett to accept the plea offer, she could have prevented her client from spending twenty additional years in jail. While I ultimately disagree with Smith's conclusion, one cannot ignore the compelling nature of her argument, particularly when one considers the source. Smith is one of the premier indigent criminal defense attorneys, and she is speaking from inside the trenches. The tension between Smith and Jarrett is a compelling example of how situated practice complicates the theories of ideal practice.

IV. Struggles and Rewards of Poverty Lawyering

Poverty law is at once a difficult and rewarding practice. Poverty lawyers work in an environment defined by scarce resources and often complain of overburdening themselves with their work. As noted in the Introduction, a job in this field is not customarily accompanied by widespread respect.[127] Both books also deal with the pervasive belief by poverty lawyers that they work within an unjust system inimical to the interests of their clients.[128] Similarly, poverty lawyers sense that the problems they fight are too big for them to solve. However, these challenges have corollary rewards. The work is universally described as stimulating,

125. To be fair, Smith does provide some closure on the topic at the end of the book, but one cannot help but get the sense that she is speaking of her present feelings when she denigrates Jarrett's faith in this situation and others throughout the book. *See* SMITH, *supra* note 27, at 225–26 (describing with incredulity the effect Jarrett's faith had on her ability to appreciate the film *Brokeback Mountain*); *id.* at 42 (insinuating that faith in God is per se misplaced); *id.* at 53 ("Kelly was blinded by her faith . . . ."); *id.* at 158–59 (claiming to respect Jarrett's belief, then undermining its validity by suggesting people turn to faith for fear of death); *id.* at 191 ("Oh no, not God again. Where was this God anyway?"); *id.* at 201 (using "goddamn," one of the few curse words in the book, in reference to Jarrett's failure to take the plea); *id.* at 218–19 (balking at the concept that "God's plan" would look different from her own).

126. *See Frontline: The Plea*, *supra* note 119 (showing Bruce Green disagreeing with Smith's suggestion that a lawyer should force some clients to take a plea).

127. *See, e.g.*, David Feige, *You Could Be a Private Lawyer!*, INDEFENSIBLE (Nov. 6, 2006), http://davidfeige.blogspot.com/2006/11/you-could-be-private-lawyer.html ("We [poverty lawyers] know full well how the world looks down upon us. We live with families, friends and even clients who assume that we're only doing the work because we couldn't get a better job.").

128. SHDAIMAH, *supra* note 25, at 116; SMITH, *supra* note 27, at 228.

often referencing its intellectually challenging nature.[129] Poverty lawyers further describe their work as inspirational, enjoyable, and meaningful.[130] This Part will examine these struggles and rewards in order to highlight the uniqueness of poverty law practice.

A. Overburdened Attorneys

While the lack of financial incentives for pursuing public interest law is well documented,[131] there is less awareness of how busy poverty lawyers are.[132] This constraint is acutely felt by lawyers who desire to help as many people as they can but also want to spend a great deal of time with their clients in order to retain a client-centered practice and to be effective lawyers.[133] Poverty lawyers feel overwhelmed with work, logging extensive hours at the office, yet still believe they are unable to spend enough time with their clients.[134] Despite this belief, they often continue taking on cases simply because they realize that if they do not then it is unlikely that the client will ever receive assistance.[135] As illustrated by Shdaimah, "And I take on too many cases. . . . I have too many cases, I know that . . . . [R]ight now, I'm totally overloaded, I got too much on my plate . . . . But I just can't say no to my clients."[136] This sentiment is common among poverty lawyers, though it potentially hampers their ability to represent their clients to the fullest of their abilities.

Surprisingly, the clients of these overworked lawyers do not begrudge their advocates too much, though they do express frustration.[137] For an example of this frustrated acceptance, Jarrett playfully claimed it was a "miracle" anytime she was able to reach Smith in less than three tries.[138]

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129. *See, e.g.*, SHDAIMAH, *supra* note 25, at 131–32 (noting that despite the difficulties that arise from relationships with clients, poverty lawyers still welcome the challenge that comes from their work).

130. *See id.* at 157 (recounting the "meaningful" experiences that gave great "satisfaction" to two poverty lawyers); KENN, *supra* note 4, at 35–40 (recounting how a poverty lawyer "found her passion" working with Legal Services for Children).

131. *See supra* note 13.

132. *See, e.g.*, Robert Behre, *Public Defender Is One Busy Guy*, POST & COURIER (May 1, 2010), http://www.postandcourier.com/news/2010/may/01/public-defender-is-one-busy-guy/ (recounting the hectic schedule of a public defender); Jill Smolowe et al., *The Trials of the Public Defender*, TIME, Mar. 29, 1993, at 48, *available at* http://www.time.com/time/printout/0,8816,978105,00.html ("Across the country, [public service lawyers] strike a common note: they get no respect.").

133. *See* SHDAIMAH, *supra* note 25, at 149 (illustrating the dilemma of overworked poverty lawyers, who are concerned with developing a rapport with their clients yet reluctant to turn away needy newcomers).

134. *Id.*

135. *Id.* at 151.

136. *Id.* at 149.

137. *Id.* at 150.

138. SMITH, *supra* note 27, at 176.

Shdaimah credits this lack of outrage to a desensitization of low-income clients by their frequent contact with underresourced bureaucracies.[139]

These attorney–client relationships take place in an environment of constraint resulting from a prevalence of poor individuals with legal needs and a scarcity of lawyers devoted to their cause. The lawyers who have committed to poverty law are remarkable human beings who shoulder immense caseloads for the benefit of their clients; unfortunately, the demand is greater than the supply. Absent a sea change in the priorities of the legal community, poverty lawyers will continually wrestle with the tension between maximizing the number of clients they serve and the adequacy of services they provide.

B. Lack of Respect

Poverty lawyers are frequently underestimated. Even colleagues in the legal community disparage their abilities and credentials.[140] Clients of poverty lawyers initially express similar distrust in the skills of their advocates.[141] A lawyer that Shdaimah interviewed, Ben, is an experienced and nationally regarded expert in his field.[142] Despite his excellent representation, his client believed that if he got an offer for a more prestigious job, he would take it.[143] "This is indicative of an understanding that many [poverty] lawyers have their jobs because they cannot find other, 'better' ones."[144] This accords with the popular notion that poverty lawyers are "sloppy, marginally qualified lawyers."[145] Anecdotally, I encountered

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139. SHDAIMAH, *supra* note 25, at 150.

140. For an example, see Feige, *supra* note 127, where Feige states,

> If you're a [poverty lawyer], it doesn't actually matter what you do or what you accomplish. Summa Cum Laude from Harvard? (several current Bronx Defenders) Supreme Court Clerk? (a friend who went to PDS) President of your state bar association? (Forsman) Law professor? (lots of us) or Brilliant Supreme Court Advocate? None of it makes any difference to the idiots out there who simply can't grasp that some people might actually want to do the righteous work [of] being a [poverty lawyer] for reasons having nothing to do with the money. It just doesn't compute. People still think that [poverty lawyers] are where they are not by choice, but because they just couldn't get a better job.

141. *See* Corey S. Shdaimah, *Not What They Expected: Legal Services Lawyers in the Eyes of Legal Services Clients* (reporting that new legal aid clients often assumed that their lawyers were "less skilled, less motivated, or less well connected," but later were satisfied with those lawyers' services), *in* THE CULTURAL LIVES OF CAUSE LAWYERS 359, 371–73, 386 (Austin Sarat & Stuart Scheingold eds., 2008); *cf.* SMITH, *supra* note 27, at 112 (recounting one client's opinion that rich people's lawyers are better than appointed ones, and comparing appointed lawyers to jailhouse lawyers).

142. Shdaimah, *supra* note 141, at 372.

143. *Id.*

144. *Id.*

145. STOVER, *supra* note 10, at 83; *see also* Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 2 AM. B. FOUND. RES. J. 155, 202–03 (1977) (determining from statistical analysis that both perceived prestige and

this when clerking with the Orleans Public Defenders (OPD) in the summer after my first year of law school. OPD is a post-Katrina reform office that employs many experienced attorneys from the best public defender offices in the country and graduates of prestigious law schools. My supervising attorney was a Harvard Law School alumnus. However, many of his clients would scrape together all of the money they had to hire one of the cheapest private defense attorneys they could find in the phone book—lawyers who were of invariably lower quality than OPD attorneys. They assumed that because my supervisor worked for the public defender he must be less qualified than *any* private attorney.

Interestingly, almost all of the clients Shdaimah interviewed reported high satisfaction with their legal representation. Despite this, they did not conclude that poverty lawyers, as a class, were proficient.[146] They assumed their lawyer was an anomaly rather than a part of a larger group of similarly skilled attorneys.[147] It seems that regardless of personal experience, the myths of low-quality lawyering in public interest hold powerful sway over society.

C. *Unsolvable Problems*

Poverty lawyers work with poor clients who have legal issues. However, their clients' poverty affects all areas of their life, making it unclear what is a legal issue and what the attorney's role is.[148] Their poverty also means that solving the legal issue is more difficult and less likely to solve the client's foremost concern.

Indigent defenders are notoriously overburdened with enormous caseloads. Exacerbating the problem, they rarely possess the resources necessary to try their cases thoroughly.[149] Moreover, the legal ideal that the accused are presumed innocent has highly questionable merit with the public.[150] For these reasons, Smith concludes that basing one's job satisfaction on winning cases is likely unsustainable. Defenders simply do

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intellectual challenge are directly related to the type of client served, with big corporations at the top and individuals from low socioeconomic groups on the bottom).

146. *See* Shdaimah, *supra* note 141, at 383, 386 (explaining that while virtually all of the interviewed clients expressed satisfaction with their legal services lawyers, the clients retained negative perceptions of legal services lawyers in general).

147. *See id.* at 383 ("[Clients] interpret their positive experience as attributable to that one special lawyer with whom they had the good fortune to work.").

148. *See* SHDAIMAH, *supra* note 25, at 139 (discussing how the complicated personal issues of clients are intertwined with the legal issues).

149. *See* Smith, *The Difference in Criminal Defense and the Difference It Makes*, *supra* note 30, at 127 (highlighting the hardships defense lawyers face in dealing with difficult clients and a lack of resources); Smolowe, *supra* note 132, at 48 (discussing the lack of resources allocated to public defense). *But see* RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 161–64 (1999) (arguing that a "bare-bones" system for indigent defenders may be optimal).

150. SMITH, *supra* note 27, at 228.

not win enough to make this viable.[151] Also, even after acquittals, clients often collide with the law again. Smith's relationship with Jarrett is a testament to the frustration a poverty lawyer will encounter if she believes the system will acquiesce so long as she does everything right. Their story illustrates the danger of believing a client's problem is solvable in any simplistic terms.[152]

In the civil context, lawyers frequently lament that their representation accomplishes only trivial changes.[153] They recognize their inability to be their clients' savior; the problems are too big and pervasive.[154] Impoverished clients have complicated lives, and the legal dilemma may just be one aspect.[155] Like criminal clients, a positive outcome in a case does not mean that the problem will not resurface in the future.[156] Lawyers cope by couching their responsibility in terms of their professional role—namely to represent the client to the extent possible, not to judge or save them.

Poverty lawyers endure this bleak environment with the understanding that there are systemic impediments to the interests of the poor.[157] This understanding informs how they approach poverty lawyering—solving what they can, while realizing that they cannot solve it all.

D. Rewards

Despite the abovementioned struggles, poverty lawyers overwhelmingly are happy in their vocation.[158] The rewards of poverty law are intangible but deep, often bound up with the concept of human dignity. Poverty lawyers advocate for recognition of their clients' dignity in a world that has persistently ignored it. While many poverty lawyers cited an abstract concern for social change, direct-service representatives continually refer back to their clients when discussing motivation and benefits of the work.[159] "While

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151. *Id.* at 129.

152. *Id.* at 228 ("I have never felt so powerless . . . or so discouraged. I did everything I could think of to free her. None of it worked. . . . It didn't matter how articulate I was or how persuasive my cause. Nobody budged. The system was unyielding.").

153. SHDAIMAH, *supra* note 25, at 62 ("[I]f I do a great job on trying to get somebody who's being kicked off of welfare I've gotten them, let's say . . . $403 a month to live on. That's abhorrent. It's a joke, it's a farce . . . .").

154. *Id.* at 139 ("A lot of people had messed up lives before I came and their lives are still going to be messed up when I leave. And they're poor. And [aren't] . . . ever going to be anything other than poor.").

155. *Id.* at 133.

156. *See id.* at 138 ("I . . . don't feel real confident that we sort of change their lives sufficiently to know if they won't be back again . . . .").

157. *See* SMITH, *supra* note 27, at 227–28 (discussing the inequalities in access to justice for the impoverished and for minorities).

158. *See, e.g.*, KENN, *supra* note 4, at 123 (characterizing public interest work as rewarding despite the paltry paycheck and other difficulties); SHDAIMAH, *supra* note 25, at 156–57 (arguing that the sources of difficulty for poverty lawyers are also sources of great reward).

159. SHDAIMAH, *supra* note 25, at 131 ("Well, it's certainly the lifeblood of the work. The reason you get out of bed in the morning is because of the clients. And it's the reason that I

relationships with clients can be difficult, for these lawyers they are also a source of inspiration, challenge, and enjoyment."[160] Their clients are indispensable in countering the depression and hopelessness that the enumerated struggles could easily bring.

Lawyers find that clients experience stress relief from their first encounter with them.[161] This ability to bring calm to a client's life is deeply important to lawyers propagating client-centered lawyering. Shdaimah reports that this ability to bring relief through the attorney–client relationship is due to "a client's sense that the lawyer cares, has empathy, and provides some hope of recourse."[162] And poverty lawyers *are* sometimes able to provide recourse for their clients, which they do consider a benefit of the job.[163] This is particularly true in certain types of civil legal services, where lawyers cite the positive reinforcement that comes from small but frequent victories.[164] As Smith asserted above, however, most poverty lawyers do not win enough to sustain them through the difficulties of the job. Smith did not continue to work on Jarrett's case because it was so successful. Her representation of Jarrett lasted a quarter of a century and suffered many more failures than victories. Smith explains that her rewards in defending clients are the ability to serve the client with respect, devotion, and zeal; the opportunity to develop her craft; and the ability to make a difference for each client through advocacy.[165] Smith exemplified this perspective when she described representing Jarrett as an "honor."[166] She admits that in Jarrett's case, uniquely, she received the additional reward of an unexpected friend.[167]

Victory and money cannot sustain the majority of poverty lawyers, as the job does not provide enough of either. Rather, the reward often comes from the fight itself.[168] Daily, poverty lawyers are able to fight for fundamental civil and human rights. This is a privilege. Regardless of the outcome of their case, clients are reminded through their lawyers' advocacy that they have inherent value, despite their circumstance.

Strikingly, the core source of many of the struggles mentioned in the previous subsections—i.e., dealing with clients and their problems—is also

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wouldn't trade my job for lots of other jobs . . . available to people who graduate from law school.").

160. *Id.* at 131–32.

161. *Id.* at 136.

162. *Id.*

163. *See, e.g., id.* at 157 ("And every day we—I get victories. . . . [I]t was great to call the client and say, 'Yes, the food stamps are on and yes, you're getting the cash!'").

164. *Id.*

165. SMITH, *supra* note 27, at 130.

166. *Id.* at 226.

167. *Id.* at 196–97 ("Kelly showed me that sometimes—not often, but sometimes—being a good lawyer also means being a good friend, no matter how uncomfortable I am with the idea.").

168. *See id.* at 128 ("[C]riminal lawyers uphold the 'charter of human rights, dignity, and self-determination' embodied in the American Bill of Rights.").

the source of a poverty lawyer's greatest reward.[169] As mentioned above, lawyers realize that they are not their clients' savior, but they hold fast to the belief that their role is important and has meaning to the client. "[S]ometimes there's a feeling that maybe I have made somewhat of a difference, but . . . you know, it's in little ways, it's not huge."[170]

V. Poverty Lawyering in Law School

> I think very few lawyers can say that they've really made the world a little bit, in a teeny way, better. Most lawyers are really not engaged in that pursuit at all.[171]

Abbe Smith and Corey Shdaimah paint a picture of poverty law practice that is not limited to second-tier lawyers unable to find a better job or skilled bleeding-heart lawyers sacrificing intellectual challenge to help the poor. Rather, they paint a picture of a practice with diverse jobs performed by highly competent attorneys.[172] The poverty lawyers in this study did not go into the field for lack of options, but because they realized it was challenging and meaningful work.[173] As I outlined in the Introduction, law schools have generally not caught up with this realization.[174] Correspondingly, the legal community at large views poverty lawyering as a commendable, but not serious, endeavor.[175] Law students believe they have a choice between

169. SHDAIMAH, *supra* note 25, at 156–57 ("Affective lawyering carries risks and benefits, and lawyers must suffer the former if they are to experience the latter. For most NELS lawyers, the benefits outweigh the risks.").

170. *Id.* at 133.

171. *Id.* at 35.

172. While this Review mentions the diversity of practice within poverty law by listing the different practice areas in NELS and using books describing both civil and criminal sides, it neglects serious analysis of the vast array of jobs within this practice area. Unfortunately, such detailed discussion is beyond the scope of this Review. It is simply worth noting that the type of work one can engage in is almost as diverse as private practice, including the opportunity to work on repetitive transactions and simple trials or to work on complex litigation on the trial or appellate level. This means that poverty law cases cannot be offhandedly grouped into a category of uncomplicated proceedings. Such impressions are usually based on perception bias rather than reality. *See* GARY A. MUNNEKE & ELLEN WAYNE, THE LEGAL CAREER GUIDE: FROM STUDENT TO LAWYER 255–56 (5th ed. 2008) (advising job-seeking students that legal aid services provide assistance with "a variety of civil problems, including landlord–tenant disputes, domestic relations, employment discrimination, and other legal issues"); *Fact Book 2009*, LEGAL SERVS. CORP., 12–15 (June 2010), http://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2009.pdf (listing over 920,000 legal-aid cases closed in a single year in a wide variety of practice areas, including trial and appellate work).

173. *See, e.g.*, KENN, *supra* note 4, at 137 ("'It was too all encompassing. It was too fulfilling. It was too interesting and I never thought that maybe I should get a job in a corporate law firm.'" (quoting interviewee Michael Deutsch)).

174. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGESSIVE LAW PRACTICE 4 (1992) (lamenting that in order to do activist work he had to overcome, rather than take advantage of, the law school experience).

175. *See, e.g.*, Hornstein, *supra* note 22, at 1057–58 (citing Justice Scalia instructing law students to only take "serious classes" and to not "waste [their] time" with "made-up stuff" like a course on poverty law). For a perspective that is even less generous, see SCHEINGOLD & SARAT,

helping people (to their own financial and professional detriment) or doing respectable and interesting work in a firm. This Review has shown that this perception is simply not true. Poverty law is not a cute, feel-good practice of perfunctory tasks;[176] it is a challenging field that demands our respect and should be more central to our conception of what a lawyer is.

The law school socialization process should provide this perspective. Law school's purported goal, particularly in the first year, is to make students "think like a lawyer." Wouldn't it be a tragedy if learning to think like a lawyer meant becoming immune to the needs of the poor?[177] Wouldn't it be inspiring and edifying to the profession if learning to think like a lawyer included a firm sense of obligation to serve the needs of the underprivileged?[178] Far too many lawyers go into BigLaw only to find a life practice void of transcendent values and personal fulfillment.[179] This Review is not meant to be a blanket condemnation of BigLaw or law schools; rather, it strives to show that not everyone belongs in a large firm. Too many people who are naturally inclined to go into poverty law practice are convinced, after three years in law school, that large firms are their best option. While a necessary and legitimate practice, there are alternatives. The existence of widespread dissatisfaction and unhappiness in BigLaw firms may simply be because law schools are directing the great majority of their students, particularly their high-performing students, towards these firms, and too many associates are finding themselves in careers in which they have no intrinsic interest. Put simply, they are in jobs where they cannot see meaning. Happiness is often correlated with having meaning in one's activities.[180] If an associate works sixty hours a week in a job where he has no natural interest and does not see deeper significance in the work, then he is likely to experience

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supra note 10, at 69–70 ("Cause lawyering is tolerated, not encouraged, embraced when political conditions imperil the organized bar's legitimacy, but then stigmatized and marginalized when the threat abates.").

176. While admittedly any area of law has tedious and unchallenging aspects, the perceptions that nonpublic interest law areas are more intellectually challenging may be based on myth more than experience or empirical evidence. STOVER, *supra* note 10, at 78–79; *see also* Kennedy, *supra* note 10, at 45 ("Legal services practice, for example, is far more intellectually stimulating and demanding, even with a high case load, than most of what corporate lawyers do. It is also more fun.").

177. *But see* GRANFIELD, *supra* note 15, at 79 ("Students who make moral arguments on the basis of equity or social justice are considered intellectually soft and often ridiculed by other students."); SCHEINGOLD & SARAT, *supra* note 10, at 51 ("The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia." (quoting KARL LLEWELLYN, THE BRAMBLE BUSH 84 (1960))).

178. The current system of "requiring" this in the Model Rules is a laudable but half-hearted move by the American Bar Association, particularly when law school has taught students the value of self-promotion at the expense of others. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

179. *See, e.g.*, Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 426–27, 434 (2005) (referencing the "egregiously low standard of behavior often encountered among attorneys and judges in the real world").

180. *Id.* at 429.

disappointment, regardless of the prestige or income derived from that position.

Poverty law jobs cannot offer a lifestyle filled with comfort and riches. This Review does not claim the field competes with firms on that level. And just as law schools should not guide all their students to a career in a large firm, they should also not hoodwink every law student into pursuing poverty law practice by painting a rosier picture than reality, or by claiming that it provides the same kind of benefits as firm practice. Law schools need to be honest with their students and explain the positives and negatives of both career paths. What this Review hopes to highlight is that there is (1) a scarcity of quality lawyers going into poverty law; (2) a number of underrated benefits of the practice; and (3) an overwhelming natural interest in the area expressed by incoming law students every year. Taking these three factors into account, if law schools were serious about fully presenting all options to their students, there should be more graduates pursuing poverty law as a career, as well as much higher job satisfaction within the bar.

This Review's critique of law schools is not meant to imply that the institutions are irredeemable. Instead, the purpose is to suggest means of improvement. Law schools must do a better job of presenting options other than BigLaw firms. One can only assume this is possible if they know what the other options are and consider them worthwhile. This Review specifically hopes to have shown that poverty law is a legitimate alternative to firms.

There are 39,108,422 people in the United States living beneath the poverty line.[181] There are 1,180,386 attorneys in the United States.[182] Of this latter number, only about 11,800 have devoted their practice exclusively to helping the 39,108,422.[183] This Review hopes to illustrate the difficulty of this task, highlighting the dire need for poverty lawyers. As the Introduction discussed, the issue is not lack of interest upon entering law school; the issue is maintaining that interest during the three years of law school. Law schools need to do a better job of stemming the tide of students abandoning interest in poverty law. In order to assist in that goal, this Review further intends to show the compelling nature of poverty law work and the caliber of attorneys engaged in it. Shdaimah and Smith shed light on the impressive individuals advocating on behalf of the poor. They show how bleak the situation sometimes appears, but also the hope that comes with their work. Smith and Shdaimah also reveal the grave problems with our current justice system. When our legal system makes it better to be guilty and rich than poor and

181. ALEMAYEHU BISHAW & TRUDI J. RENWICK, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEYS, POVERTY: 2007 AND 2008, at 4 (2009).

182. AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS (2009).

183. *See id.* (showing that 1% of the 1,180,386 attorneys in the United States work in the "Legal Aid/Public Defender" practice setting).

innocent,[184] we must question our priorities. This Review Note calls upon students, professors, and law school administrators to renew the conversation regarding those priorities. Law schools need to recommit their students to seeking justice rather than Mammon.

W. Lawson Konvalinka

184. Bryan Stevenson, Dir., Equal Justice Initiative, Keynote Address at the Capital Punishment Center at the University of Texas School of Law Symposium: Imprisoned by the Past (Apr. 16, 2009).

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Note

Off the Mark: Fixing the False Marking Statute*

I. Introduction

On February 12, 2010, Patent Compliance Group, Inc. filed a lawsuit against a popular video game company, Activision Publishing, Inc.[1] The complaint alleges that Activision marked a variety of its products with patents that do not cover the marked products, indicated that the products were covered by a pending patent when in fact there was no such pending patent application, and used the word "patent" in advertising in connection with unpatented products.[2] Patent Compliance Group is asking for the maximum $500 fine to be imposed for each violation.[3] The total liability could be a potentially astronomical number, considering that Guitar Hero 5, one of the alleged falsely marked products, sold 499,000 units in its first month of sales.[4] If the court imposes a full $500 fine per unit sold, then the penalty for *this product alone* will be $249.5 million.

The suit against Activision is just one of twelve lawsuits for false marking that the Patent Compliance Group has filed in 2010.[5] In fact, it is just one of over six hundred false marking lawsuits that have been filed in 2010.[6] Before 2010, the false marking statute had been rarely utilized.

The Court of Appeals for the Federal Circuit even recognized that the recent *Forest Group, Inc. v. Bon Tool Co.*[7] decision might open the door to a flood of false marking litigation.[8] This prediction has thus far proved true. Many of the false marking suits have been filed by the same plaintiffs, many

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1. McDonnell Boehnen Hulbert & Berghoff LLP, *District Court Cases*, FALSE PATENT MARKING (2010) [hereinafter *District Court Cases*], http://www.falsemarking.net/district.php.

2. Complaint at 1–2, Patent Compliance Group, Inc. v. Activision Publ'g, Inc., No. 3-10CV0288-B (N.D. Tex. Feb. 12, 2010).

3. *Id.* at 3.

4. Antony Bruno, *Beatles Boost Music Game Sales to New High*, BILLBOARD.COM (Oct. 20, 2009), http://www.billboard.com/#/news/beatles-boost-music-game-sales-to-new-high-1004023739.story.

5. *See District Court Cases*, *supra* note 1 (listing all of the false marking lawsuits that have been filed since 2007).

6. *Id.*

7. 590 F.3d 1295 (Fed. Cir. 2009).

8. *See id.* at 1303 (noting that although the defendant–appellee argued that imposing a fine on a per-article basis would give rise to "'a new cottage industry'" of false marking police, the statute allows this).

of them companies formed for the purpose of policing false marking.[9] These plaintiffs, who may have not even been harmed by the false marking, have come to be known as marking trolls.[10]

Forest Group held that contrary to historical practice, the false marking fine is to be imposed on a per-article basis, rather than on some other, less extreme basis.[11] This ruling has opened the door to potentially enormous awards. Some may argue that enormous awards are dependent on the court actually imposing the full $500 fine per offense.[12] Indeed, the court may not necessarily impose the full $500 per-article fine in most cases. However, in another relatively recent false marking case, *Pequignot v. Solo Cup Co.*,[13] the number of alleged falsely marked articles was twenty-one billion.[14] Even if a court only imposed a fine of one-tenth of one cent per article, the fine would be $21 million.[15] The full $500 penalty per article would total about $10 *trillion*.[16] Even a single penny per article could cause a fine of $210 million.

Little scholarly attention has been paid to the false marking statute until recently. But in light of the recent surge of false marking litigation, it is a good time to examine the statute in order to determine whether it is an effective law. Recently, the false marking statute has been criticized. This Note adds to that criticism, suggesting changes to both the state-of-mind requirement and the standing requirement for false marking suits. To this end, this Note proceeds in four parts. Part II explains the false marking statute and the Federal Circuit case law that has interpreted the statute. It examines the various aspects of the statute: the unpatented article requirement, the intent requirement, and the statutory penalty. The standing issue is also addressed in Part II, with a basic introduction to *qui tam* statutes.

Part III examines the state-of-mind requirement in greater detail. The current requirement is analyzed to determine how it achieves the goals of the false marking statute and the patent laws more generally. Ultimately, Part III concludes with the recommendation that the state-of-mind requirement be reduced to a negligence standard, requiring that the patentee have a reasonable belief that the patent covers the marked article. Such a lower requirement would make it much easier for plaintiffs to win a false marking

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9. *See District Court Cases*, *supra* note 1 (demonstrating in a list of filed false marking cases that many plaintiffs have filed over five false marking suits, including Simonian, which has filed thirty-eight suits since February 23, 2010).

10. Donald W. Rupert, *Trolling for Dollars: A New Threat to Patent Owners*, INTELL. PROP. & TECH. L.J., Mar. 2009, at 1, 3.

11. *Forest Grp.*, 590 F.3d at 1304.

12. The false marking statute imposes a fine *not to exceed* $500 per offense. 35 U.S.C. § 292(a) (2006).

13. 608 F.3d 1356 (Fed. Cir. 2010).

14. Justin E. Gray & Harold C. Wegner, *The New Patent Marking Police: Answering* Clontech *and* Forest Group, GRAY ON CLAIMS, 3 (Jan. 8, 2010), http://www.grayonclaims.com/storage/MarkingPoliceVers4.pdf.

15. *Id.*

16. *Id.*

case but would also better comport with the goals of the false marking statute and patent laws more generally.

Part IV looks in greater detail at standing issues for false marking. It examines how the current standing requirement contributes to the false marking trolls and assesses whether the marking trolls are good for society. Part IV concludes with a recommendation about how Congress should impose a more stringent standing requirement. It assesses a current congressional proposal to impose a standing requirement, how the proposal fits the recommendation, and how it falls short. Finally, Part V offers a brief conclusion.

II. The False Marking Statute

Before the 1842 Patent Act,[17] there was no marking requirement.[18] The 1842 Patent Act imposed a requirement that patentees mark their products with the date of the patent.[19] Failure to do so resulted in a fine of "not less than one hundred dollars."[20] In 1861, the marking requirement reached what it substantially is today. The 1861 Patent Act provided that a patentee could not recover damages for an unmarked article unless the infringer received actual notice of the patent,[21] and the current patent statute is mostly unchanged.[22] Marking an article with a patent mark is intended to notify the public that the article is patented. The Federal Circuit has said that the marking statute serves three purposes: "1) helping to avoid innocent infringement . . . ; 2) encouraging patentees to give notice to the public that the article is patented . . . ; and 3) aiding the public to identify whether an article is patented."[23]

The false marking statute was also added in the 1842 Patent Act.[24] Initially, the statute imposed a fine of "not less than one hundred dollars" for every offense.[25] It has undergone some change throughout the years and now states,

> Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word "patent" or any word

17. Patent Act of 1842, ch. 263, 5 Stat. 543.

18. Nike, Inc. v. Wal-Mart Stores, Inc., 138 F.3d 1437, 1443 (Fed. Cir. 1998).

19. Patent Act of 1842 § 6, 5 Stat. at 544–45.

20. *Id.* §§ 5–6, 5 Stat. at 544–45.

21. Patent Act of 1861, ch. 88, § 13, 12 Stat. 246, 249.

22. *See* 35 U.S.C. § 287(a) (2006) (providing that if a patentee fails to mark, he cannot recover damages unless he can prove that the infringer was notified of the patent and continued to infringe thereafter).

23. *Nike*, 138 F.3d at 1443 (citations omitted).

24. Elizabeth I. Winston, *The Flawed Nature of the False Marking Statute*, 77 TENN. L. REV. 111, 120 (2009).

25. Patent Act of 1842, § 5, 5 Stat. at 544.

> or number importing that the same is patented for the purpose of deceiving the public; or
>
> Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—
>
> Shall be fined not more than $500 for every such offense.[26]

The Federal Circuit has indicated that there are two elements to a false marking offense: (1) "an unpatented article is marked with the word 'patent' or any word or number that imports that the article is patented," and (2) the "marking is for the purpose of deceiving the public."[27] Furthermore, the statute provides that "[a]ny person" may sue for a false marking offense.[28] If that person prevails, one-half of the recovery goes to the plaintiff and the other half goes to the United States.[29] Each of these elements, as well as the standing and penalty issues, will be explored later in this Note.

False marking tends to frustrate the purposes of the marking requirement. False marking will cause the public to avoid infringing on patents that do not exist by providing the public with a fake notice that an article is patented. The Federal Circuit has recognized that false marking can have multiple detrimental effects on the public. First, false marking deters innovation.[30] A person or a company may see a falsely marked article and believe that it is patented. Consequently, that person or company may decide not to improve on that product. This could be for many reasons, chief among which may be the perceived transaction and licensing costs of obtaining rights to use the article. Furthermore, by deterring innovation, false marking stifles competition.[31] Potential competitors may decide not to compete with another company on this same product and thus will not enter the market.[32] Because of this, the public will lose out on the benefits of competition, resulting in an undeserved monopoly on the product for the false marker.[33]

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26. 35 U.S.C. § 292(a). The initial paragraph of § 292(a) has been omitted. It deals not with false marking but counterfeit marking. Counterfeit marking occurs when a person "marks upon, affixes to, or uses in advertising" the name of the patentee, or the patent number of the patentee, without the consent of the patentee. *Id.* It also contains an intent requirement. *Id.*

27. *See* Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1352 (Fed. Cir. 2005) (establishing that a fine is invoked when these two requirements are met).

28. 35 U.S.C. § 292(b).

29. *Id.*

30. Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1302 (Fed. Cir. 2009); *see also* Complaint at 4, Altrach Data Solutions LLC v. Evercare Co., No. 10-CV-0461 (N.D. Ga. Feb. 17, 2010) (alleging that marking with expired patents has the potential to quell product innovation).

31. *Forest Grp.*, 590 F.3d at 1302–03.

32. *Id.*; *see also* Complaint, *supra* note 30, at 4 (alleging that marking with expired patents can quell price competition).

33. *See* Complaint, *supra* note 30, at 4 (alleging that the lack of competing products and the resulting lack of price competition cause harm to the consuming public).

Monopolies tend to increase prices and decrease output, so the public will pay more and get less because of a false mark.[34] Additionally, false marking may cause unnecessary design-around costs.[35] Other companies trying to enter the market may unnecessarily design around the falsely marked article.[36] Thus, companies will spend scarce resources to develop products that perform the same functions as already-existing products.[37] That money could be better spent elsewhere on more worthwhile inventions, rather than attempting to design around an article that the company does not need to design around. Needless design around to produce a product that performs the same function is wasteful.[38] In addition, other companies could waste resources trying to determine whether the patent covers the marked article and whether it is valid and enforceable.[39] These are resources that could possibly be used in valuable innovation but instead are being used to determine the validity and enforceability of a patent that the marker knows does not cover the marked article. This design around imposes a needless cost on the public in the form of wasted resources.

False marking also has a direct detrimental effect on consumers. Consumers may rely on a patent mark as showing a superior quality.[40] Consequently, the consumer may pay more for the falsely marked article than an equivalent product.[41] In these cases, the consumer has been directly deceived. Note that this is a different problem than the monopoly problem. The monopoly problem exists when the manufacturer of the article is the only one in the market because the false mark has caused others not to enter the market. When the consumer relies on a mark as showing a superior quality, there may be competing products, but the consumer decides to buy the falsely marked one because she thinks that it must be superior to the unmarked products.

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34. *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 383–86 (1995) (illustrating how a monopolist will maximize profit by increasing price and decreasing output).

35. *Forest Grp.*, 590 F.3d at 1303.

36. *Id.*

37. *Id.*

38. *See* SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 57 (Comm. Print 1958) (prepared by Fritz Machlup) (criticizing the idea that forcing an inventor to design around a patent is an advantage of the patent system).

39. *Forest Grp.*, 590 F.3d at 1303 (citing Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1356 n.6 (Fed. Cir. 2005)).

40. *See* Winston, *supra* note 24, at 133 (describing a segment of the population that regards patents as indicating that there is something special about the patented article).

41. *See id.* (noting that such consumers provide an "intangible benefit" to the marker).

A. Marking an Unpatented Article

One element of false marking is that the accused has marked an unpatented article.[42] In *Clontech Laboratories, Inc. v. Invitrogen Corp.*,[43] the Federal Circuit said in dicta that "[w]hen the statute refers to an 'unpatented article' the statute means that the article in question is not covered by at least one claim of each patent with which the article is marked."[44] Thus, to determine whether an article is unpatented, the court must interpret the claims and then decide whether the claims read on the article.[45] The statute expressly forbids indicating that a patent is pending or has been patented when in fact no patent application has been filed.[46] One commentator has noted that these are the clearest forms of false marking and has argued that this type of false marking is the most harmful to the public.[47] The party gets a benefit from the marking but without participating in the patent application process.[48] It is even possible—perhaps likely—that the mismarked item is not even patentable. In these cases, the mismarker is getting a benefit that the patent laws have deemed undeserved. Similarly, it is false marking to mark an article as patented when in fact a patent has not yet been granted on an existing application.[49]

The Federal Circuit recently decided that marking an article with an expired patent is also false marking.[50] There is a good argument that marking with an expired patent ought to be considered false marking. Professor Winston has argued that

> because an expired patent is unenforceable and due to the importance of the public's ability to rely on the patent marking, if a marking of an innovation as reading on a patent when the patent has expired was done with the intent to deceive the public, the marking should be found to violate the false marking statute.[51]

She argues that if marking with expired patents is allowed, the public notice function of marking is lost because the interested public will then have to research the listed patents to learn if they are enforceable or expired.[52] However, another commentator has argued that the harm of marking with

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42. 35 U.S.C. § 292(a) (2006).

43. 406 F.3d 1347 (Fed. Cir. 2005).

44. *Id.* at 1352.

45. *Id.*

46. 35 U.S.C. § 292(a); Winston, *supra* note 24, at 123–24.

47. Winston, *supra* note 24, at 123–24.

48. *Id.*

49. *See* Undersea Breathing Sys., Inc. v. Nitrox Techs., Inc., 985 F. Supp. 752, 782 (N.D. Ill. 1997) (finding that the defendant's use of the word "patented" in describing its system for which a patent application had only been filed was deceptive false marking).

50. *See* Pequignot v. Solo Cup Co., 608 F.3d 1356, 1362 (Fed. Cir. 2010) ("[W]e agree . . . that articles marked with expired patent numbers are falsely marked. That conclusion alone does not, however, decide the question of liability under the statute.").

51. Winston, *supra* note 24, at 127–28.

52. *Id.* at 127.

expired patents is exaggerated and that such marking may even have benefits by showing the public where it can get detailed information about the product's technology.[53] The Federal Circuit adopted the view that marking with expired patents presents many of the same policy concerns as marking with inapplicable patent numbers.[54] Specifically, the court rejected the argument that problems of determining validity and enforceability do not exist with expired patents because it can still often be difficult to determine exactly when a patent has expired.[55]

The Federal Circuit's dicta in *Clontech* indicating that at least one claim from *every patent* listed must read on the article in question may represent a drastic change in the law.[56] The Federal Circuit based the decision on a lack of intent to deceive—the experiments that the defendant had performed were not adequate to provide notice that the patent did not actually cover the marked articles; thus, there was no intent to deceive the public.[57] But if the dicta is taken as authoritative, the language could have a profound effect. Prior to *Clontech*, courts had held that language indicating that an article was covered by "at least one of the following patents" did not violate § 292 as long as at least one patent listed did in fact cover the article in question.[58] If the *Clontech* language is read broadly, it could call these prior cases into question. At least one court has seized on this language, allowing a false marking claim to survive a motion to dismiss by saying that what matters is whether the marker used this marking scheme in bad faith.[59] The Federal Circuit has not yet ruled definitively on the issue.

B. Intent to Deceive the Public

While it may seem unfair that any party who marks an article with a patent number that does not actually cover the product could be fined, it does not necessarily mean that the party is guilty of false marking. The patent

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53. *See* Laura N. Arneson, *Defining Unpatented Article: Why Labeling Products with Expired Patent Numbers Should Not Be False Marking*, 95 MINN. L. REV. (forthcoming 2010) (manuscript at 28–34), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599902 (criticizing the view that marking with expired patents is false marking and explaining the advantages to the public of marking with expired patents).

54. *Pequignot*, 608 F.3d at 1362.

55. *Id.*

56. *See* Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1352, 1356 (Fed. Cir. 2005) (rejecting the appellant's "argument that as a matter of law marking under section 292 does not require a good faith belief that the marked article falls within the subject matter defined by at least one claim of each patent with which the article is marked").

57. *Id.* at 1355.

58. 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.03[7][c][vii], at 20-656 to 20-657 (2010).

59. Astec Am., Inc. v. Power-One, Inc., No. 6:07-cv-464, 2008 WL 1734833, at *10–11 (E.D. Tex. Apr. 11, 2008); *see also* Pequignot v. Solo Cup Co., 540 F. Supp. 2d 649, 654–56 (E.D. Va. 2008) (denying a motion to dismiss on the grounds that a conditional statement that a product "may be covered by one or more U.S. or foreign pending or issued patents" may constitute false marking if there is intent to deceive the public).

laws are complicated—a party may have a reasonable belief or argument that a patent does indeed cover an article, only to have a court later determine that the patent does not actually cover the article.[60] To that end, the false marking statute contains an intent requirement. While this Note argues for lessening the intent requirement, it asserts that some kind of state-of-mind requirement should be maintained because of the complexity, and sometimes uncertainty, of the patent laws.[61]

In order to violate the false marking statute, the marker must also have intent to deceive the public.[62] Before *Clontech*, the case law was relatively unclear as to the intent requirement. *Clontech* noted that while the false marking statute is quite old, the case law was so sparse that the court was basically addressing a question of first impression.[63] *Clontech* held that "[i]ntent to deceive is a state of mind arising when a party acts with sufficient knowledge that what it is saying is not so and consequently that the recipient of its saying will be misled into thinking that the statement is true."[64] The court went on to say that while intent to deceive is subjective, it is established by objective criteria.[65] If the accuser can show that the party had knowledge of the falsity, then it is enough to warrant an inference of fraudulent intent.[66] To establish knowledge, the accuser must show that the party did not have a reasonable belief that the article was properly marked.[67] If the accuser can establish knowledge, then "the mere assertion by a party that it did not intend to deceive will not suffice to escape statutory liability."[68]

Intent to deceive the public can be proven in a variety of ways. Direct evidence of intent to deceive the public is not used often. Intent is more often proven by circumstantial evidence.[69] As noted before, the Federal Circuit has held that a lack of reasonable belief that the article is properly marked is required to warrant an inference of intent to deceive the public.[70] Furthermore, before the Federal Circuit was created, the Fifth Circuit noted that if the article marked with a patent is "so obviously not revealed by it as

60. *See Clontech*, 406 F.3d at 1352–53 (stating that the plaintiff has the burden of proving by a preponderance of the evidence "that the party accused of false marking did not have a reasonable belief that the articles were properly marked"); Brose v. Sears, Roebuck & Co., 455 F.2d 763, 768 (5th Cir. 1972) ("[T]he licensee's use in good faith reliance on the license is not to be transmuted into an evil purpose to deceive the public merely on proof and finding that . . . the embodiment in question does 'not read on' or is not an 'infringement' of the cited patent.").

61. *See infra* Part III.

62. 35 U.S.C. § 292(a) (2006).

63. *Clontech*, 406 F.3d at 1351–52.

64. *Id.* at 1352 (citing Seven Cases v. United States, 239 U.S. 510, 517–18 (1916)).

65. *Id.*

66. *Id.*

67. *Id.* at 1352–53.

68. *Id.* at 1352.

69. Winston, *supra* note 24, at 130 (citing Hewlett-Packard Co. v. Bausch & Lomb Inc., 882 F.2d 1556, 1562 (Fed. Cir. 1989)).

70. *Clontech*, 406 F.3d at 1352–53.

the patentese world would view it," then false marking has occurred.[71] But if the device is even within the same field as the patent and the article uses similar materials and methods as the patented article, then the mere mismarking cannot be "transmuted" into intent to deceive.[72]

After *Clontech*, there was a disagreement as to what the case actually meant. According to one view, the case could be interpreted as creating a rebuttable presumption of intent to deceive. If the plaintiff can show that the accused false marker lacked a reasonable belief that the patents covered the products, then the burden shifts to the accused to show that he did not have the requisite intent to deceive the public.[73] But mere assertions of good faith will not suffice to escape liability.[74] The other possible interpretation is that *Clontech* created an irrebuttable presumption of intent to deceive. If the plaintiff can show that the accused mismarker lacked a reasonable belief that the marking covered the patent, then an inference must be drawn that the accused had intent to deceive the public.

The Federal Circuit took this debate up on appeal in *Pequignot v. Solo Cup Co.*[75] Ultimately, the court determined that knowledge of a false mark raises a rebuttable presumption of false marking.[76] The court held that *Clontech* did not stand for the proposition that the presumption is irrebuttable—such a standard would be "'inconsistent with the high bar that is set for proving deceptive intent.'"[77] Furthermore, even though the statute only provides for a civil fine, it is a criminal statute, so the bar for proving intent is especially high.[78] Citing to Supreme Court precedent, the Federal Circuit noted that there is a difference between "purpose" and "knowledge."[79] The presumption is relatively weak—a defendant can rebut it by showing lack of intent to deceive by a preponderance of the evidence.[80] In addition, the presumption is even weaker when expired patents are at issue.[81] The Federal Circuit explicitly blessed an advice-of-counsel defense to rebut deceptive intent; a defendant can argue that he reasonably relied on advice of counsel that marking the products would be appropriate.[82] The

71. Brose v. Sears, Roebuck & Co., 455 F.2d 763, 768 (5th Cir. 1972).

72. *Id.*

73. *See, e.g.*, Pequignot v. Solo Cup Co., 646 F. Supp. 2d 790, 797 (E.D. Va. 2009) (holding that *Clontech* created a rebuttable presumption of intent to deceive).

74. *Clontech*, 406 F.3d at 1352.

75. 608 F.3d 1356 (Fed. Cir. 2010).

76. *Id.* at 1362–63.

77. *Id.* at 1363 (quoting *Pequignot*, 646 F. Supp. 2d at 796–97).

78. *Id.*

79. *Id.*

80. *Id.* at 1364.

81. *Id.*

82. *Id.*

court did, however, reaffirm the principle that blind assertions of good faith cannot rebut intent to deceive.[83]

C. *The Statutory Penalty*

The false marking statute provides that the false marker shall be fined up to $500 for every offense.[84] Unless the government brings the false marking suit, half of the penalty will go to the government and half to the plaintiff.[85] One major question for a long time, however, was what counted as an offense. Before 2009, district courts used various methods to determine how many offenses there had been. The majority approach came from an old First Circuit case, *London v. Everett H. Dunbar Corp.*[86] However, in the twentieth century, another approach arose—the court picked a period of time and every period for which false marking continued was a separate offense.[87] For example, the court could use a week as the period of time and impose a separate fine for every week that the false marking continued. Another approach, rarely used, was to impose a fine for each falsely marked article.[88]

The approach in *London v. Everett H. Dunbar Corp.* was the majority approach until the *Forest Group* decision in 2009. The court in *London* rejected the argument that the statute (which was a predecessor to the current statute) imposed a fine for each article marked, instead holding that intent to deceive the public is the "gravamen of the offense, and the marking [is] the overt act whereby the intent is made manifest."[89] Thus, the court required that the evidence show such "divergence of time and circumstances as to make one act of marking separable and distinct from other acts of marking."[90] It gave the example that a showing that there was an act in June and a separate act in July would be sufficient to show two different offenses.[91] The court's rather narrow definition of an offense appears to be driven by the policy concern that imposing a penalty for every article falsely marked would lead to a penalty entirely out of proportion to the value of the article. For example, if a large number of cheap articles are falsely marked,

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83. *Id.* at 1363.

84. 35 U.S.C. § 292(a) (2006).

85. *Id.* § 292(b).

86. 179 F. 506 (1st Cir. 1910).

87. *See* Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1302 (Fed. Cir. 2009) (surveying federal court opinions that implemented a time-based approach to imposing false marking penalties).

88. *See* Michael R. O'Neill, *False Patent Marking Claims: The New Threat to Business*, INTELL. PROP. & TECH. L.J., Aug. 2010, at 22, 22 (generalizing that historically most courts have disregarded the number of falsely marked articles when calculating fines); Winston, *supra* note 24, at 142 & n.213 (citing a case in which a federal district court assessed a $500 fine for each of three falsely marked products).

89. *London*, 179 F. at 508.

90. *Id.* at 509.

91. *Id.*

the penalty could far exceed the value of the articles. On the other hand, if a small number of expensive articles are falsely marked, the penalty could be very slight in comparison to the value of the articles. The court's concern may have been justified. This promise of an enormous reward appears to be driving the so-called marking trolls to sue. But the problem with the *London* approach is that it does not provide much incentive to actually enforce the false marking statute. It appears that most plaintiffs were not able to show more than one offense in the majority of cases following the *London* approach.[92]

Another approach that was used, albeit rarely, was an approach based on the time the false marking occurred. In this method, the fine is imposed per increment of time in which the false marking occurred. The approach is based on a pre-Federal Circuit case from the Fifth Circuit, *Brose v. Sears, Roebuck & Co.*[93] In a footnote to this case, the court merely noted that a court would find a way to avoid an astronomical award for false marking, for example by limiting each offense to each "day or week or month."[94] At least one court took hold of this language and actually implemented this solution.[95] Even before the Federal Circuit's *Forest Group* decision, this decision was criticized by the district court as having no basis in the statutory language.[96]

The Federal Circuit changed *London*'s majority view in its review of *Forest Group*. The court held that the statutory penalty is to be imposed on a per-article basis, rejecting the argument that *London* should control the penalty.[97] It noted that the statute that *London* had interpreted called for a fine of "not less than one hundred dollars" per offense,[98] rather than the maximum of $500 that the current statute provides for.[99] In 1952, Congress changed the fine[100] because courts had been treating the $100 as a maximum rather than a minimum.[101] The court said that by changing the fine to a maximum rather than a minimum, *London*'s policy concern—that imposing the fine on a per-article basis would lead to disproportionate fines—is

92. *See* Pequignot v. Solo Cup Co., 646 F. Supp. 2d 790, 801 & n.18 (E.D. Va. 2009) (collecting cases that followed the *London* approach and finding only one false marking offense).

93. 455 F.2d 763 (5th Cir. 1972).

94. *Id.* at 766 n.4. Note that the court here was operating on the assumption that the award would have been calculated based on the number of articles that were falsely marked. Because the court held that there was no false marking, it did not reach the issue of the penalty.

95. *See, e.g.*, Icon Health & Fitness, Inc. v. Nautilus Grp., Inc., No. 1:02 CV 109 TC, 2006 U.S. Dist. LEXIS 24153, at *21–22 (D. Utah Mar. 23, 2006) (holding that it was reasonable to conclude that Nautilus used a false mark in advertising once a week and imposing a penalty based on 650 weeks, or 650 offenses).

96. Forest Grp., Inc. v. Bon Tool Co., No. H-05-4127, 2008 U.S. Dist. LEXIS 71502, at *10 (S.D. Tex. Sept. 22, 2008).

97. Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1302 (Fed. Cir. 2009).

98. *Id.* at 1301 (emphasis removed).

99. 35 U.S.C. § 292(a) (2006).

100. Patent Act of 1952, ch. 29, § 292, 66 Stat. 812, 814.

101. 35 U.S.C. § 292 note.

solved.[102] The court also explicitly rejected the time-based approach that *Icon Fitness* had used because such an approach has no support in the statutory language.[103] The Federal Circuit further justified a per-article approach on the policy concern that the harm to the public increases with each article falsely marked. Thus, with each article falsely marked, the fine should increase.[104] *London*'s solution, on the other hand, renders the statute ineffective.[105] The fact that the statute allows any person to bring suit bolsters the argument that the fine should be per article. If *London*'s approach were followed, there would be no incentives for citizens to bring a false marking suit.[106] However, the court emphasized that the $500 fine per article is a maximum.[107] The court held that a district court has discretion to "strike a balance between encouraging enforcement of an important public policy and imposing disproportionately large penalties for small, inexpensive items produced in large quantities."[108] A court can even award a fraction of a penny per falsely marked article.[109]

On remand in *Forest Group*, the Southern District of Texas awarded a penalty of $180 per article that was falsely marked.[110] The falsely marked stilts had been sold at prices ranging from $103 per article to $180 per article.[111] The court based its decision on the three policy goals of *Forest Group*: discouraging false marking, encouraging enforcement, and avoiding disproportionately large penalties.[112] Overall, the fine totaled just under $7,000.[113]

D. Standing to Sue for False Marking

1. Qui Tam *Statutes and Their Problems.*—The false marking statute is a *qui tam* statute. *Qui tam* is a shortened version of *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "who as well for the king as for himself sues in this matter."[114] A *qui tam* statute is one in which the government partially assigns its cause of action to a private citizen.[115] The

102. *Forest Grp.*, 590 F.3d at 1302.
103. *Id.*
104. *Id.* at 1303.
105. *Id.*
106. *Id.* at 1304.
107. *Id.*
108. *Id.*
109. *Id.*
110. Forest Grp., Inc. v. Bon Tool Co., No. H-05-4127, 2010 WL 1708433, at *2 (S.D. Tex. Apr. 27, 2010).
111. *Id.*
112. *Id.*
113. *Id.*
114. BLACK'S LAW DICTIONARY 1368 (9th ed. 2009); J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 541 n.3 (2000).
115. Beck, *supra* note 114, at 541.

citizen, known as a "relator" or an "informer," will sue on behalf of the government and will share in the proceeds of the suit with the government.[116] *Qui tam* statutes have a rich history in England and have been used since before the founding of the United States.[117] However, such statutes have not been as prevalent in the United States as they once were in England.[118] There are only three active *qui tam* statutes remaining in the United States Code:[119] the False Claims Act,[120] a statute concerning Indian tribes,[121] and the false marking statute.[122]

Qui tam statutes have been justified on the ground that they promote adequate enforcement of the statute. For example, the 1986 amendments to the False Claims Act were justified on the grounds that the Justice Department was unwilling to aggressively prosecute fraud and that the government's enforcement resources were limited.[123] The amendments were also justified on the ground that they were needed to incentivize citizens to expose fraud because sometimes the government would otherwise be unaware of the fraud.[124] The beginning of *qui tam* enforcement was likewise based on underenforcement of the law by local officials.[125] One commentator has said that "[*qui tam*] actions prove their value when the public benefits from private knowledge of public harm, but privately held knowledge can be both difficult and expensive for the public to obtain."[126] It is in this way that the adequate level of lawsuits is achieved. Without *qui tam* statutes, the government would not adequately enforce the law because it would lack knowledge of the violations. Allowing individuals to police violations increases the deterrent effect of the law.

Despite the advantages of *qui tam* legislation, a number of drawbacks have also been recognized. One commentator has noted that the problems with *qui tam* statutes are derived from the conflict of interests between private informers and the public, whom the statute is meant to protect.[127] He asserts that the goals of regulatory regimes are deterrence and compensation

116. *Id.*

117. *See id.* at 549–50 (recounting that by the time Blackstone's *Commentaries* were published, *qui tam* statutes had been in force for centuries in England).

118. *Id.* at 553.

119. CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2009).

120. False Claims Act, 31 U.S.C. §§ 3729–3733 (2006).

121. 25 U.S.C. § 201 (2006).

122. 35 U.S.C. § 292 (2006).

123. Beck, *supra* note 114, at 564–65.

124. *Id.* at 563.

125. *Id.* at 567–70.

126. Winston, *supra* note 24, at 139.

127. *See* Beck, *supra* note 114, at 608–09 (recognizing that "*qui tam* legislation provides a personal financial interest in the law enforcement process that often conflicts with other public interests at stake in the litigation").

for the public, but these goals must be counterbalanced with social cost.[128] Enough violations of the law must be prosecuted, but not so many that the public incurs unnecessary costs. The problem with *qui tam* statutes is that the private informer does not have the incentives to protect the public interest, resulting in a number of issues.[129] First, *qui tam* statutes can result in secret settlements, depriving the public of money that it would otherwise receive if the government brought suit or the informer brought a *qui tam* action on behalf of the government.[130] There is no evidence that this is a problem with current false marking suits. But the rash of litigation is new enough that there likely is not yet any data of settlements favorable to the informer but not favorable to the public. By itself, however, this compensation-based objection likely is not enough to justify reforming the false marking regime. The goal of the statute is less about raising money than it is about deterring false marking and protecting the public from deception.

Another recognized problem with *qui tam* statutes, and one that likely is present with current false marking litigation, is overenforcement of the statute. When the government is prosecuting these suits, it can engage in a case-by-case determination of whether the overall public good is served by bringing suit.[131] But when private citizens are bringing suit, there is no incentive to take into account the public good. A rational citizen will look only at the possible recovery for himself. This can lead to filing meritless lawsuits, in hopes of either receiving a settlement or convincing a court of the allegations.[132] Moreover, private citizens will have an incentive to file suits that do not promote the goals of the statute for minor violations.

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128. *Id.* at 609.

129. *See id.* at 611 ("To the extent the informer's personal financial interest conflicts with public interests affected by an enforcement action, the public interest typically will be sacrificed.").

130. *See id.* at 616–20 (providing examples of secret settlements of *qui tam* actions, both under the False Claims Act and English *qui tam* statutes).

131. *Id.* at 610.

132. *See id.* at 624–27 (describing U.S. problems with meritless *qui tam* claims). It is likely that Rule 11 sanctions could be imposed on entirely meritless false marking claims. *See* FED. R. CIV. P. 11(b)(3) (requiring that pleadings have evidentiary support or are likely to have evidentiary support after a reasonable time for investigation or discovery). This issue has not yet arisen, likely because false marking as a major issue is so new. But it is likely that a court would treat false marking claims the same way it would a normal patent infringement suit—by requiring a false marking plaintiff to make a reasonable investigation into whether or not the listed patent covers the marked article. *Cf.* Judin v. United States, 110 F.3d 780, 784–85 (Fed. Cir. 1997) (finding that the trial court abused its discretion in denying Rule 11 sanctions when the plaintiff failed to make a reasonable effort to ascertain whether the accused product fell within the scope of the plaintiff's patent). If it would be reasonable, this may involve testing the product to determine whether it is covered by the patent. However, Rule 11 does not solve the problem completely. While the sanctions awarded may be enough to offset the cost of defending the frivolous suit, a defendant still has to go through the hassle of defending the suit in the first place. Furthermore, one can easily imagine a situation where the plaintiff's conduct rises above the Rule 11 threshold, but the information is sparse enough that the expected costs of the lawsuit on the defendant and the public outweigh the expected benefit to the plaintiff and the public.

Overenforcement of the statute does appear to be a legitimate concern in light of the rash of false marking litigation.[133] Many plaintiffs have filed multiple false marking lawsuits.[134] It is unlikely that these plaintiffs are taking the public good into account when they file suit. There are likely many instances in which there are technical violations of the false marking statute, but the public is not harmed.[135] If a company falsely marks an article, but the company has no competitors, and no person has relied on the marking for making decisions about further research, invention, or purchasing, it is unlikely that anyone has been harmed. A lawsuit will impose additional costs on an already crowded judicial system, causing companies to have to defend possibly meritless suits. Thus, the public will incur substantial costs in processing and defending these lawsuits when there has been no harm to the public. While those who are sued may discontinue their false marking, this does not benefit the public because these false markings were not harming the public in the first place. Furthermore, this rash of lawsuits may deter others from properly marking for fear of being sued. Deterrence of proper marking will actually hurt the public because the public will not get the benefit of notice that patent marking is intended to give.

2. Constitutional Challenges.—A number of cases have challenged *qui tam* statutes as unconstitutional on separation of powers grounds, Appointment Clause grounds, Article III grounds, and due process grounds.[136] As a whole, they have been unsuccessful.[137] The false marking statute specifically has been held constitutional by a district court in the recent case of *Pequignot v. Solo Cup Co.*[138] In *Pequignot*, Solo Cup contended that the false marking statute violates the Article II Take Care Clause.[139] Specifically, Solo Cup argued that the false marking statute violates Article II because it does not afford any way for the Executive Branch to control the litigation.[140] Relying on a number of other cases

133. *But see* Craig Deutsch, Note, *Restoring Truth: An Argument to Remove the* Qui Tam *Provision from the False Marking Statute of the Patent Act*, 11 MINN. J. L. SCI. & TECH. 829, 847–49 (2010) (arguing that the false marking statute is underutilized due to the difficulty of recovery).

134. *See District Court Cases*, *supra* note 1 (listing all of the false marking lawsuits filed since 2007 and who filed them).

135. *See, e.g.*, Arneson, *supra* note 53 (manuscript at 27–36) (criticizing the view that marking with expired patents is false marking and explaining the advantages to the public of marking with expired patents).

136. *See* Beck, *supra* note 114, at 546 n.21 (collecting cases upholding the constitutionality of the *qui tam* provisions in the False Claims Act on various grounds).

137. *See id.* at 545–46 (noting that most federal appellate courts have upheld the constitutionality of the False Claims Act's *qui tam* provisions).

138. 640 F. Supp. 2d 714 (E.D. Va. 2009).

139. *Id.* at 724. The Take Care Clause is "part of the scheme of separation of powers, in which Congress passes the laws, the President enforces them, and the judiciary interprets them." *Id.* (citing Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 760 (5th Cir. 2001)).

140. *Id.*

upholding the constitutionality of the False Claims Act (another *qui tam* statute) on Article II grounds, the long history of *qui tam* legislation, and Article II law, the court held the false marking statute constitutional as applied to the facts of the case.[141] Given the long history of *qui tam* statutes, the multiple courts of appeals that have held other *qui tam* provisions constitutional, and the Supreme Court's upholding of part of the False Claims Act on constitutional grounds while citing *qui tam* statutes' long history, it is unlikely that future constitutional challenges to the false marking statute will be successful.

Recently, there have also been a number of challenges to the standing of individual *qui tam* false marking plaintiffs.[142] *Stauffer v. Brooks Brothers Inc.*,[143] recently decided by the Federal Circuit, addressed the Article III requirements for false marking *qui tam* plaintiffs. It is clear that even though a *qui tam* plaintiff is statutorily authorized to sue, she still must satisfy standing requirements.[144] In order to have standing, a plaintiff must meet three requirements: an injury in fact,[145] causation between the alleged injury in fact and the defendant's action, and a "'substantial likelihood' that the requested relief will remedy the alleged injury in fact."[146] The *qui tam* plaintiff, however, can assert the injury in fact suffered by the assignor (the United States).[147] In *Stauffer*, the plaintiff alleged that the false marking quelled competition, causing harm to the U.S. economy.[148] The district court dismissed this argument, holding that the plaintiff had not alleged injury with any specificity, having shown no injury to any individual competitor.[149] Furthermore, the court said that the possibility of future injury is not sufficient to establish standing.[150] Other courts, however, have recognized that the United States' interest in having its laws enforced is a sufficient injury in fact to confer standing on a *qui tam* plaintiff.[151] The Federal Circuit

141. *Id.* at 724–29. The Supreme Court has also upheld the constitutionality of *qui tam* provisions of the False Claims Act on Article III standing grounds, while declining to address the issue on Article II grounds. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 & n.8 (2000).

142. *See, e.g.*, Stauffer v. Brooks Bros., Inc., 615 F. Supp. 2d 248, 255 (S.D.N.Y. 2009) (holding that the plaintiff lacked standing to bring the *qui tam* false marking claim because the alleged injury was "insufficient to establish an injury in fact to the public"), *rev'd*, No. 2009-1428, 2010 WL 3397419, at *1 (Fed. Cir. Aug. 31, 2010).

143. No. 2009-1428, 2010 WL 3397419, at *1 (Fed. Cir. Aug. 31, 2010).

144. *See Vt. Agency*, 529 U.S. at 771–74 (applying Article III standing requirements to a *qui tam* relator under the False Claims Act).

145. *Id.* at 771 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

146. *Id.* (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)).

147. *Id.* at 773.

148. Stauffer v. Brooks Bros., Inc., 615 F. Supp. 2d 248, 252 (S.D.N.Y. 2009), *rev'd*, No. 2009-1428, 2010 WL 3397419, at *1 (Fed. Cir. Aug. 31, 2010).

149. *Id.* at 255.

150. *Id.* (citing Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151–52 (2009)).

151. *See, e.g.*, Juniper Networks v. Shipley, No. C 09-0696 SBA, 2010 WL 986809, at *6 (N.D. Cal. Mar. 17, 2010) (holding that a marking suit brought on behalf of the United States alleging

agreed with Stauffer and held that he did indeed have standing through the injury to the United States of having its laws broken.[152]

III. Lowering the Intent Requirement

The current standard for a false marking offense is inadequate to achieve its goal of minimizing the harm to the public caused by false marking. Currently, the statute requires intent to deceive the public in order to commit a violation.[153] While the strict interpretation of this standard is correct in light of the plain language of the statute and its penal nature, it does not fully achieve its purpose. Commentators have noted the inconsistency between the level of intent required and the purposes of the statute and thus have argued that the statute should be either interpreted less strictly or amended to allow lesser showings in order to impose liability.[154]

It is quite difficult to prove actual intent to deceive the public. It appears that the Federal Circuit has tried to ease this requirement by allowing a showing of a lack of a reasonable belief that the patent reads on the marked product.[155] If a plaintiff can show a lack of reasonable belief, the burden shifts to the defendant to show that he did not have the requisite intent to deceive the public.[156] Any further judicial action to ease the statute's intent requirement would be inappropriate. The statute on its face requires intent to deceive the public, and turning that requirement into lack of reasonable belief would eviscerate the plain language. Furthermore, the statute is penal in nature. The legislative history indicates that the false marking statute is a criminal provision.[157] Although lawsuits for false marking are civil suits, it is

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violations of the false marking statute is sufficient to establish standing); Pequignot v. Solo Cup Co., 640 F. Supp. 2d 714, 724 n.15 (E.D. Va. 2009) (rejecting an argument that the United States cannot assign its sovereign interest in seeing its laws enforced).

152. Stauffer v. Brooks Bros., Inc., No. 2009-1428, 2010 WL 3397419, at *4 (Fed. Cir. Aug. 31, 2010).

153. 35 U.S.C. § 292(a) (2006) ("Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word 'patent' or any word or number importing that the same is patented for the purpose of deceiving the public . . . [s]hall be fined not more than $500 for every such offense.").

154. *See* Winston, *supra* note 24, at 136–37 (arguing that requiring the relator to prove intent to deceive the public places an "insurmountable" burden on the relator and that the statute should be interpreted as allowing the burden to shift to the marker to show lack of intent if the relator can show objective recklessness); Bonnie Grant, Note, *Deficiencies and Proposed Recommendations to the False Marking Statute: Controlling Use of the Term 'Patent Pending,'* 12 J. INTELL. PROP. L. 283, 300–04 (2004) (remarking that an intent-to-deceive-the-public requirement is inconsistent with the purpose of preventing public deception and arguing that the scienter requirement should be lowered to knowledge or even negligence).

155. *See* Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1352–53 (Fed. Cir. 2005) (noting that a plaintiff must show a lack of reasonable belief "that the articles were properly marked" as patented in order for liability to ensue).

156. *See supra* notes 75–83 and accompanying text.

157. 35 U.S.C. § 292 note (2006).

clear that Congress intended this to be a penal statute.[158] Courts have recognized this penal nature and have held that because the statute is penal, it must be strictly construed.[159] Requiring less than intent to deceive would not be a strict construction of a penal statute. Rather, it would punish somebody for what is not a literal violation of the statute.

Congress should instead amend the false marking statute to require only a lack of reasonable belief that the patent reads on the article. The harm that flows from mismarking does not depend on whether there was intent to deceive—the mismarking itself causes the harm. Even without intent to deceive, a false mark can deter both competition with the product and further research on the technology in attempts to improve it or create other products.[160] Furthermore, to the extent that consumers may be harmed by false marking, they will rely on patent marks as indications of superiority regardless of whether the underlying marking was intended to be fraudulent.

This Note does not propose doing away with any kind of state-of-mind requirement, however, because of the complexity of the patent laws. A patent attorney can reasonably construe a patent differently than a court will. The Federal Circuit often overturns district court constructions of patent claims.[161] But on the other hand, because the injury of mismarking occurs regardless of intent to deceive, a company should not be able to mark any product that it manufactures with a patent without some reasonable belief that the article covers the product, even if there is no intent to deceive. If the public is meant to endure the limited monopoly conferred by a patent, the patent holder should be expected to know (or have a reasonable belief about) what the patent covers. Because of the enormous benefit of a patent, a patent holder should be required to obtain a reasonable belief, likely by consulting with a patent attorney, that its product is indeed covered by its patent. It should not be the job of the public, unfamiliar with the patent laws and the patentee's patent, to determine whether a product is really covered by a patent.[162]

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158. *Id.*

159. *See* Proportion-Air, Inc. v. Buzmatics, Inc., No. 94-1426, 1995 WL 360549, at *3 (Fed. Cir. June 14, 1995) (observing that the false marking statute is penal in nature and must be strictly construed); Mayview Corp. v. Rodstein, 620 F.2d 1347, 1359 (9th Cir. 1980) (stating that § 292 is penal in nature and therefore must be strictly construed); Brose v. Sears, Roebuck & Co., 455 F.2d 763, 765 (5th Cir. 1972) (acknowledging that the plaintiff's failure to prove any of the elements under the statute would have proved fatal to his case because the false marking statute is penal in nature and must be strictly construed); Chamilia, LLC v. Pandora Jewelry, LLC, No. 04-CV-6017 (KMK), 2007 WL 2781246, at *10 (S.D.N.Y. Sept. 24, 2007) ("Because [§] 292 is, unlike the Lanham Act, a penal statute, it must be strictly construed . . . .").

160. Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1303 (Fed. Cir. 2009).

161. *See, e.g.*, PIN/NIP, Inc. v. Platte Chem. Co., 304 F.3d 1235, 1245–47 (Fed. Cir. 2002) (holding that the district court improperly interpreted patent claims and remanding the case to be reconsidered under the proper claim constructions).

162. *See* Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1356 (Fed. Cir. 2005) (noting that false marking inhibits full and free competition of ideas because it "misleads the public into believing that a patentee controls the article in question . . . , externalizes the risk of error in the

Changing the text of the statute itself solves the problems of judicially created solutions to easing the intent requirement. If the statute required some form of negligence, there would be no problem with evisceration of the plain language of the statute as there would be if knowledge of false marking could establish an irrebuttable presumption of intent to deceive. Furthermore, even if the penal nature of the statute is not changed as suggested below, there are no notice problems with holding somebody in violation of the statute when he may not have literally violated its terms. While it may seem unfair to impose a large statutory penalty on someone who has no intent to deceive, this harshness can be mitigated by further amending the statute as discussed below.[163] Even if the standing requirement is not amended, the level of culpability could be a factor in determining the penalty per falsely marked article.

IV. Fixing the Standing Requirement: Fending off the Marking Trolls

The combination of the *Forest Group* decision and the *qui tam* feature of the false marking statute has given rise to a new industry of policing false marking—marking trolls. This development is not surprising. One major problem in England's experience with *qui tam* legislation was professional informers.[164] The Federal Circuit itself recognized that its *Forest Group* decision could lead to the rise of a cottage industry for enforcing the false marking statute.[165] However, while there are certainly benefits to *qui tam* legislation, such as adequate enforcement of laws of which violations would otherwise be underreported, the costs in this case, outlined above, likely outweigh any such benefits. The judicial system has been flooded with false marking suits since the *Forest Group* decision.[166] Such a flood of litigation overburdens an already crowded judicial system with plaintiffs that likely have not been harmed in any way by the false marking. This Note's previous recommendation to lower the state-of-mind requirement for false marking will create even more incentives for marking trolls to sue.[167] Furthermore, as there may not be a requirement that the public actually be harmed, it is possible that many of these alleged false markings will not have actually harmed the public. Thus, the possible enormous reward of a successful false

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determination, placing it on the public rather than the manufacturer or seller of the article, and increases the cost to the public" in determining who controls the intellectual property).

163. *See infra* Part IV.

164. Beck, *supra* note 114, at 577–78. The professional informers obtained a bad reputation in England, leading one commentator to call them "viperous Vermin." *Id.* at 578 (citation omitted).

165. *Forest Grp.*, 590 F.3d at 1303–04.

166. *See District Court Cases*, *supra* note 1 (listing more than 600 false marking cases filed since December 29, 2009, the day after *Forest Group* was decided).

167. *See* Deutsch, *supra* note 133, at 848–49 (asserting that if the plaintiff's burden of proving intent was reduced, the number of *qui tam* actions under the false marking statute would "certainly increase").

marking suit, coupled with the *qui tam* nature of the false marking statute, is leading to lawsuits by plaintiffs who have likely not been harmed alleging false marking that may not have harmed the public in the first place. The judicial system's resources could be better spent on deterring conduct that is actually harming the public and compensating plaintiffs that were actually harmed.

This Note proposes that the *qui tam* nature of the false marking statute be changed to a compensatory system. England abandoned all *qui tam* legislation in the 1950s due to the extensive problems brought on by *qui tam* statutes.[168] There has also been a proposal in the House of Representatives to amend the false marking statute to require some kind of individual standing with a compensatory regime. The bill amends § 292(b) to read "[a] person who has suffered a competitive injury as a result of a violation of this section may file a civil action in a district court of the United States for recovery of damages adequate to compensate for the injury."[169] This bill would require a "competitive injury" to the plaintiff and would change the amount awarded to an amount "adequate to compensate for the injury."[170] While this bill is a step in the right direction, this Note will offer a couple of comments.

First, the requirement of a competitive injury may be unduly restrictive. It is currently unclear what would be required for a competitive injury. However, on its face, it appears as if this language would likely limit recovery to plaintiffs that are in direct competition with the defendant. Such an interpretation would be underinclusive. There may be plaintiffs that are not in direct competition with the defendant but who are deterred by the false mark from related research in their own industries. There may also be people or companies who are not yet in competition with the defendant but are deterred from entering the market because of the potential costs of patent licensing or research into patent scope. Finally, it is possible that consumers could be harmed by relying on a patent mark as an indication of superiority or technological innovation, causing them to purchase marked products when in fact they could have settled for a less expensive, unmarked product of similar quality. While it would likely be difficult for these consumers to show an injury, there is no reason to exclude them from the statute. It is possible that competitive injury could encompass all of these types of harm. However, as written the statute is unclear, and it would likely be left to the courts to decide. Thus, the term *competitive injury* should merely be replaced with the term *injury*. If a plaintiff can show the three requirements for standing—injury in fact, a causal connection between the alleged injury and the defendant's conduct, and an injury that is likely to be redressed by

168. *See* Beck, *supra* note 114, at 605–08 (describing the events leading up to the abolition of *qui tam* legislation in England and the multiple criticisms of *qui tam* informers in Parliament).

169. H.R. 4954, 111th Cong. (2010).

170. *Id.*

the courts—then the plaintiff should have standing to sue for false marking.[171]

Second, as one commentator has noted, it is unclear how to reconcile the requirement of damages adequate to compensate the injury with the fine of up to $500 per offense, which would still remain in the statute.[172] The general idea of the amendment is adequate—the false marking statute should be changed to an entirely compensatory regime. Without a compensatory regime, there is still an incentive for plaintiffs who have not been harmed to sue on any questionable marking in order to elicit a settlement from a competitor. The problem of filing lawsuits in hopes of achieving enormous penalties in the face of only slight injury would also persist. A company that can show harm, but only a small amount, may be awarded a sum entirely out of proportion to the harm incurred. By instituting a compensatory regime, the role of the courts is confined to remedying those false markings that have a substantial impact on the public. Thus, a compensatory regime would help to ensure that the benefits of false marking lawsuits would outweigh the cost of the lawsuits' drain on judicial resources.

Some may argue that a compensatory regime would not be sufficient to deter intentional and fraudulent false marking—false marking that is solely intended to gain a competitive advantage. Some people or companies may deem it worth the risk to engage in false marking if the only penalty is compensatory damages. Indeed, it may often be difficult to prove a large amount of damages. Thus, in cases of fraudulent intent, it may be appropriate to award treble damages, in the same way that damages for willful infringement can also be enhanced.[173] Allowing treble damages for intentional false marking would better deter those who seek to fraudulently gain a competitive edge. On the other hand, those who negligently mismark would not be subject to treble damages. It is unlikely that such a drastic measure would be needed to deter negligent false marking.

It is true that it may be difficult for individual consumers to show actual damages, and if they can, it is probably unlikely that the damages would be high enough to bring a false marking suit. However, this is not a reason to deny consumers the ability to bring false marking claims. If a consumer can show an adequate injury, there is no reason why that person should not be

171. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (maintaining that, at a minimum, standing requires a plaintiff to have suffered injury in fact, a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision of the courts).

172. Christina L. Brown & Taffie N. Jones, *Proposed Legislation Under the Patent Reform Act*, MBHB'S FALSE MARKING NOTES & COMMENTS (Mar. 22, 2010), http://falsemarkingmbhb.typepad.com/mbhbs-false-marking-notes-comments/2010/03/propsed-legislation-under-the-patent-reform-act.html (referring to identical language in a proposed amendment to a Senate bill).

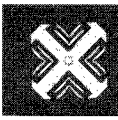
173. *See* 35 U.S.C. § 284 (2006) (allowing a court to award damages up to three times the amount found).

allowed recovery. Furthermore, if enough consumers have been harmed, false marking lawsuits may be amenable to class actions.

V. Conclusion

The false marking statute has received little attention until recently. There were very few false marking lawsuits until *Clontech* was decided in 2005. It was not until *Forest Group* that the statute became an effective cause of action. However, there are some deficiencies in the false marking statute as observed in this Note and other scholarship. Thus, this Note has made two recommendations to address these inadequacies. First, the state-of-mind requirement for a false marking violation should be lowered. All that should be required is a lack of reasonable belief that the patent reads on the product at issue. Second, in light of this relaxation of the requirements to prove a false marking violation and the *Forest Group* decision opening the door to potentially astronomical fines, the standing requirement should be tightened. A false marking plaintiff should have to meet the Article III standing requirements himself rather than being assigned the government's harm. Furthermore, the recovery should be compensatory, with possible treble damages for intentional false marking. These recommendations would help the false marking statute to better address the harm caused by false marking, while discouraging an emerging and potentially wasteful cottage industry in false marking litigation.

Christopher G. Granaghan



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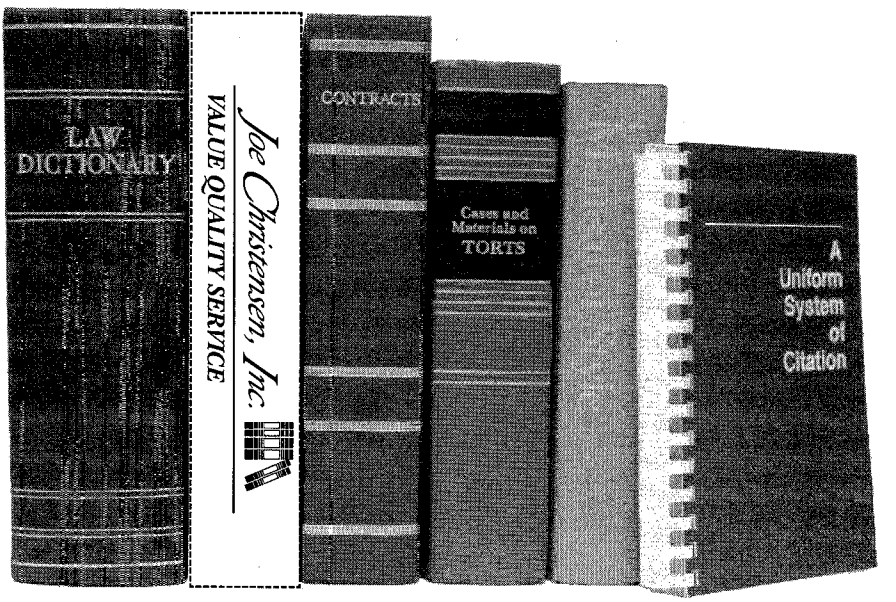

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