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Articles

The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property

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> Your knowledge is nothing if no one else knows you know it.[1]
>
> —Latin Proverb

Introduction

Contemporary law has become grounded in the conviction that not only the *outputs* of innovation—artistic expressions, scientific methods, and technological advances—but also the *inputs* of innovation—skills, experience, know-how, professional relationships, creativity, and entrepreneurial energies—are subject to control and propertization. In other words, we now face a reality of not only the expansion of intellectual property (IP) but also "cognitive property." The new cognitive property has emerged under the radar, commodifying intellectual intangibles that have traditionally been kept outside of the scope of intellectual property. This Article introduces the growing field of human capital law at the intersections of IP law, contract and employment law, and antitrust law and cautions against the devastating effects of the growing enclosure of cognitive capacities in contemporary markets.

Regulatory and contractual controls on human capital—postemployment restrictions, including noncompetition contracts, nonsolicitation, nonpoaching, and antidealing agreements; collusive do-not-hire talent cartels; pre-invention assignment agreements of patents, copyright, as well as nonpatentable and noncopyrightable ideas; and nondisclosure agreements, trade secret laws, and economic-espionage prosecution against former insiders—are among the fastest growing frontiers of market battles.[2]

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1. The original Latin: *Scire tuum nihil est, nisi te scire hoc sciat alter.* Jim Russel, *Your Knowledge Is Nothing If No One Else Knows You Know It*, PAC. STANDARD, Oct. 2, 2013, http://www.psmag.com/business-economics/knowledge-nothing-one-else-knows-know-67445, *archived at* http://perma.cc/XM4C-FBAA; *see also* A NEW DICTIONARY OF QUOTATIONS FROM THE GREEK, LATIN, AND MODERN LANGUAGES 422 (Philadelphia, J.B. Lippincott & Co. 1859) ("Your own knowledge is as nothing, goes for nothing, unless others know that you possess such knowledge.").

2. *See* Steven Greenhouse, *Noncompete Clauses Increasingly Pop up in Array of Jobs*, N.Y. TIMES, June 8, 2014, http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?r=0, *archived at* http://perma.cc/ZEV2-NJ5J (discussing the problems and benefits resulting from the widening use of noncompete clauses in employment contracts); Eric Goldman, *Congress Is Considering A New Federal Trade Secret Law. Why?*, FORBES (Sept. 16, 2014, 12:14 PM), http://www.forbes.com/sites/ericgoldman/2014/09/16/congress-is-considering-a-new-federal-trade-secret-law-why/, *archived at* http://perma.cc/LLR2-HLAP (analyzing new legislation that would strengthen federal trade secret law and questioning whether such legislation is necessary); Joel Rosenblatt, *Apple, Google, Intel, Adobe Settle Antitrust Hiring Case*, BLOOMBERG (Apr. 24, 2014, 11:01 PM), http://www.bloomberg.com/news/2014-04-

Regionally and globally, these disputes heavily shape industrial competition. Through this web of extensively employed mechanisms, knowledge that has traditionally been deemed part of the public domain becomes proprietary. Pre-innovation assignment agreements regularly go beyond the subjects that IP deems commodifiable. They also regularly reach into the future, propertizing innovation that has not yet been conceived. Nondisclosure agreements span beyond traditionally defined secrets under trade secrecy laws and are routinely enforced by courts.[3] Violations of secrecy requirements are also increasingly criminalized, chilling exchanges that are recognized as productive and consistent with professional norms. Noncompete agreements are now required in almost every industry and position, stymieing job mobility and information flows. Beyond the individualized agreements between firms and employees, new antitrust investigations of Silicon Valley giants, including Apple, Google, Intel, eBay, and Pixar, reveal the rise of collusive antipoaching agreements between firms. Postemployment restrictions have become so widespread that they form a cognitive property thicket that curtails efficient recruitment efforts and entrepreneurship.

While IP law restricts knowledge and information that cannot be taken out of the public domain, this delicate balance is subverted in the emerging field of human capital law. In patent law, the lines between nonpatentable abstract ideas and patentable inventions are heavily monitored. Most recently, in June 2014, the Supreme Court unanimously ruled that a computer-implemented electronic escrow service for facilitating financial transactions was ineligible for patent protection because the claims were drawn to an abstract idea rather than a patentable invention.[4] Similarly, in copyright law, the boundaries between expressions and ideas are extensively policed to ensure that ideas themselves will not become property.[5] And yet, this Article uncovers how the logic of IP, cautiously maintaining a balance between monopolized information and the public domain, between propertized intangibles and knowledge flow, is undermined by a second,

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24/apple-google-intel-adobe-settle-antitrust-hiring-case.html, *archived at* http://perma.cc/4UBW-6FLA (discussing the settlement of a recent lawsuit against numerous technology companies for illegally colluding not to poach or solicit one another's employees).

3. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 155 & n.20 (1998) (describing confidentiality agreements as "enhanc[ing] the noncontractual protection given trade secrets" and noting that the Uniform Trade Secrets Act allows for such agreements).

4. Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347, 2360 (2014).

5. For example, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court stated that "copyright's idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (1983)) (internal quotation marks omitted).

rapidly growing layer of cognitive controls through human capital law. The expansion of controls over human capital has thus become the blind spot of IP debates.

The talent wars are heated. More than ever before, the recruitment, retention, and engagement of employees sit atop businesses' priority lists,[6] and yet human capital law remains diffuse and murky. Analyzing the current state of human capital law against new empirical research, this Article challenges orthodox economic assumptions about the need for cognitive property, demonstrates the inadvertent harm from the unrestrained shifts toward such controls, and calls for the recognition of human capital as a shared public resource. The realities of twenty-first-century production and competition, which have changed work patterns and increased the premium on constant innovation, coincide with the accumulation of new empirical insights on innovation and knowledge creation. While these developments are of great significance, legal scholarship on human capital remains surprisingly thin. The traditional and underdeveloped analysis of human capital law views controls over human capital as necessary to generate investment and growth. At the same time, a growing body of empirical evidence indicates that excessive human capital controls have detrimental effects. Law's role in safeguarding and promoting human capital as a shared resource is little understood. A closer study of human capital law regimes suggests that the most successful regional economies have relied on legal regimes that nurture a cognitive commons, protect mobility, and encourage the densification of knowledge networks.

The Article proceeds as follows: Part I argues that the contemporary IP debates have obscured the broader ways in which knowledge and the potential to innovate are restricted. The Part presents three interrelated expansions of human capital controls. First, *subject-wise*, through agreements assigning all innovation "*whether patentable or nonpatentable; whether copyrightable or noncopyrightable*,"[7] as well as through developments in trade secret law, the propertization of intangible assets has expanded deep into the intangibility spectrum, enclosing knowledge that falls outside the scope of patent and copyright. The increased criminalization of trade secret protections, far more amorphously defined than other IP pillars, functions to further subvert the boundaries between protectable and nonprotectable knowledge. Second, *time-wise*, ownership has expanded to future innovation as well as attempts to go back in time and capture prior knowledge that an employee held when joining a firm. The expansion

6. Josh Bersin, *The Year of the Employee: Predictions for Talent, Leadership and HR Technology in 2014*, FORBES (Dec. 19, 2013, 10:10 AM), http://www.forbes.com/sites/joshbersin/2013/12/19/ten-predictions-for-talent-leadership-and-hr-technology-in-2014/, *archived at* http://perma.cc/5N6L-CY2X.

7. *See infra* sections I(B)(1)–(2).

includes a rise in both pre-innovation assignment contracts, including trailer clauses, which reach into the postemployment period to assign IP ownership back to the firm, as well as new legal constructs, including the assignor estoppel doctrine, which prevents assignors from challenging the validity of a patent. The assignor estoppel doctrine dramatically limits the defenses available to former employees who seek to compete in the industry and turns these experienced employees into legal liabilities of the new firms that recruit them. Third, *scope-wise*, recent years have witnessed a colossal rise in the use of noncompetes along with a shift from individualized controls to metacontrols—cognitive cartels—as evidenced in the ongoing antitrust class action suit against Silicon Valley high-tech giants for their no-poaching agreements.

Analyzing new empirical research on the nexus between innovation and human capital, Part II uncovers the harms of the new cognitive property by developing a novel taxonomy of different types of knowledge as they relate to human capital flows: tacit, relational, networked, motivational, and disruptive. Each aspect of knowledge helps explain the various harmful effects of the new cognitive property. The Part analyzes these effects of contemporary human capital law through the lens of new economic research about endogenous growth, labor-market search, and innovation networks, demonstrating the extent to which markets benefit from continuous investment in shared cognitive capital.

Part III argues that the rise in cognitive controls should be understood as the Third Enclosure Movement, turning human capital and intangibles of the mind—knowledge, experience, skill, creativity, and network—into property, with detrimental effects on the public domain. This Part explains these developments in relation to the ongoing shift from viewing IP through the lens of antitrust to the lens of property. The expanding lens of property into the intangibles of the mind has now reached the next frontier, enclosing not merely innovation but the potential for innovation. This Part further shows how regions that promote employee mobility encourage positive spillovers and densification of knowledge networks, which lead to economic growth and innovation, and conversely how regions that restrict employee mobility stifle growth. Finally, this Part demonstrates how the threat of litigation diminishes the quality of human capital and encourages companies to hire employees with no experience rather than seasoned employees. The new cognitive property benefits incumbent firms with superior resources and chills new market entry. The Article concludes with a call to reform human capital law from a nebulous set of harmful doctrines to a body of law committed to the promotion of innovation, knowledge flow, and economic growth.

I. Erecting Cognitive Fences: From Outputs to Inputs

A. Human Capital Law and the Knowledge Economy

In the past two decades, scholars from a wide variety of disciplines have warned against the overexpansion of knowledge controls through IP policy. The debate surrounding the effects of IP laws on inventive activity and technological progress is enduring and lively. At the same time, the field of human capital—at the intersection between IP law, contract law, employment law, and antitrust—has been relatively neglected and presents urgent and fertile grounds for important inquiry on how knowledge is created, owned, distributed, and shared in contemporary economies. A closer look at human capital law reveals a dangerous expansion of controls over cognitive capacities, far beyond the bargain struck in IP law.

Nobel Laureate Elinor Ostrom, who pioneered research on economic governance, described knowledge as "a shared resource, a complex ecosystem that is a *commons*—a resource shared by a group of people that is subject to social dilemmas."[8] Ostrom defined knowledge as "all intelligible ideas, information, and data."[9] While Ostrom viewed knowledge as a shared resource, IP recognizes some forms of knowledge as privately owned. This legal conceptualization of knowledge as property is a fairly recent development, reaching its dominance around the world only in the past century.[10] In ancient times, there was little formal protection for intangible goods.[11] Over time and most dramatically in the past few decades, notions over ownership of information and knowledge have significantly evolved. The term "intellectual property" itself did not become prevalent until the late 20th century.[12]

The drive to control information through legal tools is obvious: in its unregulated state, information travels quickly. Knowledge is, by its very nature, a public good, and it expands and multiplies without running out. Without effort, ideas flow freely. Thomas Jefferson viewed the free spread of ideas "over the globe, for the moral and mutual instruction of man, and improvement of his condition" as akin to air and fire: "[Ideas are] peculiarly and benevolently designed by nature, when she made them, like fire,

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8. Charlotte Hess & Elinor Ostrom, *Introduction: An Overview of the Knowledge Commons*, *in* UNDERSTANDING KNOWLEDGE AS A COMMONS 3, 3 (Charlotte Hess & Elinor Ostrom eds., 2007).

9. *Id.* at 7.

10. *See* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 39–41 (2002) (detailing the historical protection of intangible, knowledge-based property); *Intellectual Property*, STANFORD ENCYCLOPEDIA PHIL. (Sept. 22, 2014), http://plato.stanford.edu/entries/intellectual-property, *archived at* http://perma.cc/D99U-9S4Z (noting that recent international treaties have expanded intellectual property protections across the globe).

11. WALTERSCHEID, *supra* note 10, at 39.

12. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031, 1033–34 & tbl.1 (2005).

expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation."[13]

Yet, especially in recent years, with the shift from an industrial economy to a knowledge- and service-based economy,[14] ideas have enormous commercial value. For this reason, over the past few decades, IP rights have expanded in length of protection, subject matter, and scope.[15] Patent eligibility has expanded to new categories, such as computer software, business methods, and genetically modified organisms.[16] Lawmakers have expanded and lengthened copyright protections.[17] Trademark law now protects the value of the brand beyond the logo and beyond the original purpose of preventing consumer confusion.[18] Trade secret law spans new subject matters and modes of infringement.[19] Together, this body of law has been hailed "the foundation of the modern information economy. It fuels the software, life sciences, and computer industries, and pervades most other products we consume."[20] But as the scope of IP protection has expanded, the field has also become one of the most contested areas of policy. From music-file sharing to broadcasting, from drugs for AIDS to patent trolls, "[t]he intellectual property wars are on."[21]

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13. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THE COMPLETE JEFFERSON 1011, 1015 (Saul K. Padover ed., 1943).

14. *See generally* Joseph E. Stiglitz, *The Book of Jobs*, VANITY FAIR, Jan. 2012, http://www.vanityfair.com/politics/2012/01/stiglitz-depression-201201, *archived at* http://perma.cc/YZW6-P877 (discussing the current transition from an industrial economy to a service-based economy).

15. *See* WALTERSCHEID, *supra* note 10, at 296, 300; Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 35, 88 (2010).

16. Joshua D. Sarnoff, *Patent-Eligible Inventions After* Bilski*: History and Theory*, 63 HASTINGS L.J. 53, 119 (2011); Jacob S. Sherkow, *The Natural Complexity of Patent Eligibility*, 99 IOWA L. REV. 1137, 1139 (2014).

17. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827–28 (1998) (codified as amended at 17 U.S.C. §§ 301–304 (2012)); Beckerman-Rodau, *supra* note 15, at 63–64.

18. Michael A. Johnson, *The Waning Consumer Protection Rationale of Trademark Law: Overprotective Courts and the Path to Stifling Post-Sale Consumer Use*, 101 TRADEMARK REP. 1320, 1322 (2011); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010); Note, *The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment*, 127 HARV. L. REV. 995, 995–96 (2014).

19. ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 106 (2013).

20. Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, *in* 2 INNOVATION POLICY AND THE ECONOMY 51, 51 (Adam B. Jaffe et al. eds., 2002).

21. Gaia Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257, 2262 (2010). The Supreme Court has heard a substantial number of cases relating to patents, copyrights, or trademarks over the past two terms alone. *See, e.g.*, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (relating to copyright); Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014) (relating to patent); Nautilus, Inc., v. Biosig Instruments, Inc., 134 S. Ct. 2120 (2014) (relating to patent); Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) (relating to copyright); Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843 (2014) (relating to patent); Ass'n for Molecular

The fierce battles over the proper scope of IP law raise questions about the costs and benefits of controlling knowledge and the distributional effects of the current legal regime. IP rights are generally understood as a "carefully crafted bargain."[22] The bargain is quid pro quo: inputs to innovation are rewarded with exclusivity over certain outputs of innovation for a limited time.[23] The prevailing consensus is that IP protections themselves are mostly harmful, but the incentive system they create is valuable.[24] In other words, IP law is a necessary evil: it promotes innovation by creating a temporary monopoly.[25] The debates normally surround the scope of enclosure and the limits of this necessary evil.[26] Increasingly, scholars believe that the contours of this bargain have exceeded their limits. A decade ago, a group of scholars and activists denounced "excessive, unbalanced or poorly designed intellectual property protections" when they drafted an open letter to the director–general of the World Intellectual Property Organization (WIPO).[27] The letter called for updated approaches to knowledge building and sharing.[28] Since then, the quest to reach the right balance between public domain and IP protections has only intensified. In March 2013, the central provisions of the America Invents Act, the first major patent law reform since 1952, went into effect.[29] Currently, several major patent, trade secrets, and copyright reform bills are before Congress.[30]

Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013) (relating to patent); Already, LLC v. Nike, Inc., 133 S. Ct. 721 (2013) (relating to trademark).

22. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33 (2003) (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150 (1988)) (internal quotation marks omitted).

23. *See* Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 131 (2004) (noting that under the "classic incentive story," creators are granted exclusive rights over their works, permitting creators to control the price and availability of their works).

24. *See id.* (describing the negative effects of IP protections—stifling downstream innovation and decreasing the number of consumers who can afford the protected works—and noting that these effects are designed to incentivize creation).

25. *Id.*

26. A growing but significant minority of commentators advocate against intellectual property as an unnecessary evil that ultimately reduces access and slows down progress in the arts and sciences. *See generally* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY (2008).

27. Declan Butler, *Drive for Patent-Free Innovation Gathers Pace*, 424 NATURE 118, 118 (2003).

28. *Id.*

29. David Goldman, *Patent Reform Is Finally on Its Way*, CNN MONEY (June 24, 2011, 11:05 AM), http://money.cnn.com/2011/06/24/technology/patent_reform_bill/index.htm, *archived at* http://perma.cc/M47B-PUEK; *Leahy-Smith America Invents Act Implementation*, USPTO, http://www.uspto.gov/aia_implementation, *archived at* http://perma.cc/D8UA-MEVW. For the content of the act itself, see Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 28 U.S.C. and 35 U.S.C.).

30. *See, e.g.*, Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, H.R. 845, 113th Cong. (2013) (providing "for the recovery of patent litigation costs, and for other purposes"). Currently, there are multiple bills before Congress aimed at strengthening trade secret

While the scope of IP has triggered lively disputes and exchanges as well as intense, ongoing efforts by legislatures and courts to strike the right balance, these debates have overshadowed a deeper expansion into the world of intangible goods. Under the radar, excessive, unbalanced, poorly designed (to borrow the language of the WIPO letter) human capital controls have wildly expanded and are widespread in almost every industry.[31] And yet, strikingly, their expansion has been largely neglected in the IP wars. These contractual and regulatory constraints on the use of knowledge, skill, and information acquired during employment consist of (1) pre-innovation assignment agreements that go beyond the subjects and timeline that IP deems commodifiable; (2) nondisclosure agreements and secrecy restrictions, which span beyond traditionally defined secrets under trade secret law, as well as the increased criminalization of secrecy infringement; (3) airtight noncompete agreements; (4) postemployment career restrictions, including antisolicitation and nondealing clauses; and (5) most recently, meta-noncompetes: anticompetitive labor-market collusion through multilateral antipoaching agreements. Each of these central mechanisms, vigorously employed by companies to propertize human capital, is subject to doctrinal rules and litigation but has received surprisingly little attention as a field of law.

B. The Intangible Spectrum

1. Evan Brown's Abstract Solution: "Whether Patentable or Non-patentable."—Eureka! The sudden realization of a solution to a problem. Evan Brown, a computer programmer from Texas, claimed to have experienced such a flash of genius one weekend while driving.[32] Brown claimed that at that moment the problem he had been trying to solve for over two decades, an abstract algorithm that would be the basis of adapting old software to new hardware, had come to him.[33] Brown was an employee at

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protections. *See, e.g.*, Deter Cyber Theft Act of 2014, S. 2384, 113th Cong. (2014) (proposing safeguards to deter international trade secret theft in cyberspace); Defend Trade Secrets Act of 2014, S. 2267, 113th Cong. (2014); Private Right of Action Against Theft of Trade Secrets Act of 2013, H.R. 2466, 113th Cong. (2013); Press Release, Senator Sheldon Whitehouse, Whitehouse and Graham Working to Crack Down on Economic Espionage (July 29, 2013), *available at* http://www.whitehouse.senate.gov/news/release/whitehouse-and-graham-working-to-crack-down-on-economic-espionage, *archived at* http://perma.cc/XH4G-PBP2 (describing a proposed draft of legislation intended to "help prosecutors crack down on economic espionage and trade-secret theft"). For further discussion of pending congressional acts concerning intellectual property rights, see Joshua Sibble, *International Trend Toward Strengthening Trade Secret Law*, INTELL. PROP. & TECH. L.J., Apr. 2014, at 18, 18–19.

31. Greenhouse, *supra* note 2.

32. This example is adapted from LOBEL, *supra* note 19, at 141–44.

33. Dan Michalski, *Street Talk: Who Owns Your Brain?*, D MAG., June 2001, http://www.dmagazine.com/publications/d-magazine/2001/june/street-talk-who-owns-your-brain, *archived at* http://perma.cc/7WSX-MPF7.

the technical-support department of the telecommunications company DSC Communications, now known as Alcatel USA.[34] At the beginning of his employment, Brown signed an innovation assignment clause with Alcatel assigning Alcatel "full legal right, title and interest" in any future inventions,[35] including transfer of "all information concerning any discoveries or inventions he made or conceived while in its employ which related to the nature of the company's business."[36] When Brown made his discovery, he attempted to negotiate a deal to share the profits of the "Solution," as it would be called in court, with Alcatel.[37] Alcatel instead fired him and sued for full ownership over the Solution.[38] After seven years of litigation, a Texas court ruled in favor of Alcatel, holding that Brown's algorithms belonged to his former employer.[39] The Texas court found that the Solution was an invention or conception falling under the terms of the employment agreement and that the employment contract applied to the Solution because Alcatel was in a business related to the Solution and that "one of Brown's job functions was to manually convert Alcatel's existing low-level code to high-level code."[40] The practical result was that Brown, postemployment and postlitigation, commuted for several months to Alcatel's offices and programed the Solution he had conceived in his mind, all without compensation.[41]

Brown's case became a symbol of the outrage felt by inventors required to hand over their innovations to their former employers.[42] Scott Adams created a Dilbert strip about Brown's all-too-common experience, showing an employee asked to "cough up his idea."[43] Brown's story is far from unique. Pre-invention assignment clauses are pervasive and standard across many industries and jobs.[44] While individual inventors develop patented inventions, the vast majority of the patents submitted to the U.S. Patent and

34. Brown v. Alcatel USA, Inc., No. 05-02-01678-CV, 2004 WL 1434521, at *3 (Tex. App.—Dallas June 28, 2004, no pet.) (mem. op., not designated for publication).

35. LOBEL, *supra* note 19, at 142; *see also Brown*, 2004 WL 1434521, at *3.

36. *Id.* at *1.

37. Michalski, *supra* note 33.

38. *Id.*

39. *Brown*, 2004 WL 1434521, at *3, *5.

40. *Id.*

41. LOBEL, *supra* note 19, at 142; *accord* Michalski, *supra* note 33.

42. *See, e.g.*, Jeff Nachtigal, *We Own What You Think*, SALON (Aug. 18, 2004, 2:30 PM) http://www.salon.com/2004/08/18/evan_brown/, *archived at* http://perma.cc/XF6Z-DK7U (chronicling Brown's legal dispute and noting concerns raised by the Court's decision).

43. LOBEL, *supra* note 19, at 143 fig.7.1.

44. David J. Brody, *Employee Invention Assignment Agreements: Issues in Getting Them Right*, HAMILTON BROOK SMITH REYNOLDS (June 2011), http://www.hbsr.com/news_events/148-employee-invention-assignment-agreements-issues-getting-them-right, *archived at* http://perma.cc/5S33-USD9.

Trademark Office (USPTO) are submitted by corporations.[45] And yet, despite this pervasive assignment practice, the outrage that Brown's case triggered was particularly acute in part because the Solution existed entirely in Brown's mind and was merely an intangible idea in incubation. From a temporal perspective, the Solution reflects the product of Brown's life work, spanning a career far richer than the decade of work at Alcatel. Even more generally, the sense of wrong may come from the common practice of requiring employees to forfeit all future innovation through assignment agreements, effectively restricting them from later pursuing independent career paths, notwithstanding the fact that they were not hired to invent.

In the Brown case, the judge analyzed the case from a pure contractual perspective.[46] The judge explained that the contract was a valid one because "Brown's continued employment was conditioned on his signing the employment agreement."[47] The court stated that Brown's contract with Alcatel was enforceable because "[t]he continued employment and payment of salary, which would not have occurred but for Brown signing the employee agreement, was Alcatel's performance under the unilateral contract," and a unilateral contract "becomes enforceable if the party seeking to enforce the contract has performed, conferring even a remote benefit on the other party."[48] "[The court] ordered complete disclosure of the Solution to Brown's ex-employer" and refused to apply a reasonableness analysis to invalidate the assignment contract Brown signed at Alcatel.[49]

Drawing the lines between an abstract idea that cannot be owned and innovation that may become the subject of property, patent law asserts that abstract concepts that are only in their incubation stage cannot be propertized. In patent law, information is patentable only after the information is reduced to practice, has utility, and is inventive.[50] In several leading cases, the Supreme Court ruled that abstract ideas could not be patented because they are the fundamental building blocks of science and technology.[51] In 2010 in

45. U.S. PATENT & TRADEMARK OFFICE, ALL TECHNOLOGIES REPORT: JANUARY 1, 1989–DECEMBER 31, 2013, at A1-2 (2014).

46. LOBEL, *supra* note 19, at 144.

47. Brown v. Alcatel USA, Inc., No. 05-02-01678-CV, 2004 WL 1434521, at *2 (Tex. App.—Dallas June 28, 2004, no pet.) (mem. op, not designated for publication).

48. *Id.*

49. LOBEL, *supra* note 19, at 144; *see also id.* at *2–3 (noting that Brown signed the agreement at the beginning of his ten-year employment with Alcatel and concluding that "the trial court properly awarded 100% of the Solution to Alcatel").

50. *See* 35 U.S.C. § 101 (2012) (granting the right to obtain a patent on a person who "invents or discovers any new and useful process, machine, manufacture, or composition of matter"); U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 2138.05 (9th ed. 2014), *available at* http://www.uspto.gov/web/offices/pac/mpep/documents/2100_2138_05.htm, *archived at* http://perma.cc/YRD4-Q6YV (discussing the reduction-to-practice requirement).

51. Editorial, *Abstract Ideas Don't Deserve Patents*, N.Y. TIMES, Mar. 29, 2014, http://www.nytimes.com/2014/03/30/opinion/sunday/abstract-ideas-dont-deserve-patents.html, *archived at* http://perma.cc/6F5P-P3KS. On the challenges in drawing the lines between concrete and abstract

Bilski v. Kappos,[52] the Court held that a method for hedging risk of changing energy prices was too abstract a concept to be patentable.[53] This line drawing continues with the recent Supreme Court case *Alice Corp. v. CLS Bank International*,[54] in which the Court unanimously decided that a computer-implemented method of mitigating risk in foreign-currency transactions was too abstract to be patentable.[55] While the specifics of line drawing continue to challenge courts and patent scholars, the efforts to draw lines are uncontested: patents are not granted to abstract concepts. Similarly, copyright law protects expressions but not abstract ideas. The idea–expression dichotomy was developed early on by the courts and later incorporated into the Copyright Act of 1976.[56] Section 102(b) of the Act states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[57] In other words, core IP law would not have protected Brown's idea.

The abstract–concrete and idea–expression distinctions are the heart of the bargain struck in IP. While fine-tuning these lines remains a highly contested and frequently litigated affair, the principle that these lines ought to be policed remains strong in both copyright and patent law. And yet, when we shift our gaze from the traditional pillars of IP to contractual extensions, we uncover a completely different picture. Thus, coercing disclosure pursuant to human capital contracts at such an early stage of innovation appears technically premature, legally contradictory, and ethically harsh. Pragmatically, and indeed cynically, the legal result leads to the conclusion that Brown would have been better off quitting and pursuing the development of his idea on his own, rather than revealing the fact that he had an idea. Consequently and perversely, transferring ownership of a fledgling and individually conceived innovation impedes the move from conception to a full blueprint by disincentivizing the very person who possesses the foundational ingredients.

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patent claims, see generally Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530 (2013) and Tun-Jen Chiang, *The Levels of Abstraction Problem in Patent Law*, 105 NW. U. L. REV. 1097 (2011).

52. 561 U.S. 593 (2010).

53. *Id.* at 598, 611–12.

54. 134 S. Ct. 2347 (2014).

55. *Id.* at 2351–52.

56. *See, e.g.*, Baker v. Selden, 101 U.S. 99, 104–05 (1879) (distinguishing between the protections available for ideas described and a particular expression of those ideas); Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1124 (1986) (noting that "the 1976 Copyright Act incorporates the [*Baker*] doctrine").

57. 17 U.S.C. § 102(b) (2012).

2. Carter Bryant's Concept: "Whether Copyrightable or Non-copyrightable."—Like Evan Brown, Carter Bryant had signed an agreement assigning all his concepts and know-how to his employer, Mattel.[58] Bryant's employment agreement provided:

> I agree to communicate to the Company as promptly and fully as practicable all *inventions* (as defined below) conceived or reduced to practice by me (alone or jointly by others) at any time during my employment by the Company. I hereby assign to the Company . . . all my right, title and interest in such *inventions*, and all my right, title and interest in any patents, copyrights, patent applications or copyright applications based thereon.[59]

The contract defined the term "inventions" to include, "but . . . not limited to, all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, *whether patentable or unpatentable*."[60]

Bryant worked as a fashion and hairstyle designer for high-end Barbie dolls at Mattel for four years.[61] In 2000, Bryant pitched an idea of a new doll line, Bratz, to MGA Entertainment and immediately thereafter left Mattel to work full time on the development of the line.[62] A year later, MGA introduced Bratz to the toy market.[63] Launching a $2 billion lawsuit and decade-long litigation, Mattel sued MGA for ownership over the Bratz empire, claiming that pursuant to Bryant's employment status and employment contract, the doll line, copyright, and trademark, and thereby all profits from its sales, belonged to Mattel.[64]

In the first jury trial, the court interpreted Bryant's employment agreement as effectively assigning all possible ideas to Mattel.[65] The court instructed the jury to merely decide "*which* ideas Bryant came up with during his time with Mattel."[66] The trial court thereafter imposed a constructive trust

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58. This example is adapted from LOBEL, *supra* note 19, at 158–63.

59. Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 909 (9th Cir. 2010) (internal quotation marks omitted).

60. *Id.* (emphasis added) (internal quotation marks omitted).

61. *Id.* at 907; Mattel, Inc.'s Second Amended Answer at 34, 36, Mattel, Inc. v. MGA Entm't Inc., 782 F. Supp. 2d 911 (C.D. Cal. 2011) (No. CV 04-9049).

62. *Mattel*, 616 F.3d at 907.

63. *Id.*

64. *See Mattel*, 616 F.3d at 908 (recounting that Mattel sought more than $1 billion and ownership of the Bratz trademarks and copyrights in the lawsuit); John Kell, *Bratz Doll Maker MGA Entertainment Sues Mattel*, WALL ST. J., Jan. 13, 2014, http://online.wsj.com/news/articles/SB10001424052702303595404579318680190603384, *archived at* http://perma.cc/S3QF-EZZ7 (noting that the complex litigation over the Bratz empire had lasted more than a decade and that the rights to the Bratz brand sought by Mattel may be worth $2 billion).

65. *Mattel*, 616 F.3d at 909.

66. *Id.*

over all Bratz-related trademarks[67] and awarded Mattel $100 million stemming from the breach of Bryant's contract.[68]

On appeal, Judge Alex Kozinski turned to conventional contract interpretation in an attempt to determine whether ideas, regardless of their patentability or copyrightability, were included in the pre-invention assignment agreements. He noted the lack of the word "ideas" in the contract itself.[69] But he also noted the emphasis in the contract that the list was not meant to be finite.[70] Judge Kozinski thereafter compared the other categories listed against the term *ideas*: "Designs, processes, computer programs and formulae are concrete, unlike ideas, which are ephemeral and often reflect bursts of inspiration that exist only in the mind. On the other hand, the agreement also lists less tangible inventions such as 'know-how' and 'discoveries.'"[71]

Judge Kozinski further inquired on the right method to interpret the contract by emphasizing the contractual word "conceived," which he interpreted as suggesting that "Bryant may have conveyed rights in innovations that were not embodied in a tangible form by assigning inventions he 'conceived' as well as those he reduced to practice."[72] Judge Kozinski sent these inquiries back for a second jury trial that would look into the contract interpretation more carefully.[73] In other words, Judge Kozinski, in overturning the first jury trial, supported a better drafted contract that could fence up all ideas, abstract and ephemeral.

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67. *Id.* at 908.

68. Gillian Flaccus, *Mattel Awarded $100M in Bratz Dolls Copyright Case*, USA TODAY, Aug. 27, 2008, http://www.usatoday.com/money/industries/retail/2008-08-26-mattel-bratz-dolls_N.htm, *archived at* http://perma.cc/Z5GK-S7ES (reporting on the $100 million awarded in total damages).

69. *Mattel*, 616 F.3d at 909.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.* at 909–10 (finding the contract to be ambiguous and ordering the district court to consider the contract's interpretation on remand). The Ninth Circuit remanded the Bryant case and the district court ultimately ordered a new trial. Mattel, Inc. v. MGA Entm't, Inc., 782 F. Supp. 2d 911, 942 (C.D. Cal. 2011). On the eve of the first trial, Mattel entered into a settlement agreement with Bryant, thus leaving claims against MGA that included intentional interference with contract, aiding and abetting breach of fiduciary duty, and copyright infringement. *Id.* at 941. Various counterclaims were filed by both parties, including claims against each other for trade secret misappropriation. Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108, 1109 (9th Cir. 2013). In 2011, the district court rendered judgment on the merits pursuant to a jury verdict that awarded MGA more than $80 million in damages. *Id.* at 1110. The district court then "awarded MGA an equal amount in exemplary damages" and "awarded trade-secret attorneys' fees and costs." *Id.* Also, "because the jury found for MGA on Mattel's copyright claim," MGA was awarded attorneys' fees and costs under the Copyright Act. *Id.* On appeal, the Ninth Circuit vacated the verdict for MGA's trade secret claim as well as the related damages, fees, and costs. *Id.* at 1110–11. The Ninth Circuit did affirm the district court's award of fees and costs to MGA under its Copyright Act claim. *Id.* at 1111.

Strikingly, in the very same decision, Judge Kozinski warned about the chilling effect of overly broad copyright protection. As we have come to expect from the judge's significant lineage of intellectual property holdings,[74] Judge Kozinski was well aware of the threat that strong controls over information pose to innovation and creativity. When he turned to the actual drawings of the Bratz dolls that Bryant had sketched and sold to MGA, he emphasized the idea–expression distinction at the core of copyright law: "Degas can't prohibit other artists from painting ballerinas, and Charlaine Harris can't stop Stephenie Meyer from publishing *Twilight* just because Sookie came first. Similarly, MGA was free to look at Bryant's sketches and say, 'Good idea! We want to create bratty dolls too.'"[75]

And yet, the same decision gives a well-drafted contract the power to preassign far more than what is, as expressly stated in the contract, patentable or copyrightable. This gap between the scope of intellectual property and the scope of contractual pre-innovation assignment is illuminating. Substantively, intellectual property only protects a narrow set of information, excluding abstract concept and ideas, while the human capital cases expand the disputes into these unprotectable forms of knowledge.

The explicit subversion of the lines drawn in patent and copyright law in the drafting of assignment agreements is increasingly standard. Google, for example, requires its employees to sign an assignment agreement that defines "inventions" to include "inventions, designs, developments, ideas, concepts, techniques, devices, discoveries, formulae, processes, improvements, writings, records, original works of authorship, trademarks, trade secrets, all related know-how, and any other intellectual property, *whether or not patentable or registerable under patent, copyright, or similar laws*."[76] Both the patent-assignment dispute over Evan Brown's algorithm and the copyright dispute over Bryant's concept of Bratz illustrate the way the bargain struck in intellectual property law has been subverted in human capital law. The standard human capital agreements create a new form of cognitive property, commodifying and assigning ownership over abstract ideas that would otherwise be deemed part of the public domain.

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74. *See, e.g.*, White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting) (introducing Judge Kozinski's much-quoted statement that "[o]verprotecting intellectual property is as harmful as underprotecting it").

75. *Mattel*, 616 F.3d at 913.

76. Google Inc., At-Will Employment, Confidential Information, Invention Assignment and Arbitration Agreement (Cal. ed. Mar. 2014) (on file with author) [hereinafter Google Employment Contract] (emphasis added).

3. Sergey Aleynikov's Crime: Secrecy Hysteria as a Control Device.—

> Why exploit the ignorance of both the general public and the legal system about complex financial matters to punish this one little guy? Why must the spider always eat the fly?[77]
>
> —Michael Lewis

Sergey Aleynikov was a star programmer at Goldman Sachs.[78] A month after leaving Goldman Sachs to work for a new company, Teza Technologies, he was arrested by the Federal Bureau of Investigation (FBI), and later prosecuted and convicted under the Economic Espionage Act (EEA) for stealing proprietary technology.[79] Goldman had accused Aleynikov of stealing computer code and sending himself thirty-two megabytes of source code.[80] Immediately upon discovering the downloads, Goldman notified the FBI, which promptly sent agents to arrest Aleynikov.[81] Aleynikov was sentenced to eight years in federal prison.[82]

Aleynikov worked as a programmer for Goldman's high-frequency trading platform where he, like other programmers, used open-source software on a daily basis.[83] Unlike the frequently practiced requirement of putting open-source code back to the common pool after use and modification, Goldman had a one-way attitude about open source.[84] When Goldman programmers took open source, it became Goldman's proprietary information.[85] Goldman would not return the adjusted code to public domain, likely in violation of the open-source licensing agreements.[86] Journalist Michael Lewis, who investigated this case, described Aleynikov's experience at Goldman, where Aleynikov used open-source components to program new solutions.[87] Aleynikov asked his boss if he could release the repackaged open source back on the Internet and his boss told him it was now Goldman's property.[88] As Lewis described:

> Open source was an idea that depended on collaboration and sharing, and Serge [Aleynikov] had a long history of contributing to

77. Michael Lewis, *Did Goldman Sachs Overstep in Criminally Charging Its Ex-Programmer?*, VANITY FAIR, Sept. 2013, http://www.vanityfair.com/business/2013/09/michael-lewis-goldman-sachs-programmer, *archived at* http://perma.cc/9F97-YGXG.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*; *cf.* Christian H. Nadan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349, 361 (2002) (noting that one concern with some open-source license provisions is that they do not adequately protect against users taking the code private for commercial purposes).

87. Lewis, *supra* note 77.

88. *Id.*

> it. He didn't fully understand how Goldman could think it was O.K. to benefit so greatly from the work of others and then behave so selfishly toward them. "You don't create intellectual property," he said. "You create a program that does something."[89]

The core logic of the open-source initiative is that rewriting code from scratch for every new program is an utter waste of time,[90] analogous to recreating mathematical proofs rather than using a calculator in every market transaction. During Aleynikov's trial, his attorney presented evidence of identical pages of computer code: one marked with an open-source license and the other a Goldman's copy "with the open-source license [removed] and replaced with a Goldman Sachs license."[91]

When Aleynikov quit his position at Goldman he agreed to remain in his position for six more weeks to help train others at Goldman and teach them what he knew.[92] During that time, he mailed himself source code he had been working on that contained large amounts of the open-source code he had been using for two years intertwined with code he developed at Goldman.[93] He later claimed that he sent this code to himself because he hoped to disentangle the two and have the open source available if he needed a reminder of what he had used.[94]

There is no doubt that Aleynikov broke Goldman Sachs' rules. There is also no doubt that employees are generally required to not divulge a company's secrets.[95] The claim here is that trade secret law, like other areas of intellectual property, is a bargain between encouraging investment in innovation by protecting certain information and stimulating market competition by ensuring the use and dissemination of other information.[96] Traditionally then, trade secret law, like other forms of IP, has boundaries: information deemed a trade secret must be confidential, valuable, not generally known in the industry, and the company must exert reasonable

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89. *Id.*

90. Joel Spolsky, *Things You Should Never Do, Part I*, JOEL ON SOFTWARE (Apr. 6, 2000), http://www.joelonsoftware.com/articles/fog0000000069.html, *archived at* http://perma.cc/LX9C-ENWE.

91. Lewis, *supra* note 77.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* Orly Lobel, *Intellectual Property and Restrictive Covenants*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 517, 523–26 (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009) (discussing trade secret doctrine, including that employees are not permitted to divulge firm-specific knowledge unless it is public).

96. *See generally* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 329–41 (2008) (explaining "the two critical features that trade secrets share with other IP rights—they promote inventive activity and they promote disclosure of inventions"—and analyzing the balance between secrecy and disclosure required to promote those two goals).

efforts in maintaining its secrecy.[97] And yet while trade secret law, like other pillars of IP, is designed to promote innovation, it functions to regulate the relationship between firms and individuals.[98]

Using the lens of human capital, contemporary trade secrets have expanded both in *subject matter*, the type of information that can be deemed trade secret, and *protection*, the type of activities that are deemed misappropriation. The *Aleynikov*[99] case illuminates both these trends toward cognitive property through recent developments in trade secret law, raising doubt about whether the original bargain struck in trade secrecy has been abandoned. In several ways, the case points to unbalanced controls over information beyond the actual secrecy of the information at stake. First, the evidence in the case pointed to the little value that the source code would have for anyone outside of Goldman. While Goldman's system was an archaic patchwork, newer and faster systems were designed differently.[100] Second, there was no actual use of the information taken. The only evidence presented in the case was testimony by Aleynikov's new employer that he had absolutely no interest in or use for the code.[101] Rather, the new employer wanted to build something from scratch and testified that "[e]ven if [he were] offered Goldman's entire high-frequency-trading platform he would not have been interested."[102] Third, much of the code was open-source code that Aleynikov had taken from the Internet. He insisted convincingly to the panel of experts who examined the evidence posttrial that he took the code for those elements.[103] For programmers like Aleynikov, the code is analogous to the pocketbook inventors used to carry around everywhere. One of the experts considering the evidence post-conviction explained:

> In [Serge Aleynikov's] case, think of being at a company for three years and you carry a spiral notebook and write everything down. Everything about your meetings, your ideas, products, sales, client meetings—it's all written down in that notebook. You leave for your new job and take the notebook with you (as most people do). The contents of your notebook relate to your history at the prior company, but have very little relevance to your new job. You may never look at it again. Maybe there are some ideas or templates or thoughts you can draw on. But that notebook is related to your prior job, and you will start a new notebook at your new job which will make the old one

97. *Id.* at 317.

98. Madhavi Sunder, *Trade Secret and Human Freedom*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 334, 335 (Shyamkrishna Balganesh ed., 2013).

99. United States v. Aleynikov, 676 F.3d 71 (2d Cir. 2012).

100. Lewis, *supra* note 77.

101. *Id.*

102. *Id.*

103. *Id.*

> irrelevant. . . . [It enables them] to remember what they worked on—but it has very little relevance to what they will build next.[104]

Fourth, the manner in which Aleynikov downloaded the code was not that of an inconspicuous thief, as he e-mailed it to himself from work when he could have easily downloaded the information onto a thumb drive.[105] Fifth, and perhaps most compelling, Aleynikov took very little, "eight megabytes in a platform that consisted of an estimated one gigabyte of code," and nothing of true value, namely Goldman's trading strategies—the "secret sauce."[106] Sixth, procedurally, these questions were tried in the absence of actual expertise about the nature of the information and the allegations of its value.[107] Both the FBI investigators who arrested Aleynikov and the jury who convicted him seemed to have little grasp of the world of high-frequency trading and its trade secrets. Finally, the harsh consequences: the eight-year imprisonment of a former programmer (a father of three with no criminal record) for the act, common among programmers, of e-mailing his work to himself.[108]

In his new book, *Flash Boys*, Michael Lewis attempted to understand why Goldman fought pugnaciously under such nonthreatening circumstances to make sure that a former star programmer would be sentenced to jail.[109] Lewis asked: "Why on earth call the F.B.I.? Why coach your employees to say what they need to say on a witness stand to maximize the possibility of sending him to prison?"[110]

The best explanation Lewis finds is that Goldman had to send a message to shareholders, competitors, and employees that its code is original and genius.[111] If anyone discovered that 95% of it is open source, it would kill

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104. *Id.* The expert contrasted these actions with real theft: "If Person A steals a bike from Person B, then Person A is riding a bike to school, and Person B is walking. A is better off at the expense of B. That is clear-cut and most people's view of theft." *Id.*

105. *Id.*

106. *Id.* As one expert described it: "But that's like stealing the jewelry box without the jewels." *Id.*

107. The one outside expert witness in the trial called by the government turned out rather to be a non-expert:

> About the market itself he was badly misinformed. (He described Goldman Sachs as "the New York Yankees" of high-frequency trading.) He turned out to have testified as an expert witness in an earlier trial involving the theft of high-frequency-trading code, after which the judge had described what he'd said as "utter baloney."

Id. The jury was composed of high-school graduates without computer background or experience. *Id.* "'They would bring my computer into the courtroom,' recalls Serge incredulously. 'They would pull out the hard drive and show it to the jury. As evidence!' . . . [During the trial,] half the jury appeared to be sleeping." *Id.*

108. *Id.*

109. *See* MICHAEL LEWIS, FLASH BOYS 252–54 (2014) (exploring theories into why Goldman pursued charges against Aleynikov).

110. Lewis, *supra* note 77.

111. *Id.*

Goldman's reputation, and the high bonuses of Goldman traders might suddenly seem less justifiable.[112]

A year into his imprisonment, the Second Circuit Court of Appeals reluctantly overturned Aleynikov's sentence on technicalities.[113] The court found that the two statutes used for his conviction had loopholes.[114] The National Stolen Property Act (NSPA) was written to cover only "goods, wares, merchandise, securities or money," not intangible goods, while the EEA covered the misappropriation of trade secrets that were designed to enter into interstate commerce.[115] Since Aleynikov did not remove anything

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112. *Id.*

113. United States v. Aleynikov, 676 F.3d 71, 73 (2d Cir. 2012). A few months after Aleynikov's appeal in August 2013, the Second Circuit affirmed the criminal conviction of Samarth Agrawal for violating both the NSPA and the Economic Espionage Act (EEA) in a very similar case, where the employee was found to have misappropriated "high-frequency trading code at the time he was leaving the company." Jennifer L. Achilles & Lina Zhou, *Virtually Identical Trade Secret Theft Cases Result in Opposite Conclusions: Lessons from the Second Circuit's Attention to Detail*, MONDAQ (Aug. 8, 2013), http://www.mondaq.com/unitedstates/x/256732/Terrorism+Homeland+Security+Defence/Virtually+Identical+Trade+Secret+Theft+Cases+Result+In+Opposite+Conclusions+Lessons+From+The+Second+Circuits+Attention+To+Detail, *archived at* http://perma.cc/DK7R-2GUM. The difference between the cases was that unlike Aleynikov, Agrawal printed the code on paper, making his theft tangible. *Id.* According to the Second Circuit, "[t]his makes all the difference" under the EEA. United States v. Agrawal, 726 F.3d 235, 252 (2d Cir. 2013). The reason for the court's decision, as the court itself pointed out, was the fact that Congress amended the EEA in response to the Aleynikov case so that the statute would be broadly construed to protect against the theft of trade secrets. *Id.* at 244 n.7. Although the Court found that the cases were identical in "moral culpability," it stated, "it is Congress's task, not the courts', to define crimes and prescribe punishments." *Id.* at 253.

114. *Aleynikov*, 676 F.3d at 76; Lewis, *supra* note 77. Aleynikov is still being charged in New York state court for unlawful use of secret scientific material and unlawful duplication of computer-related material, facing a four-year prison sentence. Peter Lattman, *Former Goldman Programmer Is Arrested Again*, DEALBOOK, N.Y. TIMES (Aug. 9, 2012, 5:06 PM), http://dealbook.nytimes.com/2012/08/09/ex-goldman-programmer-is-arrested-again/, *archived at* http://perma.cc/L65E-L4EB. He is currently on bail. *Id.* Aleynikov challenged the charges on double jeopardy grounds; the judge found that the charges were different and that the federal charges were dismissed based on the inadequacy of the indictment and not the evidence, therefore not constituting double jeopardy. Jonathan Stempel, *Former Goldman Programmer Fails to Win Dismissal of Code Theft Case*, REUTERS, Apr. 30, 2013, *available at* http://www.reuters.com/article/2013/04/30/us-goldman-aleynikov-idUSBRE93T16E20130430, *archived at* http://perma.cc/QR5V-D8WV. More recently, Aleynikov filed a complaint in September 2012, seeking costs for his legal fees as a former corporate officer. Sophia Pearson, *'Flash Boys' Programmer Loses in Goldman Fight over Fees*, BLOOMBERG (Sept. 2, 2014, 12:37 PM), http://www.bloomberg.com/news/2014-09-03/ex-goldman-programmer-s-legal-fee-advance-rejected.html, *archived at* http://perma.cc/3R2E-YAGY. The fees amount to more than $2.4 million. *Id.* Aleynikov recently scored a major victory. A New York state court declared that his initial arrest was illegal and that the prosecution could not use the evidence gathered from the arrest and subsequent searches. Ben Protess, *Judge Blocks Evidence in Goldman Code Theft Case*, DEALBOOK, N.Y. TIMES (June 20, 2014, 8:20 PM), http://dealbook.nytimes.com/2014/06/20/judge-throws-out-evidence-in-sergey-aleynikovs-code-theft-case/?_php=true&_type=blogs&_r=0, *archived at* http://perma.cc/E72B-G2LF.

115. *Aleynikov*, 676 F.3d at 76, 79; *see also* 18 U.S.C. §§ 1832, 2314 (2006).

physically out of Goldman's offices, the NSPA did not apply.[116] Because Goldman's code was used internally and not for sale, the court ruled that it did not meet the EEA's interstate commerce requirement.[117]

In his concurring opinion, Judge Guido Calabresi called Congress to amend the EEA to cover the kind of information Aleynikov downloaded.[118] Congress quickly reacted and closed the gap with a bipartisan vote, and President Barack Obama signed the reform into law in late December 2012.[119] The Act added the word "service" in addition to "product," such that it would include secrets used internally but that relate to activities, like high-frequency trading, that involve interstate commerce.[120] A month later, President Obama signed the Foreign and Economic Espionage Penalty Enhancement Act, which enhances the penalties under the EEA.[121] Meanwhile, the *Aleynikov* case has been transferred to New York state prosecutors and Aleynikov is currently being criminally charged under state trade secret law for the "unlawful use of secret scientific material" and "unlawful duplication of computer related material," based on a signed complaint by the same federal agent who led the investigation of the federal prosecution.[122]

The criminalization of trade secret law is particularly disturbing when understood in the context of the expansion of trade secret subject matter. The EEA defines "trade secret" very broadly to include:

> [A]ll forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing . . . .[123]

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116. *See Aleynikov*, 676 F.3d at 77 ("We join other circuits in relying on *Dowling* for the proposition that the theft and subsequent interstate transmission of purely intangible property is beyond the scope of the NSPA.").

117. *Id.* at 82.

118. *Id.* at 83 (Calabresi, J., concurring).

119. For the act itself, see Theft of Trade Secrets Clarification Act of 2012, Pub. L. No. 112-236, 126 Stat. 1627 (codified at 18 U.S.C. § 1832 (2012)).

120. *Id.* § 2, 126 Stat. at 1627.

121. Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269, § 2, 126 Stat. 2442, 2442 (2013) (codified at 18 U.S.C. § 1831 (2012)).

122. Max Stendahl, *Ex-Goldman Coder Sues Firm for $2.4M Theft Defense Fees*, LAW360 (Sept. 26, 2012, 1:35 PM), http://www.law360.com/articles/381717/ex-goldman-coder-sues-firm-for-2-4m-theft-defense-fees, *archived at* http://perma.cc/AYJ3-MCMS; *see also supra* note 114.

123. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488, 3488–91 (codified as amended at 18 U.S.C. § 1839(3) (2012)).

Under the Uniform Trade Secrets Act, adopted by most states, the definition of a trade secret is also very broad.[124] Just as the scope of copyright and patent subject matter expands through human capital law, the type of information that is deemed secret in contemporary employment disputes frequently extends beyond what the Uniform Trade Secret Act defines as a trade secret. Some courts regularly accept the theory that under an employee's duty of loyalty, information can be "confidential" or "proprietary" even if not a trade secret.[125] Contractually, it has become standard to include broad and open-ended lists of confidential information that goes beyond the statutory definition of trade secrets. Take for example Google's definition of confidential information in the standard contract new recruits are required to sign:

> "Google Confidential Information" means, without limitation, any information in any form that relates to Google or Google's business and that is not generally known. Examples include Google's non-public information that relates to its actual or anticipated business, products or services, research, development, technical data, customers, customer lists, markets, software, hardware, finances, employee data and evaluation, trade secrets or know-how, intellectual property rights, including but not limited to, Assigned Inventions (as defined below), unpublished or pending patent applications and all related patent rights, and user data (i.e., any information directly or indirectly collected by Google from users of its services). Google Confidential Information also includes any information of third parties (e.g., Google's advertisers, collaborators, subscribers, customers, suppliers, partners, vendors, partners [sic], licensees or licensors) that was provided to Google on a confidential basis.[126]

The contract then states that "all Google Confidential Information that I use or generate in connection with my employment belongs to Google."[127] While some jurisdictions have stated clearly that if information is not a trade secret under the state trade secret statute the employer can have no legal interest in prohibiting its use,[128] other states allow protection of information

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124. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005); *see also* Charles Tait Graves, *Nonpublic Information and California Tort Law: A Proposal for Harmonizing California's Employee Mobility and Intellectual Property Regimes Under the Uniform Trade Secrets Act*, UCLA J.L. & TECH., Fall 2006, at 1, ¶ 18 ("The UTSA is now the law in some forty jurisdictions . . . .").

125. Charles Tait Graves & Elizabeth Tippett, *UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing*, 65 RUTGERS L. REV. 59, 76–78 (2012).

126. Google Employment Contract, *supra* note 76.

127. *Id.*

128. *See* Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1345 (N.D. Ga. 2007) (noting that, under Colorado law, "if the design of the plaintiff's machine is not a trade secret, plaintiff has no property right in its design, and it therefore would have no claim" (quoting Powell Products, Inc. v. Marks, 948 F. Supp. 1469, 1475 (D. Colo. 1996))); Hauck Mfg. Co. v. Astec Indus.,

beyond what the law deems a trade secret, including information that is public.[129] The Seventh Circuit, for example, stated that:

> [I]t is unimaginable that someone who steals property, business opportunities, and the labor of the firm's staff would get a free pass just because none of what he filched is a trade secret. . . .
>
> . . . An assertion of trade secret in a customer list does not wipe out claims of theft, fraud, and breach of the duty of loyalty that would be sound even if the customer list were a public record.[130]

Another court explained that "to the extent [a former employee] disclosed confidential information to Defendants and that information was not a 'trade secret,' Plaintiffs are entitled to seek redress for Defendants' tortious interference with [the former employee's] confidentiality contracts."[131]

The web of statutes and contractual definitions made available for employers to claim secrecy has meant that confidential information becomes a catch-all category under human capital law, as employers assert ownership not merely over concrete information but also knowledge that has not traditionally been commodified. Coupled with the increased criminalization of the misappropriation of such knowledge, cognitive controls become airtight. While the EEA was intended primarily to fight international post-Cold War espionage,[132] in practice the criminal provisions have targeted mostly domestic trade secret misappropriation.[133] The vast majority of these prosecutions have been brought against insiders, usually employees, seeking

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Inc., 375 F. Supp. 2d 649, 657 (E.D. Tenn. 2004) (holding that, if the plaintiff's allegedly stolen information is not a trade secret, "the plaintiff has no legal interest upon which to base his or her claim" of conversion).

129. *See, e.g.*, Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 894 (N.J. 1988) (recognizing that "employers may have legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry"); MING W. CHIN ET AL., CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION ¶ 14:455 (2014) ("It is not settled whether a former employee's use of a former employer's confidential information that is *not protected as a trade secret* constitutes unfair competition.").

130. Hecny Transp., Inc. v. Chu, 430 F.3d 402, 404–05 (7th Cir. 2005).

131. Dow Corning Corp. v. Xiao, 101 U.S.P.Q.2d (BNA) 1802, 1815 (E.D. Mich. 2011).

132. *See, e.g.*, United States v. Hsu, 155 F.3d 189, 194 (3d Cir. 1998) ("The end of the Cold War sent government spies scurrying to the private sector to perform illicit work for businesses and corporations . . . .").

133. *See* Peter J. Toren, *A Look at 16 Years of EEA Prosecutions*, LAW360 (Sept. 19, 2012, 12:18 PM), http://www.law360.com/articles/378560/a-look-at-16-years-of-eea-prosecutions, *archived at* http://perma.cc/LTN8-N9TV (reporting that only 9 out of 124 EEA indictments from 1996 to 2012 accused defendants of espionage assisting a foreign government). *See generally* R. MARK HALLIGAN, REPORTED CRIMINAL ARRESTS AND CONVICTIONS UNDER THE ECONOMIC ESPIONAGE ACT OF 1996, *available at* http://b-e-o-w-u-l-f.com/texts/Reported_Criminal_Arrests.pdf, *archived at* http://perma.cc/FD8U-DAYQ (surveying forty EEA criminal prosecutions from 1996 to 2003).

to leave their employers.[134] As the *Aleynikov* case demonstrates, the act of misappropriation under the EEA covers broad activities, including attempts with no actual harm.[135] As a result, the statute covers the types of activities employees routinely engage in throughout their careers, such as memorization of information and the disclosure of insider knowledge postemployment.[136] Many routine behaviors among workers are now criminalized. For example, according to one recent survey: "Sixty-two percent of employees think it's acceptable to transfer corporate data to their personal computers, tablets, smartphones and cloud file-sharing apps."[137] And yet, even routine self-storage and data backing risk qualifying as misappropriation under the EEA. Rochelle Dreyfuss described the 1996 enactment of the EEA as "drastically chang[ing] the bargain between the public and the rights holder" and believed it would likely stifle innovation, though she remained hopeful that the EEA would be employed with great caution.[138] Almost two decades later, the EEA has been strengthened both in subject matter and in its criminal penalties and has expanded its reach beyond intellectual property to cognitive property.

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134. Michael L. Rustad, *The Negligent Enablement of Trade Secret Misappropriation*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 455, 493 (2006). During the early years of the statutes, Attorneys General normally only prosecuted after a process of private investigation by the corporation. *Id.* at 458. Currently, it appears that the Department of Justice is playing a more active role in initiating such investigations. *See* Quinn Emanuel Urquhart & Sullivan, LLP, *Spotlight on the Economic Espionage Act*, JDSUPRA BUS. ADVISOR (Mar. 22, 2012), http://www.jdsupra.com/legalnews/spotlight-on-the-economic-espionage-act-20115/, *archived at* http://perma.cc/6CVT-XU5J (stating that the FBI and DOJ have recently made investigating and prosecuting corporate trade secret theft a high priority).

135. The EEA criminalizes anyone who, merely intending to injure, "without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys [trade secrets]." 18 U.S.C. § 1832(a)(2) (2012).

136. *See* Gerald J. Mossingoff et al., *The Economic Espionage Act: A New Federal Regime of Trade Secret Protection*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 191, 201–02 (1997) (bemoaning that the difficulty of distinguishing between "general knowledge" and "trade secret" may expose employees to criminal liability under the EEA).

137. Robert Hamilton, *The "Frenemy" Within—Insider Theft of Intellectual Property*, SYMANTEC (Feb. 6, 2013), http://www.symantec.com/connect/blogs/frenemy-within-insider-theft-intellectual-property?om_ext_cid=biz_socmed_twitter_facebook_marketwire_linkedin_2013Feb_worldwide_InsiderThreat, *archived at* http://perma.cc/5MK6-YEN6.

138. Rochelle Cooper Dreyfuss, Essay, *Trade Secrets: How Well Should We Be Allowed to Hide Them? The Economic Espionage Act of 1996*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4–6, 43 (1998). In the first years, Attorney General Janet Reno stated that any prosecution under the EEA would "require her personal approval or that of her deputy attorney general, or assistant attorney general for the criminal division." *Id.* at 41. For further discussion of the difficulties arising out of the EEA's broad coverage, see generally Joseph F. Savage, Jr., *I Spy: The New Economic Espionage Act Can Be Risky Business*, CRIM. JUST., Fall 1997, at 12.

C. *The Timeline: Back to the Future*

1. Before: Pre-Innovation Assignments.—Businesses increasingly seek to expand their control over the time of innovation through broad invention assignment contracts. Today, it is common for the employee–inventor to agree in advance to assign her rights of any future innovation to the employer.[139] Both the Evan Brown/Alcatel and the Bratz/Barbie disputes involved contractual claims of ownership over innovation even before the ideas made their debut inside the innovator's mind.

If one looks only at intellectual property law on the books, innovation rights are granted to authors and inventors. The U.S. Constitution names "authors and inventors" as the beneficiaries of intellectual property rights.[140] Both patent law and copyright law establish, in reasonably clear terms, that ownership, as a default, is vested to the author of an invention or creative expression.[141] The Supreme Court has repeatedly explained that IP is affixed to the belief that the "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[142] The exception that swallows the rule is at the nexus of IP, employment, and contract law. Corporations cannot author a patent, but they can nonetheless become patent owners. Similarly, corporations do not write poems or paint, but they can certainly become copyright owners. In developing the common law of patent ownership, courts adopted the hired-to-invent doctrine, under which inventions created as part of the job for which an employee was hired belong to the employer.[143] In copyright law, the work-for-hire doctrine was codified into the Copyright Act, shifting the definition of "authorship," in the context of employment, from the employee to the employer that commissions the work.[144] These doctrines in both patent law and copyright law leave the default ownership with the employee for any innovation that has not been commissioned as part of the job.[145]

The real devil is in contract law. Even though the legal defaults in IP law leave most innovation as employee owned—only patentable inventions and copyrightable works that were the purpose of the employee's work are employer owned—a default is just that: the default rule can be reversed by

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139. Since the 1990s and ever increasingly, assignment agreements are required in nearly every position. Ann Bartow, *Inventors of the World, Unite! A Call for Collective Action by Employee-Inventors*, 37 SANTA CLARA L. REV. 673, 674–75 (1997).

140. U.S. CONST. art. 1, § 8, cl. 8.

141. 17 U.S.C. § 201(a) (2012); 37 C.F.R. § 3.73(a) (2013).

142. *E.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954).

143. Solomons v. United States, 137 U.S. 342, 346 (1890).

144. 17 U.S.C. § 201(b) (2012). The landmark victory for freelance writers was *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 2000), but again, this was per the default rule that as freelancers they owned the copyright, but that loophole can be closed by contractual invention-creation assignment that freelancers now sign too. *Id.* at 166.

145. *See supra* note 141 and accompanying text.

contract. In the contemporary economy, businesses routinely require pre-innovation assignment contracts in which employees cede all rights to future inventions.[146] Many companies upon hiring demand the signing of such innovation clauses of all employees, from the "low-level manufacturing [employees] to design engineers and creative workers."[147] Most often for a comprehensive pre-innovation assignment of all creative and inventive prospects, employees receive no other remuneration outside of their monthly salary.[148]

At times, future-looking pre-innovation assignment agreements reach back to an employee's past. Evan Brown claimed to have conceived of the Solution years before working for Alcatel, building on years of computer programming beginning in his college years.[149] Before Alcatel, Brown wrote computer-conversion programs for several different companies and began the creative process of thinking about his solution.[150] Similarly, Carter Bryant created designs of angelic-looking fantasy girls since his childhood, long before joining Mattel.[151] Indeed, during the trial, his attorneys presented substantial amounts of his early drawings from his high school and college years, including submissions to art competitions in his teens.[152] In another recent case, an employee of Marathon Oil, Yale Preston, signed an assignment agreement that provided for the assignment of inventions "made or conceived" during employment.[153] Preston claimed he came up with the idea for his invention before his employment began, but the Federal Circuit

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146. Peter Caldwell, *Employment Agreements for the Inventing Worker: A Proposal for Reforming Trailer Clause Enforceability Guidelines*, 13 J. INTELL. PROP. L. 279, 284–85 (2006).

147. Orly Lobel, Op-Ed., *My Ideas, My Boss's Property*, N.Y. TIMES, Apr. 13, 2014, http://www.nytimes.com/2014/04/14/opinion/my-ideas-my-bosss-property.html?_r=0, *archived at* http://perma.cc/9SEQ-X4ZN.

148. *Id.*; Steven Cherensky, Comment, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 595, 623 (1993). It is worth noting that the American system of uncompensated contractual cognitive assignment is an exception among highly innovative countries. In the United States, private employers have no affirmative duty to compensate employees for profits derived from their inventions. Lobel, *supra* note 147. By contrast, other countries with high patent competitiveness legally require businesses to pay fair compensation to the inventor who assigns an invention to them. Germany, the United Kingdom, France, and Finland all require fair compensation to the employee for any assigned invention. Morag Peberdy & Alain Strowel, *Employee's Rights to Compensation for Inventions – A European Perspective*, *in* PLC CROSS-BORDER LIFE SCIENCES HANDBOOK 63, 63 (2009–2010). China and Japan similarly guarantee employee–inventors a reward for assigned work. Vai Io Lo, *Employee Inventions and Works for Hire in Japan: A Comparative Study Against the U.S., Chinese, and German Systems*, 16 TEMP. INT'L & COMP. L.J. 279, 306 (2002).

149. Jim C. Lai, Alcatel USA, Inc. v. Brown: *Does Your Boss Own Your Brain?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 295, 298 (2003).

150. *Id.*

151. *See* Transcript of Record at 2846–48, Bryant v. Mattel Inc., No. CV04-9049 (C.D. Cal. Dec. 3, 2008) (No. 4371-22) (testifying that Bryant drew award-winning female fashion designs since he was twelve years old).

152. *Id.*

153. Preston v. Marathon Oil Co., 684 F.3d 1276, 1279 (Fed. Cir. 2012).

held that regardless of when it was "conceived," the invention had been first "made," that is developed, during his employment and thus should belong to the company.[154] Moreover, the court found that Preston's belief that his invention rights were protected because he had conceived of the invention before signing the contract was irrelevant.[155]

The temporal reach of corporate ownership does not only occur by individual contract but also through institutional policy, such as a company handbook or an employee manual. Petr Táborský was an undergraduate science student at the University of South Florida when he discovered a method to turn cat litter into a reusable human-waste cleaning device.[156] Táborský's project was funded by a grant from a Florida utility company.[157] After the initially scheduled end of the project passed, Táborský received permission to continue the research as part of his master's thesis.[158] Táborský had not signed any employment agreement with neither the university nor the utility company, and yet both claimed ownership over the invention, based on the university policy assigning inventions from its employee to the university.[159]

Táborský, convinced the discovery was his own, filed for a patent.[160] He also kept his handwritten lab notebooks, which became the center of the lawsuit, eventually leading to Táborský's imprisonment.[161] After a court determined that the university owned Táborský's research, the notebooks were also deemed the property of the University of South Florida.[162] Therefore, Táborský was charged for their theft (self-theft perhaps would be the correct term).[163]

Táborský's refusal to comply with the order to transfer ownership of his patent and hand over his notebooks resulted in his imprisonment in a maximum-security state prison.[164] Táborský declined clemency offered by then-Florida Governor Lawton Chiles, explaining: "When you think about going to jail, it's so terrifying I couldn't get out of bed in the morning. But at some point I made the decision I wasn't going to let them use the criminal court to get something they weren't entitled to."[165]

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154. *Id.* at 1282, 1287–88.
155. *Id.* at 1287–88.
156. This example is adapted from LOBEL, *supra* note 19, at 152–53.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 152–53.

The 2011 Supreme Court case *Stanford v. Roche*[166] further solidified the contemporary realities of future-innovation assignment agreements, which preemptively strip away all rights and claims in one's innovation. In this case, two institutions, Stanford University and the biotech corporation Cetus, disputed over the ownership of a patent.[167] The dispute arose from the wording of two competing agreements that scientist Mark Holodniy had signed, each assigning future innovation.[168] In the backdrop of the new cognitive property, it should not be surprising that the dispute over invention ownership in this case was between two institutions, Cetus and Stanford, while the inventor had long been stripped of any claims to his invention.[169] The key issue in the case was the interpretation of the phrase "do hereby assign," which is commonly used in employment pre-invention assignment agreements.[170] The Supreme Court affirmed the Court of Appeals's construction of the phrase "do hereby assign" for future patent rights used by Cetus as taking effect immediately, thereby trumping Stanford's "I agree to assign" clause, which the Court interpreted as a promise of future action.[171]

The "automatic assignment" adopted by the Supreme Court has meant that an employment or assignment agreement signed at the beginning of employment automatically transfers title to the employer, with no further act of transfer required once those inventions are conceived and come into existence. These agreements often lead to the transfer of title of inventions conceived or created years after the inventor started work with the company.[172] The automatic assignment rule runs contrary to long-understood maxims of equity, which have held that assignment of future, not-yet-in-existence goods creates a contractual right, not the actual assignment itself. Thus, until the property comes into existence, the assignee:

> [H]as nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property. . . . It is not an interest in property, but a mere right under the contract. . . . [F]or in [the] contemplation of equity it amounts not to an assignment of a

166. Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 131 S. Ct. 2188 (2011).

167. *Id.* at 2189.

168. *Id.*

169. *Id.* at 2192.

170. *See* Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 583 F.3d 832, 842 (Fed. Cir. 2009) (holding that due to the language in the contracts, Cetus' rights in the invention vested first); *Stanford*, 131 S. Ct. at 2199 (affirming the judgment of the Federal Circuit).

171. *Stanford*, 131 S. Ct. at 2199; *see also id.* at 2202–03 (Breyer, J., dissenting) (decrying that such a great distinction should be drawn between the phrases "do hereby assign" and "agree to assign").

172. *See, e.g.*, DDB Techs., L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284, 1286–90 (Fed. Cir. 2008) (holding an automatic assignment agreement signed in 1980 to be enforceable against an inventor who developed his patented works through the 1990s).

present interest, but only to a contract to assign when the interest becomes vested.[173]

Similarly in tension with the current interpretation of pre-invention assignment agreements, the Uniform Commercial Code states: "Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell."[174] The difference between a contractual right of assignment and an automatic assignment rule is significant. Corporations have quickly taken note of this contractual difference between "agree to assign" and "hereby assign" and employ the latter in their standard employment contracts. Google's employment contract, for example, provides further emphasis on the reach into the future as it states: "I hereby irrevocably assign to Google Inc. my rights in all Assigned Inventions, and convey to Google Inc. ownership of any Assigned Inventions not yet in existence."[175]

In a series of recent cases, the rule has meant stripping away an employee's ability to contest the validity of the assignment agreement as well as fraudulent actions by their employers. Imagine an employee who pre-assigns all his future innovation and later discovers that his employer had falsely omitted him from several patent applications and obtained patents without naming the employee as a co-inventor.[176] Employee–inventors are now held to not have intervening equities that could defeat a pre-assignment contract.

In a current case on appeal before the Federal Circuit,[177] inventor Dr. Alex Shukh discovered that he was wrongly omitted from several patents filed by his employer.[178] Shukh was a star inventor for Seagate, with nine of his inventions incorporated into several Seagate product lines of hard-disk drives.[179] While Shukh was named as an inventor for several of his inventions early in his employment, later on when his work relationship with his supervisors became strained, Shukh discovered that Seagate applied for other patents on inventions he co-invented without disclosing his co-

173. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 353 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 13th ed. 1886) (footnotes omitted).

174. U.C.C. § 2-105(2) (2011).

175. Google Employment Contract, *supra* note 76.

176. Such an omission is in violation of the Patent Act. *See* 35 U.S.C. § 111(a)(1) (2012) (requiring a patent to be filed by the inventor or a person the inventor authorizes); *id.* § 115(a) (requiring the inventor to be named on the patent application); *id.* § 116(a) (requiring multiple people who make an invention together to apply for the patent jointly).

177. Notice of Docketing at 1, Shukh v. Seagate Tech., LLC, No. 14-1406 (Fed. Cir. Apr. 10, 2014).

178. Shukh v. Seagate Tech., LLC, No. 10-404, 2014 WL 1281518, at *14 (D. Minn. Mar. 31, 2014).

179. Shukh v. Seagate Tech., LLC, No. 10-404, 2011 WL 1258510, at *1 (D. Minn. Mar. 30, 2011).

inventorship.[180] Shukh demonstrated that he was given inventorship awards for inventions that Seagate had patent applications on, but he was falsely told these inventions would not be pursued for patenting.[181] Automatic assignment construction divests inventors not only of ownership rights but also inventorship rights. The court ruled that because of the assignment agreement, the employee did not have standing to seek correction of the patents nor did he have a reputational interest.[182]

Courts have further interpreted the automatic assignment rule to divest an employee–inventor of standing to seek correction of inventorship under the Patent Act. In several recent cases, the Federal Circuit held that an inventor who has assigned his or her inventions to an employer does not have standing to sue for the correction of inventorship because the inventor no longer has a stake in the invention.[183] In other words, the construction of "hereby assign" does not only propertize in advance all inventions that will be correctly filed by the employer but also has the effect of preventing an employee–inventor from later correcting inventorship or claiming breach of the assignment contract when an employer wrongly omits the inventor from patent applications. Such a construction leaves employees without recourse when stripped not only from ownership but also attribution for their inventions.

2. After: Trailer Clauses and the Assignor Estoppel Doctrine.—An invention-assignment trailer clause is designed to ensure a company's right to future inventions even after the departure of the employee. A typical trailer clause states that after the employee leaves her job, her former employer owns any patent filed within a specified period.[184] While some states restrict the ability of employers to require such assignments postemployment, most courts routinely enforce these clauses, except in extreme circumstances in which the trailer clause is unlimited in its time or scope. For example, a trailer clause that is set for an indefinite period of time into the postemployment future, assigning all invention made by the former employees for which the firm might have an interest, is likely to be deemed

180. *Id.* at *2–4, *14.

181. *Id.* at *3.

182. *Id.* at *6. *But see* Chou v. Univ. of Chi., 254 F.3d 1347, 1353, 1356–57, 1359 (Fed. Cir. 2001) (holding that an inventor who assigned all inventions to her university nonetheless has standing because being named inventor entitled her to monetary rewards).

183. *See, e.g.*, Larson v. Correct Craft, Inc., 569 F.3d 1319, 1327 (Fed. Cir. 2009) (holding that an inventor who has no financial interest in being named on a patent has no standing to sue for correction of inventorship); Jim Arnold Corp. v. Hydrotech Sys., Inc., 109 F.3d 1567, 1571–72, 1579 (Fed. Cir. 1997) (holding that federal courts did not have removal jurisdiction over this patent infringement claim because the validity of a series of assignment contracts must be determined under state law before any federal question becomes at issue).

184. *See* Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 887 (N.J. 1988) (characterizing a trailer clause as one that "involves the assignment of future or post-employment inventions").

unreasonable and void.[185] The typical trailer clause, limited in time (for example, one year postemployment) and in scope (for example, limiting the ownership over future innovation to inventions that relate to the former employer's business) is regularly upheld.[186]

Like other cognitive controls, the benefits, legitimacy, enforceability, and scope of trailer clauses are questionable. Similar to other forms of cognitive controls, firms seek "to obtain more protection than the common law affords" by using trailer clauses.[187] The result is a penalty on former employees and their new employers if they wish to compete with their former firm. As such, they should be viewed as a postemployment restriction much like an absolute noncompete clause. As Robert Merges has described, trailer clauses "are best seen as particular applications of post-employment covenants not to compete, which have long represented a suspect class of obligations and are often voided under common-law restraint of trade principles."[188] Once again, the bargain reached in intellectual property is subverted by contractual arrangements purposely designed to give the firm ownership over innovation that would, by default, belong to its former employees.[189]

In a recent case, a research scientist at Milliken resigned and started a new company.[190] While working for Milliken, the scientist developed an idea for a new type of fiber.[191] In the months following his resignation, he continued to contemplate his idea, which led to his invention of a new fiber.[192] Milliken alleged it owned the rights to the new fiber.[193] The scientist had signed an assignment agreement when he began his employment at Milliken stating that any inventions by the scientist, patentable or not, relating to Milliken's business or research or resulting from work he

185. For example, in *Federal Screw Works v. Interface Systems, Inc.* the court held that a trailer clause for an indefinite period of time requiring former employees to turn over all inventions covering subjects both within the company's field of activity or "contemplated field of activity" was too restrictive and overbroad. 569 F. Supp. 1562, 1563–64 (E.D. Mich. 1983). The court held that "[i]t is not reasonable to confiscate all new inventions made by the employees for which Interface might have an interest." *Id.* at 1564.

186. Marc B. Hershovitz, *Unhitching the Trailer Clause: The Rights of Inventive Employees and Their Employers*, 3 J. INTELL. PROP. L. 187, 199–201 (1995).

187. *Id.* at 197.

188. Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1, 53 (1999).

189. *See* Michael R. Mattioli, Comment, *The Impact of Open Source on Pre-Invention Assignment Contracts*, 9 U. PA. J. LAB. & EMP. L. 207, 233–34 (2006) ("Unfortunately, pre-invention assignment agreements rendered these equitable solutions largely meaningless. And, rather than grappling with the troublesome implications of these forced agreements, courts of the early twentieth century generally followed a plain and simple path of enforcement.").

190. Milliken & Co. v. Morin, 731 S.E.2d 288, 291 (S.C. 2012).

191. *Id.*

192. *See id.* (stating that the scientist filed for a patent several months after resigning from Milliken).

193. *Id.*

performed for the company during his employment were the property of Milliken.[194] The assignment clause had a holdover provision stating that such inventions developed within one year after termination of employment also belonged to Milliken.[195] The scientist argued that these covenants were invalid because they were legally equivalent to noncompete agreements and created an unlawful restraint on trade.[196] The South Carolina Supreme Court affirmed a jury verdict for Milliken,[197] ruling that holdover invention-assignment agreements "do not operate in restraint of the employee's trade but merely vest ownership of an invention with the entity which ought to have it."[198] While the court nodded to the idea that holdover clauses should be examined to ensure that they do not "curtail[] the employee's ability to earn a living,"[199] the court held that the one-year holdover was "eminently reasonable" because the invention was related to his former employer's business.[200] Yet, while a trailer clause does not prohibit an inventive employee from working for a competitor in absolute language:

> [B]usiness competitors do not desire to hire individuals obligated under such a clause because the work product of such employees may not accrue to the new employer's benefit. At best, employers that hire inventive employees obligated under such agreements will under-utilize the employees' inventive skills so as not to develop conflicts with prior trailer clauses.[201]

Operating similarly to a trailer clause, the assignor estoppel doctrine, a recently developed doctrine in patent law, constitutes a postemployment restriction over the cognitive abilities of employees. The assignor estoppel doctrine is a rule of equity that prevents the assignor of a patent from raising the defense of invalidity in case of a suit of patent infringement.[202] The doctrine of assignor estoppel was originally developed by courts to prevent unfairness in circumstances in which an owner of a patent right sells the right to her patent and later denies the value of the very thing from which she profited.[203] The logic is analogous to landlord–tenant situations and estoppel

194. *Id.* at 290.

195. *Id.*

196. Brief of Petitioner at 5, *Milliken*, 731 S.E.2d 288 (No. 2005-CP-23-7135).

197. *Milliken*, 731 S.E.2d at 290.

198. *Id.* at 292.

199. *Id.* at 293.

200. *Id.* at 295.

201. Hershovitz, *supra* note 186, at 198–99 (footnote omitted).

202. *See* Franklin D. Ubell, *Assignor Estoppel: A Wrong Turn from* Lear, 71 J. PAT. & TRADEMARK OFF. SOC'Y 26, 26 (1989) (describing a Federal Circuit holding that estopped an inventor from denying the validity of a patent he had assigned).

203. *See* Kinsman v. Parkhurst, 59 U.S. (18 How.) 289, 293 (1855) (estopping an assignor from asserting the invalidity of a patent when he had received money for the patented invention by force of contract); Amber L. Hatfield, Note, *Life After Death for Assignor Estoppel: Per Se Application*

by deed of real estate.[204] The courts viewed an "intrinsic unfairness in allowing an assignor to challenge the validity of the patent it assigned" because of "the implicit representation of validity contained in an assignment of a patent for value."[205] This logic however is flipped on its head when we shift our inquiry from patent law to human capital law and examine the application of the doctrine in the context of pre-invention assignment in the employment relationship. As we saw, assignment clauses refer to future innovation rather than a patent in suit. The invention can be very different than what had been assigned. Indeed, the USPTO often determines that a filed patent application must be divided into two or more patents, expanded, or modified.[206] Thus, assignment of future innovation is always done under conditions of uncertainty.[207] Put differently, in the context of human capital, the representation of the assignment in contracts assigning future innovation is made by the employer rather than the employee. Thus, the landlord parallels the employer and the tenant parallels the employee. The analogies that served as the basis for the development of the assignor estoppel doctrine do not simply fail but are reversed.

In practice, the assignor estoppel doctrine operates to place a former employee and his new employer at a great disadvantage compared to all other competitors because their legal defenses are dramatically diminished. Because invalidity is a major defense in patent litigation,[208] in essence, assignor estoppel penalizes a former employee and thus creates a powerful disincentive for competitors to hire an employee who has experience in the field. Essentially, anyone who already has human capital in the hiring company's field becomes a liability for the new company. The following has become a prevalent scenario: an employee, as part of his employment agreement, assigns an invention to the firm (Firm A). The employee moves to a competing firm, Firm B. After the employee leaves Firm A, Firm A files for a patent on the former employee's inventions. This can happen without

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to Protect Incentives to Innovate, 68 TEXAS L. REV. 251, 260 & n.61 (1989) (describing *Kinsman* as one of the earliest American assignor estoppel cases).

204. *See* Pandrol USA, LP v. Airboss Ry. Prods., Inc., 424 F.3d 1161, 1166–67 (Fed. Cir. 2005) (noting that courts have applied both of these analogies).

205. Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 150 F.3d 1374, 1378 (Fed. Cir. 1998).

206. *See* Westinghouse Elec. & Mtg. Co. v. Formica Insulation Co., 266 U.S. 342, 353 (1924) (noting that patent "claims are subject to change by curtailment or enlargement by the Patent Office with the acquiescence or at the instance of the [inventor]"); U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE 700-162 (9th ed. 2014) (providing that the USPTO may contact a patent applicant to request amendments or other submissions to address patentability issues).

207. *See* Q.G. Prods., Inc. v. Shorty, Inc., 992 F.2d 1211, 1213 (Fed. Cir. 1993) (noting that when the bounds of future patent claims are uncertain, the U.S. Supreme Court has recognized the need for "ample evidence to define the assignor's representations").

208. 35 U.S.C. § 282(b)(2)–(3) (2012). *See generally* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (2011) (discussing the invalidity defense).

the employee's knowledge or consent regarding the claims issued and the scope of the filed patents. Frequently, claims are filed postemployment and without the former employee's control over the filed claims. During this period after the employee began working at Firm B, she works on innovation for Firm B. If Firm A sues Firm B for patent infringement, Firm B is estopped from attacking the validity of the patent because it has hired a former Firm A employee and involved the employee in the innovation in question.[209]

The perverse result is that the most productive and experienced employees, who are already engaged in inventive activities in their industry, become untouchables.[210] The hiring of these employees who are already in the field creates an immense risk. Aberrantly, the more experienced an employee, the less employable they become. The assignment agreement coupled with the assignor estoppel doctrine becomes a de facto trailer clause, both tantamount to a postemployment noncompete.

3. And Everything in Between: Weekends and Nights.—In *Mattel v. MGA*[211] much of the trial drama centered on whether the court could pinpoint the moment that Carter Bryant created his brainchild, the Bratz doll. Recall that Bryant's employment agreement provided assignment for all inventions conceived or reduced to practice "at any time during [his] employment" at Mattel.[212] Bryant argued that he came up with the concept of the doll while on a year leave from Mattel in 1998.[213] Alternatively, he argued that even if

209. *See* Juniper Networks, Inc. v. Palo Alto Networks, Inc., No. 11-1258-SLR, 2014 WL 527621, at *1–2 (D. Del. Feb. 6, 2014) (involving almost the same situation as the hypothetical). In *Juniper*, the employee was one of the founders of the new company. *Id.* Similarly, assignor estoppel has been invoked against the hiring firm even when the new employee is not a founder but heavily involved in the allegedly infringing operations. In other situations, the former employee is estopped but not the hiring corporation as a whole. *See* 6A DONALD S. CHISUM, CHISUM ON PATENTS, § 19.02[3][b][ii] & n.49, at 19-146.15 (2014).

210. There may well be gender and age impact. Women are still more likely than men to be geographically constrained by dual-career coordination. *See* Anne Green et al., *The Employment Consequences of Migration: Gender Differentials*, *in* MIGRATION AND GENDER IN THE DEVELOPED WORLD 60, 63–64 (Paul Boyle & Keith Halfacree eds., 2005) (noting a study in which nineteen of thirty dual-career households reported that the male's career took precedent in migration decisions). Restrictions over their job mobility may create a disincentive to move jobs altogether. Similarly, older employees are likely to have more job experience, which perversely under the new cognitive property creates a further penalty on their employment, in a labor market that is already prone to age discrimination. *See* Noam Scheiber, *The Brutal Ageism of Tech*, NEW REPUBLIC, Mar. 23, 2014, http://www.newrepublic.com/article/117088/silicons-valleys-brutal-ageism, *archived at* http://perma.cc/2RZH-TUNW (examining the taboo of age in the tech world).

211. Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904 (9th Cir. 2010).

212. *Id.* at 909.

213. Edvard Pettersson, *MGA Wins $225 Million Punitive Damages, Fees Against Mattel*, BLOOMBERG (Aug. 5, 2011, 9:49 AM), http://www.bloomberg.com/news/2011-08-04/mattel-must-pay-mga-225-million-in-punitive-damages-fees-in-bratz-case.html, *archived at* http://perma.cc/EBD4-WX28.

he had worked on the concept during the period in which he was employed, he did this during his off time—at home at night and on weekends.[214] The question then becomes, even if one assigns his rights for all innovation while employed, can assignment include all cognitive resources twenty-four hours a day and seven days a week?

In looking at the issue, once again Judge Kozinski construed the issue as a question of contractual interpretation. Mattel argued that the contract must expand the contours of IP, which merely assigns to the employer work made for hire; otherwise, according to Mattel's logic, there would not be a need for a human capital contract.[215] Judge Kozinski rejected Mattel's simplified version of IP–contract nexus:

> Mattel argues that because employers are already considered the authors of works made for hire under the Copyright Act, 17 U.S.C. § 201(b), the agreement must cover works made outside the scope of employment. Otherwise, employees would be assigning to Mattel works the company already owns. But the contract provides Mattel additional rights by covering more than just copyrightable works.[216]

In other words, the mere existence of an assignment agreement is not enough to expand the legal contours of IP ownership. At the same time, Judge Kozinski took no issue with expansion by contract as long as it is clearly drafted with specific language.[217] Judge Kozinski thereby remanded the case so the lower court could examine the ambiguous contract by looking at past practices and industry norms.[218] Judge Kozinski accepted the expansion of innovation ownership by contract beyond what IP doctrine provides but urged the use of direct language, thereby setting a corporate learning curve for effectively erecting cognitive fences.

While some states delineate some limits on assignment contracts, most states allow for an expanding requirement to relinquish all rights of invention during the term of employment.[219] Even those states that limit certain types of assignment in practice provide a very narrow restriction on assignment. California, one of the states that delimits the scope of pre-invention

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214. *See Mattel*, 616 F.3d at 912 (discussing the district court's rejection of this argument).

215. *Id.* at 912 n.7.

216. *Id.*

217. *See id.* at 913, 917 (holding that the language of the contract is too ambiguous to support summary judgment but allowing the jury to decide whether the contract "assigned works created outside the scope of Bryant's employment").

218. *See id.* at 912, 917 (remanding, in part, to resolve the ambiguity of the phrase "at any time during my employment"); *id.* at 913–17 (discussing extrinsic evidence that may show copyright infringement).

219. Donald J. Ying, Comment, *A Comparative Study of the Treatment of Employee Inventions, Pre-Invention Assignment Agreements, and Software Rights*, 10 U. PA. J. BUS. & EMP. L. 763, 766 (2008) (indicating that only eight states have passed legislation limiting pre-invention assignment agreements).

assignment,[220] states in its Labor Code that an employment agreement requiring an employee to transfer her rights to an invention is not enforceable if the invention was developed entirely on her own time and without using employer resources or trade secrets, unless the invention was anticipated as part of the job for which she was hired.[221] In the context of Google for example, this narrow exception becomes particularly mute. As one recent Google hire described:

> Google is gigantic and has teams working on virtually everything (including things they're not known for like games, education, flying magnets, etc.), even if these interests are a tiny fraction of the company. Thus it seems they could claim just about anything.[222]

In the contemporary knowledge economy, almost any innovation can be construed as related to the firm, thereby rendering most exceptions irrelevant. Relatedly, in today's patterns of work, in which employees are expected to be connected to the workplace around the clock through remote electronic devices, work time appears to be timeless and without boundaries. Thus, even in the absence of an invention assignment contract, courts have broadly interpreted the doctrine of hired-to-invent to include work done at home. For example, the employer can own original sketches of an invention made by an employee at his home because the company had tasked him with inventing the process at issue.[223] To be on the safe side, companies explicitly draft the assignment contract to include work done during off hours. Google, for example, explicitly encompasses weekends and nights into its standard assignment agreement: "Google Inc. will own all Inventions that I invented, developed, reduced to practice, or otherwise contributed to, solely or jointly with others, during my employment with Google (*including during my off-duty hours*)."[224]

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220. *Id.*

221. CAL. LAB. CODE § 2870 (West 2011 & Supp. 2015); *see also* Cadence Design Sys., Inc. v. Bhandari, No. C 07-00823, 2007 WL 3343085, at *6–7 (N.D. Cal. Nov. 8, 2007) (holding that under § 2870 inventions that "relate to employer's business" include any inventions within the general scope of the employer's business); Cubic Corp. v. Marty, 229 Cal. Rptr. 828, 835 (Cal. Ct. App. 1986) (explaining that § 2870 does not apply if the invention grew out of the employer's research and development or resulted from work performed for the employer).

222. E-mail from Camilla Alexandra Hrdy, Postdoctoral Fellow, Yale Law Sch., to author (Apr. 19, 2014, 11:49 PST) (on file with author).

223. Teets v. Chromalloy Gas Turbine Corp., 83 F.3d 403, 406, 408 (Fed. Cir. 1996).

224. Google Employment Contract, *supra* note 76 (emphasis added). Ironically, the expansion of time exists in tension with the efforts made to draw the lines between work hour and off time. Employment laws militantly police the lines between on-the-job and off-the-job hours for the purposes of wage and hour. In this past term, the Supreme Court spent hours deciding a case concerning whether donning and doffing protective work gear is time worked or arrival time to the workplace that is not compensable. *See* Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 879 (2014) (holding that time spent donning and doffing protective gear was time spent "changing clothes" under the Fair Labor Standards Act and was therefore not compensable). And yet, with regard to fruits of an employee's labor, courts have increasingly rejected the distinction between on-the-job and off-the-job efforts. *See* Nachtigal, *supra* note 42 (noting that in *Brown v. Alcatel USA, Inc.*,

Traditionally, IP law attempted to incentivize employee invention by striking the balance of granting the employee's ownership over most innovation and providing the employer a partial stake in the invention, termed "shop right." The shop right is an implied license granted by the inventor to her employer to use an invention created outside the scope of the employee's duties when the invention is related to the company and the work environment contributed to its creation.[225] Today, this doctrine is becoming obsolete because the expansion by contract of corporate ownership has tipped the balance to include innovation far beyond work-for-hire and hire-to-invent. In the contemporary labor market, even in the absence of a signed contract, some courts allow pre-innovation assignments via oral or implied agreements.[226]

D. *The Partiality–Totality Spectrum: Noncompetes and Noncompetes on Steroids*

1. The Rise of the Postemployment Covenant Thicket.—The signing of a noncompete contract has become a standard requirement in our contemporary labor market. Employees routinely sign noncompetes promising to not work in their profession in the same region for a period of time. The vast majority of senior executives are bound by noncompete clauses.[227] At the same time, noncompetes are also on a sharp rise for all nonmanagerial employees.[228] Workers ranging from event planners to chefs, from investment-fund managers to yoga instructors, from physicians to camp counselors are all increasingly required to sign them.[229] The number of lawsuits involving noncompetes has almost doubled in the past decade.[230]

Brown's work on the "Solution," which the court awarded to Brown's employer, pre-dated his employment and was even finished while Brown was on vacation).

225. United States v. Dubilier Condenser Corp., 289 U.S. 178, 188 (1933).

226. *See* Larson v. Correct Craft, Inc., 537 F. Supp. 2d 1264, 1268 (M.D. Fla. 2008) (holding that employer and employee entered into an implied-in-fact contract to assign patent rights); Dickman v. Vollmer, 736 N.W.2d 202, 208 (Wis. Ct. App. 2007) (holding that agreements to assign do not need to be in writing; upon sufficient proof, oral pre-assignments may be upheld).

227. Noncompetes exist in almost 80% of chief executive contracts, Norman D. Bishara et al., *When Do CEOs Have Covenants Not to Compete in Their Employment Contracts?*, 34 & tbl.2 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 12-33, 2013), *available at* http://ssrn.com/abstract=2166020, *archived at* http://perma.cc/H4ZB-36HG, and over 70% of senior executive contracts, Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 378 (2009).

228. *See* Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 696 (2011) (recording that almost half of technical employees report being asked to sign a noncompete agreement).

229. Greenhouse, *supra* note 2.

230. Russell Beck, *Trade Secret and Noncompete Survey – National Case Graph 2014 [Preliminary Data]*, FAIR COMPETITION L. (Jan. 7, 2014), http://faircompetitionlaw.com/2014/01/07/trade-secret-and-noncompete-survey-national-case-graph-2014-preliminary-data/, *archived at* http://perma.cc/RF6C-U7D2.

Attorneys describe noncompetes as "the most powerful weapon for employers."[231] And yet, "the legal disputes only show the tip of the iceberg" because the large majority of employees do not choose to challenge the validity of these contracts.[232]

In debates about patent law reform, the patent thicket connotes a dense web of IP protections that in aggregate obstructs entry to markets and thus impedes innovation.[233] In other words, the sheer quantity of the restrictions qualitatively changes the nature of competition.[234] It creates a thick cluster of property rights that rigidifies the market and reduces the ability to move forward. Noncompetes are not only pervasive but also broad and often amorphous. Noncompete contracts are often drafted in an attempt to prevent all possible forms of competition, or indeed departure, of employees. A recent example involving a sales representative who signed a noncompete that prohibited the former employee from working for a competitor in any capacity is illustrative.[235] A North Carolina court of appeals deemed the contract overly broad and thereby unreasonable and unenforceable.[236] Most states employ such an ad hoc standard of reasonableness to test the validity of a noncompete.[237] Current policies delineating the enforceability of these controls are largely case by case and unpredictable. As one court described this unpredictability:

> No layman could realize the legal complication involved in [the] uncomplicated act [of signing a noncompete]. This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long. This deep and unsettled sea pertaining to an employee's covenant not to compete with his employer after termination of employment is really Seven Seas; and now that the court has sailed

231. Matthew Huddleston, *Foot Anstey: Non-Compete Clauses - The Most Powerful Weapon for Employers*, MONEY MARKETING (May 27, 2014, 8:00 AM), http://www.moneymarketing.co.uk/news-and-analysis/regulation/foot-anstey-non-compete-clauses-the-most-powerful-weapon-for-employers/2010323.article, *archived at* http://perma.cc/M4K3-UHSP.

232. Orly Lobel, *By Suppressing Mobility, Noncompete Pacts Suppress Innovation*, ROOM FOR DEBATE, N.Y. TIMES (June 11, 2014, 4:46 PM), http://www.nytimes.com/roomfordebate/2014/06/10/should-companies-be-allowed-to-make-workers-sign-noncompete-agreements/by-suppressing-mobility-noncompete-deals-suppresses-innovation, *archived at* http://perma.cc/9AQ4-BERA.

233. INTELLECTUAL PROP. OFFICE, A STUDY OF PATENT THICKETS 7 (2013).

234. *See* Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, 1 INNOVATION POL'Y & ECON. 119, 119–22 (2001) (discussing the patent thicket and its effect on the commercialization of new technology).

235. CopyPro, Inc. v. Musgrove, 754 S.E.2d 188, 192–93 (N.C. Ct. App. 2014).

236. *Id.* at 195.

237. Lobel, *supra* note 95, at 519.

> them, perhaps it should record those seas so that the next weary traveler may be saved the terrifying time it takes just to find them.[238]

The reasonableness standard is an open-ended legal term, consisting of a balancing test applied by the courts weighing "legitimate business interests," "employee hardships," and the "public interest."[239] The balancing is generally conducted on a case-by-case basis, without either referencing contemporary data or generalizing beyond the particular facts of each dispute.[240] The court's reasoning in these cases is often conclusory and subjective.[241]

In practice, most employees will alter their careers and decision making to avoid risk rather than challenge unreasonable noncompetes in court. One study that examined the behavioral patterns of inventors bound by postemployment restrictions found that these inventors are likely to engage in survival tactics—such as taking unpaid sabbaticals and unemployment, leaving their profession, or severing their past professional connections—in the hope that they will fly under their former employer's radar should they continue to work in their chosen career path.[242] Another study, which looked at the emigration of inventors, found that inventors leave states that enforce noncompete agreements in far higher rates than they leave states that do not.[243] The researchers conclude that noncompetes lead to a "brain drain" of the most valuable knowledge workers.[244] They warn that the evidence suggests noncompetes drive away those with the strongest human capital, a phenomenon which over time keeps the least desirable employees in regions that enforce noncompete restrictions while pushing the best employees to more open regions.[245]

From a firm perspective, many potential new employers will not risk a lawsuit by hiring an employee already bound by a noncompete. For example, in a recent case a former employer sent a competitor, who hired its departing employee, a letter about the existence of a noncompete.[246] In a standard

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238. Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 687 (Ohio Ct. C.P. 1952).

239. Lobel, *supra* note 95, at 519.

240. *Id.* at 519–20.

241. *See id.* at 520 (observing that case-by-case analysis of noncompete agreements by courts "does not easily lend itself to principled analysis").

242. Marx, *supra* note 228, at 709; Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 48–50 (2001).

243. Matt Marx et al., *Regional Disadvantage?: Employee Non-Compete Agreements and Brain Drain*, 44 RES. POL'Y 394, 395–96 (2015). Even when California and Connecticut are excluded from the analysis, the data shows a 25% higher emigration rate from high-enforcement states to weaker enforcing states. *Id.* at 401 tbl.5.

244. *Id.* at 399.

245. *Id.* at 403.

246. Bonds v. Philips Elec. N. Am., No. 2:12–cv–10371, 2014 WL 222730, at *2 (E.D. Mich. Jan. 23, 2014).

move, the employee was immediately fired from the new job.[247] In this case, the employee filed a lawsuit against his former employer for tortious interference with his relationship with the new employer.[248] The court dismissed the case, explaining that a former employer has a right to send such warning letters and that the result of the firing does not present a legal issue.[249]

Only a handful of states ban or nearly ban the enforcement of noncompete agreements, most notably California, which has banned noncompetes since the founding of the state. The California Business and Professions Code voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business."[250] The courts have understood this exceptional California law, which runs contrary to most other states, as a policy of favoring open competition and promoting a citizen's right to pursue the employment and enterprise of his or her choice.[251] Other states are following California's lead; in April 2014, Massachusetts Governor Deval Patrick proposed banning noncompetes in the state, alluding to the new evidence demonstrating their detrimental effects.[252]

2. Name Game: Nonsolicitation, Nondealing, and Nonpoaching.—An effective noncompete contract does not need to be labeled or entitled as such. Restrictions over the use of human capital do not have to explicitly use the language of noncompetes to reach the result of restricting employee mobility postemployment. As discussed above with regard to trailer clauses, trade secrets, and the doctrine of assignor estoppel, imposing a postemployment penalty on a former employee is tantamount in its economic effect to noncompetes. Increasingly, a standard human capital clause is a nonsolicitation clause, an agreement in which an employee agrees not to solicit a company's clients or customers, for her own benefit or for the benefit of a future employer after leaving the company.[253] A nondealing clause is an even

247. *Id.* at *3.

248. *Id.* at *1.

249. *Id.* at *7–8.

250. CAL. BUS. & PROF. CODE § 16600 (West 2008).

251. Beer & Wine Servs., Inc. v. Dumas, No. B151792, 2003 WL 1194725, at *3 (Cal. Ct. App. Mar. 17, 2003).

252. Callum Borchers & Michael B. Farrell, *Patrick Looks to Eliminate Tech Noncompete Agreements*, BOSTON GLOBE, Apr. 10, 2014, http://www.bostonglobe.com/business/2014/04/09/gov-patrick-pushes-ban-noncompete-agreements-employment-contracts/kgOq3rkbtQkhYooVIicfOO/story.html, *archived at* http://perma.cc/AA6N-3VVM.

253. David L. Johnson, *The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants*, 28 ABA J. LAB. & EMP. L. 99, 99 (2012); *see also* DAVID J. CARR, THE PROTECTION OF TRADE SECRETS, CONFIDENTIAL INFORMATION AND GOODWILL: DRAFTING ENFORCEABLE CONFIDENTIALITY, NON-COMPETE AND NON-SOLICITATION AGREEMENTS: 10 TRICKS AND TRAPS 3 (2002), *available at* http://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/tradesecrets/carr.authcheckdam.pdf, *archived at* http://perma.cc/WP7W-YKAH (listing

stronger prohibition as it precludes the employee from dealing with the former employer's customers postemployment even if these customers approach the former employee without solicitation.[254] A nonpoaching clause prohibits the former employee from luring away any employees of the former employer. For example, Google's employment contract includes the following clause:

> [D]uring my employment with Google and for twelve months immediately following its termination for any reason, whether voluntary or involuntary, with or without cause, I will not directly or indirectly solicit any of Google's employees to leave their employment.[255]

In some instances, courts even construe a nonsolicitation clause as a nondealing clause. In *Manuel Lujan Insurance, Inc. v. Jordan*,[256] an insurance company employed the defendant as a manager in its bond department.[257] Part of the employment agreement included a promise to "not for a period of two (2) years from the date of termination of employment solicit the customers (policyholders) of the Company, either directly or indirectly."[258] The agreement further stated that "[t]he purpose of this paragraph is to insure that the Employee for the periods set out herein, will not in any manner directly or indirectly enter into competition with the Company on [sic] the customers of the Company as of date of termination."[259] The trial court enjoined the former employee from soliciting or accepting business from the company's customers.[260] Upon appeal, the Supreme Court of New Mexico explained:

> [I]t is not clear whether the word "solicit" should be narrowly interpreted as precluding only solicitation but allowing [a former

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nonsolicitation agreements alongside noncompete and trade secret agreements as contractual protections against industrial espionage).

254. *See, e.g.*, Curtis 1000, Inc. v. Martin, 197 F. App'x 412, 423 (6th Cir. 2006) (enforcing a covenant prohibiting an individual from accepting unsolicited business from his former employer's clients); USI Ins. Servs. LLC v. Miner, 801 F. Supp. 2d 175, 188 (S.D.N.Y. 2011) (same); Pulse Techs., Inc. v. Dodrill, No. CV-07-65-ST, 2007 WL 789434, at *12 (D. Or. Mar. 14, 2007) (same); Ecolab, Inc. v. K.P. Laundry Mach., Inc., 656 F. Supp. 894, 896 (S.D.N.Y. 1987) (same); Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 566 (Ala. 1992) (same); Spitz, Sullivan, Wachtel & Falcetta v. Murphy, No. CV-86-0322422, 1991 WL 112718, at *6 (Conn. Super. Ct. June 13, 1991) (upholding such a covenant while noting that "[t]he defendant has cited no Connecticut precedent which renders such an agreement unenforceable merely because it prohibits a defecting professional employee from servicing unsolicited clients of his former employer"); Envtl. Servs., Inc. v. Carter, 9 So. 3d 1258, 1266–67 (Fla. Dist. Ct. App. 2009) (holding a covenant banning former employees from performing services for the employer's costumers to be enforceable).

255. Google Employment Contract, *supra* note 76.

256. 673 P.2d 1306 (N.M. 1983).

257. *Id.* at 1307.

258. *Id.* at 1308.

259. *Id.*

260. *Id.*

> employee] to accept the unsolicited business of [the employer's] customers. On the other hand, inclusion of the non-competition provision in the second sentence may be viewed as including prohibitions against any acceptance of, or competition for, the customers . . . .[261]

The court concluded that, looking at the totality of the wording in the contract and the surrounding evidence presented in court, it was "apparent that the parties intended that [the former employee] be restricted from competing by not soliciting or accepting business from [the employer's] customers."[262] The court thus held that the contract should be read as a comprehensive ban on acceptance, rather than merely a narrow promise not to solicit.[263] Even in the absence of express nonsolicitation agreements, client lists are often considered trade secrets, at the very least if such lists contain information that is not easily ascertainable through publicly available lists, such as details about the clients' past orders or any information that could undercut a competitor's pricing beyond merely the names and contacts of clients.[264]

Nonpoaching and nonhiring clauses round out the list of untouchables—expanding ownership from clients to coworkers—by stripping former employees of their professional network. In some instances, like with nonsolicitation, courts have interpreted nonpoaching clauses as an absolute prohibition of hiring former coworkers. For example, in *International Security Management Group, Inc. v. Sawyer*,[265] an employee signed a contract agreeing that he would not "solicit" any coworker to "terminate that person's employment . . . and to accept employment with a [competitor]."[266] The former employee was approached by former coworkers after he placed an ad in the local newspaper.[267] A Tennessee federal district court held that "[t]he extension of a job offer alone would qualify as solicitation, as it constitutes an instance of requesting or seeking to obtain something."[268] At

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261. *Id.* at 1309.

262. *Id.*

263. *Id.* at 1309–10.

264. *See* Optos Inc. v. Topcon Med. Sys., Inc., 777 F. Supp. 2d 217, 238–39 (D. Mass. 2011) (declaring that the company's customer list was likely a trade secret because of several factors, including that the list was "practically impossible" to compile using publicly available information); Tom James Co. v. Hudgins, 261 F. Supp. 2d 636, 641–42 (S.D. Miss. 2003) (finding that the company's customer list falls within Mississippi's definition of "trade secrets" because the company took reasonable efforts to maintain the list's secrecy, and the list could not be easily duplicated by public directories); Home Pride Foods, Inc. v. Johnson, 634 N.W.2d 774, 781–82 (Neb. 2001) (finding that a customer list was a trade secret because the list contained information not ascertainable from publicly available lists, had independent economic value, and was kept secret).

265. No. 3:06CV0456, 2006 WL 1638537 (M.D. Tenn. June 6, 2006).

266. *Id.* at *3.

267. *Id.* at *17.

268. *Id.* (quoting BLACK'S LAW DICTIONARY 1427 (8th ed. 2004)) (internal quotation marks omitted).

the same time, other courts have construed nonsolicitation clauses more narrowly, as only prohibiting active and specific inducement.[269] To expand the reach of the prohibition more explicitly, nonhiring clauses encompass the more passive instances in which a coworker approaches the former employee for a job.[270] All of these clauses, targeting the connections formed between former employees and their professional networks, impose a competition penalty on former employees and function equivalently to noncompetes. Courts have largely accepted that using prior knowledge and experience in an attempt to compete over customers and market talent breaches upon corporate rights to cognitive property.

3. Cognitive Cartels.—Starting in 2005, top executives at Google, Apple, Adobe, Intel, Intuit, Pixar, Lucas Film, eBay, and other major high-tech companies reached gentlemen's agreements to not hire each other's employees. The no-hire agreements covered the entire workforce of each company and were not "limited by geography, job function, product group, or time period."[271] In 2010, the Antitrust Division of the United States Department of Justice (DOJ) filed a complaint against these tech giants, deeming such do-not-hire agreements to be collusive restraints on trade and competition.[272] The breadth of the agreements led the DOJ to conclude that these agreements were per se violations of American antitrust law.[273] The settlement reached between the DOJ and the high-tech companies "enjoins the nonsolicit agreements and, more broadly, prohibits agreements regarding solicitation and recruitment."[274] The Department of Justice stated:

> These actions by the Antitrust Division remind us all that the antitrust laws guarantee the benefits of competition to all consumers, including working men and women. The agreements we challenged here not only harmed the overall competitive process but, importantly, harmed specialized and much sought after technology employees who were prevented from getting better jobs and higher salaries. Stifling

269. *See* Meyer–Chatfield v. Century Bus. Servicing, Inc., 732 F. Supp. 2d 514, 521–22 (E.D. Pa. 2010) (finding the word "solicit" to not include hiring); Enhanced Network Solutions Grp., Inc. v. Hypersonic Techs. Corp., 951 N.E.2d 265, 268–69 (Ind. Ct. App. 2011) (holding that a subcontractor's hiring of an employee does not violate a nonsolicitation agreement when that employee initiated contact with the subcontractor).

270. Still, some courts have found that nonhiring clauses are unenforceable, similarly to noncompetes. *E.g.*, Cox v. Altus Healthcare & Hospice, Inc., 706 S.E.2d 660, 664 (Ga. Ct. App. 2011); Cap Gemini Am., Inc. v. Judd, 597 N.E.2d 1272, 1287 (Ind. Ct. App. 1992).

271. Complaint at 5, United States v. Adobe Sys., Inc., No. 1:10-cv-01629, 2011 WL 10883994 (D.D.C. Sept. 24, 2010).

272. *Id.* at 2.

273. *Id.*

274. LOBEL, *supra* note 19, at 220; *see also* United States v. Adobe Sys., Inc., No. 1:10-cv-01629, 2011 WL 10883994, at *2 (D.D.C. Mar. 18, 2011).

> opportunities for these talented and highly-skilled individuals was bad for them and bad for innovation in high-tech industries.[275]

In 2013, a United States district court certified a private class of 64,000 former employees of these high-tech giants who filed a class action, arguing that these anticompetitive practices depressed their wages in the industry.[276] The high-tech talent cartel ran deeper and broader than this first unique class action reveals. There is evidence to suggest that other companies, including Comcast, Genentech, PayPal, Nvidia, Dell, Microsoft, DoubleClick EarthLink, AOL, Ask Jeeves, Clear Channel, Oracle, Lycos, Palm, Best Buy, Nike, and Foxconn may have been involved in these human capital collusions.[277]

Steve Jobs was the architect and driving force of these cognitive cartels. Jobs e-mailed Google warning: "If you hire a single one of these people that means war."[278] The secret agreement that followed was so strong that when a Google recruiter did contact Apple engineers, Jobs immediately reminded Google of his warning.[279] Google fired the recruiter immediately.[280] According to the allegations, Google even asked for Jobs's permission to hire former Apple employees.[281] In addition, the do-not-hire agreements spun globally. For example, one e-mail reveals Google's pacific leadership recruiter asking Google's director of recruiting to confirm whether they could cold call companies in Korea "excluding the 'do not cold call' companies, of course."[282] The collusive agreements included not only the engineers but also the chefs who worked in the company cafeteria.[283] Recruiters received lists of companies off limits: "No one calls, networks, or e-mails into the company

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275. Press Release, Dep't of Justice, Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conference Call Regarding the Justice Department's Settlement with eBay Inc. to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/305619.pdf, *archived at* http://perma.cc/Q833-BFAW.

276. Joel Rosenblatt & Karen Gullo, *Apple, Google Must Face Group Antitrust Hiring Lawsuit*, BLOOMBERG (Oct. 25, 2013, 6:13 PM), http://www.bloomberg.com/news/2013-10-25/apple-google-must-face-group-antitrust-hiring-lawsuit.html, *archived at* http://perma.cc/4BP2-P7QH. The Ninth Circuit refused to entertain the technology companies' request to overturn the class certification. Michael Lipkin, *9th Circ. Upholds Cert. in Worker Poaching Pact Antitrust Suit*, LAW360 (Jan. 14, 2014, 10:03 PM), http://www.law360.com/articles/501359/9th-circ-upholds-cert-in-worker-poaching-pact-antitrust-suit, *archived at* http://perma.cc/PY6Z-KKYL.

277. *See* Shareholder Derivative Complaint at 37, 39, 40–41, 59, Shah v. Brin, No. 1-14-cv-264512 (Cal. Super. Ct. filed Apr. 29, 2014) (presenting evidence that these companies were on Google's "do not cold call" and "sensitive" companies lists).

278. David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N.Y. TIMES, Feb. 28, 2014, http://www.nytimes.com/2014/03/01/technology/engineers-allege-hiring-collusion-in-silicon-valley.html?_r=0, *archived at* http://perma.cc/TJT6-2PR5.

279. Shareholder Derivative Complaint, *supra* note 277, at 21.

280. *Id.*

281. Streitfeld, *supra* note 278.

282. Shareholder Derivative Complaint, *supra* note 277, at 32–33.

283. *Id.* at 33.

or its subsidiaries looking for people."[284] The record indicates that top executives at these Silicon Valley giants understood the possible illegality of these agreements.[285] Eric E. Schmidt, Google's CEO at the time, asked his people to not keep a paper trail about the agreements.[286]

These no-poaching practices likely led to significant hiring and innovation problems for the companies themselves, as evidenced by Google's internal memos that reveal the difficulties teams had in filling spots and maintaining their innovative edge.[287] Consequently, in addition to the employee class action, another class action was recently filed against Google by its shareholders.[288] The shareholder derivative action seeks to recover damages, caused by Google's high-level executives, for the illegal nonsolicitation agreements that "not only hurt employees of these companies, but also the companies themselves because Silicon Valley's innovation is based in large part on the frequent turnover of employees, which causes information diffusion and spurs innovation."[289] Specifically, the shareholder suit claims that Google's executives violated the company's own code of conduct, which states that Google "strive[s] to hire the best employees, with backgrounds and perspectives as diverse as our global users. . . . Competition for qualified personnel in our industry is intense, particularly for software engineers, computer scientists, and other technical staff."[290]

In early August 2014, the tech workers and the defendants in this class action suit agreed to a $324.5 million settlement, but the district court judge, Lucy Koh, denied preliminary approval to this settlement agreement.[291] Even more recently, another class action suit was filed against Disney, DreamWorks, Lucasfilm Ltd., and Sony Pictures Animation for their "agree[ments] to not poach each other's workers."[292] Robert A. Nitsch Jr., who worked at DreamWorks, filed this suit and alleged that "[d]efendants conspired not to actively solicit each other's employees and to fix their employees' wage and salary ranges as part of one overarching conspiracy to suppress the compensation of their employees and other class members."[293]

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284. *Id.* at 47.

285. *See id.* at 58 fig.28 (containing an e-mail about Google's collusion with eBay beginning with a warning: "DO NOT FORWARD").

286. Josh Harkinson, *"I Don't Want to Create a Paper Trail": Inside the Secret Apple–Google Pact*, MOTHER JONES, Feb. 19, 2014, http://www.motherjones.com/politics/2014/02/google-apple-class-action-poaching-steve-jobs-wage-theft, *archived at* http://perma.cc/5UTN-FX6Q.

287. Shareholder Derivative Complaint, *supra* note 277, at 63.

288. Shah v. Brin, No. 1-14-cv-264512 (Cal. Super. Ct. filed Apr. 29, 2014).

289. Shareholder Derivative Complaint, *supra* note 277, at 1.

290. *Id.* at 15–16 (internal quotation marks omitted).

291. Ryan Faughnder, *DreamWorks Animation, Disney Sued Over Alleged No-Poaching Scheme*, LA TIMES, Sept. 8, 2014, http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dwa-disney-sued-poaching-20140908-story.html, *archived at* http://perma.cc/6NP6-7JX3.

292. *Id.*

293. *Id.* (internal quotation marks omitted).

Notably, the flipside of such collusive agreements are cases that deem the inducement of employees of other companies to leave their employer as actionable. A Pennsylvania court, for example, explained "systematically inducing employees to leave their present employment is actionable 'when the purpose of such enticement is to cripple and destroy an integral part of a competitive business organization rather than to obtain the services of particularly gifted or skilled employ[ees].'"[294] The irony of the Silicon Valley cognitive cartel is that it occurred precisely in the region that has most benefited from California's exceptional policy of voiding noncompete agreements.[295]

The DOJ called the cognitive cartels formed in Silicon Valley "blatant and egregious."[296] When Intuit sent a recruiting flyer to an eBay employee, eBay CEO Meg Whitman immediately contacted top executives at Intuit asking them to "remind your folks not to send this stuff to eBay people."[297] She told Google's Eric Schmidt that "recruiting practices are 'zero sum'" and that targeting eBay employees "driv[es] salaries up across the board," which, in "the valley's view," is an "unfair" practice.[298] This exchange epitomizes the upside-down world of the new cognitive property: talent mobility is deemed an "unfair practice" while suppressing competition through human capital control becomes the norm. This pattern resonates with earlier IP debates, particularly in the copyright world. Larry Lessig famously lamented the gap between the early Disney years, when "to use the language of the Disney Corporation today, Walt Disney 'stole' Willie [which became Mickey Mouse] from Buster Keaton" and the reality today.[299] While a large number of Disney's animated hits are derived from the Brothers Grimm fairy tales and culture icons, under contemporary realities with the strengthening of copyright protections, "no one can do to the Disney Corporation what Walt Disney did to the Brothers Grimm [and to Steamboat Bill]."[300] The same is happening today in human capital law. Companies such as Apple and Google, which had benefited from the vibrant culture of innovation and

294. Boyce v. Smith-Edwards-Dunlap Co., 580 A.2d 1382, 1390 (Pa. Super. Ct. 1990) (quoting Albee Homes, Inc. v. Caddie Homes, Inc., 207 A.2d 768, 771 (Pa. 1965)).

295. *See* Bruce Fallick et al., *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472, 478 & tbl.2 (2006) (presenting data showing that intra-industry mobility is higher in Silicon Valley's computer industry than in those of other cities); Lee Fleming & Matt Marx, *Managing Creativity in Small Worlds*, CAL. MGMT. REV., Summer 2006, at 6, 15 (noting the proposition that "California proscription of non-compete agreements [is] the cause of Silicon Valley's greater job mobility").

296. Press Release, *supra* note 275.

297. *Id.*

298. Shareholder Derivative Complaint, *supra* note 277, at 57, 58 fig.28 (internal quotation marks omitted).

299. Lawrence Lessig, Professor, Stanford Law Sch., Free Culture: Keynote From OSCON 2002 (July 24, 2002) (transcript available at http://archive.oreilly.com/pub/a/policy/2002/08/15/lessig.html, *archived at* http://perma.cc/5CQ7-ML2V).

300. *Id.*

mobility in Silicon Valley, have become entrenched in the notion of ownership over human capital, such that they aim to not let others do to them what they have done to others: recruit experienced employees. A final irony in this context should be noted. In the past few years, Silicon Valley leaders have been vocal about a talent drought, strongly advocating immigration reform to allow more flow of employees from around the world;[301] yet, these same high-tech leaders conspired to suppress the market for talent in their own region.

II. Dimensions of Knowledge: The Detrimental Layered Effects of Cognitive Property

The effects of contemporary human capital law, creating an ever-expanding realm of cognitive property, should be understood in relation to the multiple dimensions of human knowledge. In 1675, Sir Isaac Newton wrote in a letter to his rival Robert Hook: "If I have seen further [than you and Descartes] it is by standing on [the shoulders] of Giants."[302] Every great innovator—artist, engineer, scientist, and author—in history stood upon the shoulders of giants, and it is inherently the nature of knowledge to fertilize more knowledge. Stripping individuals of the wealth of knowledge and experience they carry has detrimental effects on innovation, market competition, and economic growth. While some of these understandings are intuitive, new field and experimental research about knowledge flows and job mobility, enriched by contemporary economic analysis of innovation policy, presents a clearer understanding of the new cognitive property and its detrimental effects. The harms include the prevention of talented individuals from standing upon the shoulders of giants, sharing knowledge, and making use of their human capital. In turn, as the research shows, such restrictions stymie industry innovation and economic growth.

The following subparts unpack these concerns by developing a novel taxonomy of the multiple facets of knowledge as it inhabits contemporary talent pools. To fully understand the effects of the new cognitive property, we need to investigate the core building blocks of human knowledge and the stepping stones of innovation and progress. Human capital is the stock of knowledge in all its multiple forms that contributes to productive work, including knowledge that is noncodifiable as well as knowledge that expresses itself in skills and know-how, in relationships and networks, in creativity and motivation, and in the ability to disrupt and energize.

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301. Lobel, *supra* note 232.

302. ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS 31 (1965).

A. Tacit Knowledge

The new cognitive property should be understood as an attempt to capture not only codifiable but also noncodifiable knowledge, precisely the type of knowledge that intellectual property law leaves in the public domain. Nobel laureate Elinor Ostrom counseled: "An infinite amount of knowledge is waiting to be unearthed. The discovery of future knowledge is a common good and a treasure we owe to future generations. The challenge of today's generation is to keep the pathways to discovery open."[303] Knowledge, however, is not merely a good to be unearthed, traded, and then bequeathed as "a treasure" to future generations. In its full breadth, knowledge cannot be captured by merely considering codified information—the kind that can be embedded in intellectual property. Knowledge is also the human skills, communications, and know-how that exist within and between people. A useful way to understand the complexity of knowledge and its relation to human capital is that knowledge embodies a dual function: it exists as a thing external to the human mind, but it is also the foundation of our cognitive systems—to be human is to know. Gilbert Ryle identified the distinction between "knowing that" and "knowing how,"[304] and renowned economist Fritz Machlup referred to the latter as "brainwork."[305] Michael Polanyi relatedly distinguished between connoisseurship—the art of knowing—and skills—the art of doing.[306] In broader terms, spanning beyond any one individual, knowledge is both a resource society possesses and the very essence that constitutes a society.[307]

Even in the information age, when the digital sphere provides abundant access, knowledge exchanges still rely on direct human contact.[308] There is a consensus in the literature that the effects of "knowledge flows are geographically localized."[309] Indeed, the differences between the quality of

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303. Hess & Ostrom, *supra* note 8, at 3, 8.

304. *See* GILBERT RYLE, THE CONCEPT OF MIND 27–32 (1949) (establishing the distinction between "knowing that" and "knowing how," where "knowing how" indicates mastery and skill at a particular task).

305. *See* FRITZ MACHLUP, THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES 379–80 (1962) (referring to work completed by human workers—as opposed to automated workers—as brain work, particularly when involving a degree of expertise).

306. MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 54 (1958).

307. *See generally* J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999) (discussing the modern tension between contractual control of knowledge and society's benefit from the free spread of knowledge).

308. *See* Pankaj Ghemawat, *Why the World Isn't Flat*, FOREIGN POL'Y, Mar.–Apr. 2007, at 54, 54, *available at* http://www.foreignpolicy.com/articles/2007/02/14/why_the_world_isnt_flat, *archived at* http://perma.cc/DF9Z-9YFC (showing that, despite appearances to the contrary, the vast majority of information and economic exchange takes place at the local level).

309. Ajay Agrawal et al., *Gone but Not Forgotten: Knowledge Flows, Labor Mobility, and Enduring Social Relationships*, 6 J. ECON. GEOGRAPHY 571, 571 (2006); *see also* Peter Thompson

human capital has become key to understanding the challenges of economic development.[310] Despite global technology and the accessibility of information through the Internet, firms are far more likely to quote research from a local university than a distant university, as exemplified in patent applications.[311]

Tacit knowledge is particularly localized compared to written knowledge precisely because it is embedded in people. Knowledge remains tacit, rather than codified, for two reasons. First, certain types of knowledge by their nature simply cannot be written down. As Polanyi put it: "We can know more than we can tell."[312] This is why tacit knowledge is difficult to transmit through a patent document or a scientific journal.[313] Second, even when knowledge is amenable to codification, those holding the knowledge often lack incentive to codify it.[314] Direct interactions between people are thus the primary vehicle of transmitting these aspects of knowledge. Given that information is not fully captured by sources outside the minds of individuals, knowledge flows in the market through employee mobility and professional interaction. Kenneth Arrow hailed mobility of employees as a central way of spreading information.[315] As Dan Burk put it, uncodified knowledge "moves only with the humans who carry it."[316]

B. Relational and Networked Knowledge

Relationships spur innovation. In part, it is the existence of tacit knowledge that drives the formation of social ties and a professional

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& Melanie Fox-Kean, *Patent Citations and the Geography of Knowledge Spillovers: A Reassessment*, 95 AM. ECON. REV. 450, 450 (2005).

310. *See generally* PAUL KRUGMAN, GEOGRAPHY AND TRADE (1991) (arguing that economics are affected by geography, leading producers to concentrate in locations with high demand and quality inputs).

311. *See* Paul Almeida & Bruce Kogut, *Localization of Knowledge and the Mobility of Engineers in Regional Networks*, 45 MGMT. SCI. 905, 915 (1999) (reporting that mobility has increased the probability that a patent will cite to a patent in the same region); Adam B. Jaffe et al., *Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations*, 108 Q. J. ECON. 577, 591 (1993) (finding "significant evidence" that patent citations are more localized than would be expected).

312. MICHAEL POLANYI, THE TACIT DIMENSION 4 (Anchor Books 1967) (1966) (emphasis omitted).

313. *See generally* Peter Lee, *Transcending the Tacit Dimension: Patents, Relationships, and Organizational Integration in Technology Transfer*, 100 CALIF. L. REV. 1503 (2012) (discussing the nature of tacit knowledge, the difficulty of transmitting tacit knowledge, and the implications this difficulty has for intellectual property law).

314. Ajay Agrawal, *Engaging the Inventor: Exploring Licensing Strategies for University Inventions and the Role of Latent Knowledge*, 27 STRATEGIC MGMT. J. 63, 64 (2006).

315. Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 615 (Nat'l Bureau of Econ. Research ed., 1962).

316. Dan L. Burk, *The Role of Patent Law in Knowledge Codification*, 23 BERKELEY TECH. L.J. 1009, 1017 (2008).

community.[317] Knowledge flows between people through relationships. These relationships continue after people move jobs, forming professional connections where past colleagues remain acquaintances and potential collaborators. But beyond the flow of tacit knowledge, relationships create opportunities for connecting between distinct types of knowledge and ideas. A series of recent studies test the importance of collaboration between professionals over time. Several important insights arise from this body of research. First, the existence of professional ties highly impacts the likelihood of individual entrepreneurial activity.[318] These relationships enable an individual to identify entrepreneurial opportunities and increase her motivation to pursue those opportunities, especially for an individual without exposure to entrepreneurship in her own family.[319] Second, relationships activate participation in collaborative efforts, and the more collaborators an individual has had, the more likely she is to participate again in a collaborative venture.[320] Third, and perhaps most importantly, knowledge is not only relational but networked in the sense that the combined knowledge that exists within a region or a professional community impacts the future knowledge ventures of each individual. Contemporary research illuminates the ways knowledge is embedded in institutions.[321] Organizations, professional networks, and regions can be understood to have "DNA" in the sense of patterning individual processes. An impressive body of research demonstrates the ways that the richness of ties in a locality determine the quality and breadth of creativity found in that region.[322] When a regional network of inventors is dense, the number of future inventions coming out of that region will significantly increase.[323] The more people in contact, the more productive each member of that network. Dense metropolitan areas

317. *See* ZYGMUNT BAUMAN, COMMUNITY: SEEKING SAFETY IN AN INSECURE WORLD 11 (2001) (arguing that "community" is dependent upon shared tacit knowledge). *See generally* Hiroe Ishihara & Unai Pascual, *Social Capital in Community Level Environmental Governance: A Critique*, 68 ECOLOGICAL ECON. 1549 (2009) (discussing how social capital, combined with common knowledge and symbolic power, gives rise to collective action in a community).

318. Ramana Nanda & Jesper B. Sorensen, *Workplace Peers and Entrepreneurship*, 56 MGMT. SCI. 1116, 1120 (2010).

319. *Id.* at 1124. In this sense, market relationships serve as a substitute for community ties and are thus a significant equalizer.

320. Jasjit Singh, *Collaborative Networks as Determinants of Knowledge Diffusion Processes*, 51 MGMT. SCI. 756, 757 (2005).

321. *See generally* Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539 (2006) (book review) (discussing modern employment law and its interplay with complex modern institutions).

322. *See generally* Peter V. Marsden & Noah E. Friedkin, *Network Studies of Social Influence*, 22 SOC. METHODS & RES. 127 (1993) (analyzing a number of studies and models that have explored the influence that social networks have upon the actors within those networks).

323. *Cf.* Morten T. Hansen, *The Search-Transfer Problem: The Role of Weak Ties in Sharing Knowledge Across Organization Subunits*, 44 ADMIN. SCI. Q. 82, 107–09 (1999) (finding that ties established broadly between product development teams, even weak ties, will facilitate the spread of knowledge and lead to greater development).

enjoy a significant rise in the number of patents *per capita* when compared to the number of patents per capita in areas that are less dense.[324] Geographic density of creative ventures provides a space for professional meetings, face-to-face interactions, and long-term social connections. As the flow of human capital increases, the density of networks facilitates the diffusion of complex information, and the quality of the knowledge network itself improves. The loss that stems from controlling human interactions and flow is therefore different and indeed greater than the formal knowledge that any single individual may possess.[325]

C. *Motivational & Disruptive Knowledge*

In the new knowledge economy, human capital has become a premier resource that gives companies their competitive edge. And yet, human capital is not a static resource in the way real estate or building materials serve a construction company. Human capital is both a resource and a living subject that makes constant judgments, decisions, and choices about the quantity and quality of outputs. Put differently, human capital is a resource with built-in motivation. Quite intuitively, noncompetes, trade secrets, and other controls over human capital, which strip individuals from ownership over their skills, knowledge, experiences, and future competitiveness, may decrease the drive to effectively employ one's cognitive energies. In other words, the new cognitive property not only commodifies intangible knowledge beyond the bounds of intellectual property, it changes the quality of that knowledge. In general, employees are discouraged from investing in their human capital when interfirm competition is less likely to occur.[326]

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324. Gerald A. Carlino et al., *Urban Density and the Rate of Invention*, 61 J. URB. ECON. 389, 390 (2007).

325. Relational and networked knowledge is related to the concept of social capital, which is distinct from intellectual capital. While intellectual capital (or formal knowledge) can be transferred through education, social capital is embedded in our daily interactions. Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 248–49 (John G. Richardson ed., 1986); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S98 (Supp. 1988). Bourdieu defined social capital as the aggregate resources that are linked to a network. Bourdieu, *supra*, at 248. Coleman defined social capital functionally as anything that supports productive activity through social norms, reciprocity, and trust. Coleman, *supra*, at S98. Indeed, there are rich debates between economists and sociologists on the definition of social capital as a form of capital or as a social structure. *See* Kenneth J. Arrow, *Observations on Social Capital*, *in* SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 3, 4 (Partha Dasgupta & Ismail Serageldin eds., 2000) (warning that the concept of social capital "may be a snare and a delusion"); Robert M. Solow, *Notes on Social Capital and Economic Performance*, *in* SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE, *supra*, at 6, 6 (criticizing the modern concept of social capital). *See generally* BEN FINE, SOCIAL CAPITAL VERSUS SOCIAL THEORY (2001) (analyzing the state of the philosophy of social capital at the beginning of the twenty-first century). Importantly for this Article, relational and networked knowledge, or the sociological concept of social capital, is viewed as a functional structure that is one aspect of human capital.

326. *See* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 863–64 (2013) [hereinafter Amir & Lobel, *Driving Performance*]

Motivation is also reduced when employees whose human capital is propertized have fewer prospects to receive credit and attribution for their work,[327] reduced expectations of profit from their innovation, and fewer entrepreneurial opportunities. The background rules of ownership over the human capital alter the very quality of the resource at stake.

In recent behavioral studies conducted with my collaborator On Amir, we set up an experimental lab designed to identify the effect of human capital controls and contractual arrangements on performance and motivation. In our study, participants in an e-lab experiment were asked to perform tasks.[328] Those participants who were asked to sign human capital restrictions on future employment in our online job market performed worse on their tasks and were more likely to quit before the end of the experiment.[329] The findings suggest that participants bound by other postemployment restrictions are less motivated to stay on task than those not bound.[330] Recent field data supports these experimental findings, showing that, contrary to traditional economic analysis, companies invest *less* in research and human capital development when noncompetes are strongly enforced,[331] providing further evidence that investment decisions are affected by workers themselves in their assessments on their own ability to move to, or to be recruited by, a different company. These findings suggest that the new cognitive property, which strips employees from ownership over their human capital, not only restricts mobility and knowledge flow but also reduces incentives to innovate.

New economic models further help explain why people are more motivated to invest in their own human capital when they do not know the precise job that they will eventually hold.[332] Companies are also incentivized to invest in technology and skill development when they do not know whom they will continue to hire.[333] MIT economist Daron Acemoglu describes the fertile conditions of uncertainty as forming a virtuous circle of human capital

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(arguing that noncompetes may stifle motivation to complete difficult tasks); On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, HARV. BUS. REV., Jan.–Feb. 2014, at 26, 26 (finding the subjects of a study to be much less motivated to expend effort when subject to fictional noncompetes).

327. *Cf.* Christopher Sprigman et al., *What's A Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389, 1425 (2013) (finding that creators value attribution and are willing to reduce their monetary compensation in return for receiving attribution).

328. Amir & Lobel, *Driving Performance*, *supra* note 326, at 852.

329. *Id.* at 854–55.

330. *Id.* at 855.

331. Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 408–10 (2011).

332. *See, e.g.*, Daron Acemoglu, *Patterns of Skill Premia*, 70 REV. ECON. STUD. 199, 199 (2003) (introducing a model that demonstrates the growing importance of human skills in new international and technological fields).

333. *See id.* at 216 (arguing that the presence of a higher supply of skilled workers leads to greater investment in further skill development).

development: when workers invest more in their human capital, businesses will invest more in innovation because of the prospect of acquiring good talent.[334] Consequently, workers will invest more in their human capital as they may end up in one, or several, of these companies. In other words, in Acemoglu's model the likelihood of finding good employees creates incentives for overall investments in human capital. Yet, empirical research shows that in most places there is an underinvestment in human capital.[335] The trend toward expanding cognitive property can help explain this underinvestment: the new cognitive property not only impedes the flow of knowledge and reduces the positive effects of market uncertainty but also undercuts the likelihood of being able to employ good employees. Consequently, the incentives and motivation to invest in human capital are lowered.

Finally, the background rules that shape ownership and control over human capital also impact the degree to which knowledge can be disruptive and used to generate new ideas. Phenomena like Not Invented Here (NIH)—an institutional pathology that prevents groups from benefiting from outside knowledge[336]—and groupthink—where cohesive groups overlook important alternatives because of the desire for consensus and conformity[337]—are mitigated by the flow of "new blood" to the organization. Even in today's globalized market, research shows that firms often to their detriment overlook outside ideas and solutions simply from an NIH mindset and because groups become entrenched in traditional methods.[338] This counterproductive lock in happens in greater frequency where there is little turnover and companies are overly stable. In one study, teams with little turnover became progressively less productive.[339] Firms in remote locations with stable personnel are more likely to draw upon the inventions of their

334. *See id.* at 216, 220 (asserting that workers' own investments in human capital increases the supply of skilled workers, which increases the market size for skill-intensive jobs, which encourages further investment in workers' skills).

335. *See* Daron Acemoglu & David Autor, *What Does Human Capital Do? A Review of Goldin and Katz's* The Race Between Education and Technology, 50 J. ECON. LITERATURE 426, 427 (2012) (book review) (noting that underinvestment in intellectual capital in the United States in recent years has led to an increase in inequality).

336. *See* Ajay Agrawal et al., *Not Invented Here? Innovation in Company Towns*, 67 J. URB. ECON. 78, 80 (2010) (observing that inventors in isolated company towns are more likely to draw upon the same set of limited ideas from year to year but that small firms located within such towns are more likely to draw upon diverse outside influences).

337. Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEXAS L. REV. 573, 642 & n.360 (2014).

338. *See* Ralph Katz & Thomas J. Allen, *Investigating the Not Invented Here (NIH) Syndrome: A Look at the Performance, Tenure, and Communication Patterns of 50 R & D Project Groups*, 12 R&D MGMT. 7, 7–8 (1982) (finding that project-team members tend to become more specialized and isolated over time, losing touch with current developments in their fields and developing NIH syndrome).

339. *Id.* at 10.

own firm and to draw upon the same set of prior inventions compared to firms in more diverse locations.[340] From this perspective, cognitive property hinders institutional openness, the absorptive capacity of firms, and firms' ability to identify and make use of good ideas. The rich texture of knowledge, an economic resource, is diminished from both the motivational and transformative perspectives.

III. The Third Enclosure Movement

A. *From Monopoly to Property*

The law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose.

—Anonymous[341]

In 1964, Charles Reich wrote: "The institution called property guards the troubled boundary between individual man and the state."[342] Reich defined "new property" as intangibles like income, benefits, occupational licenses, and franchises that were all governed by the legal rules and directed the distribution of wealth in society.[343] Reich argued that the new reliance on these forms of wealth, highly dependent on legal regulation, has become akin to traditional forms of property.[344] In the past few decades, reliance on legal regimes that create wealth in intangibles has risen dramatically. Today, as law continues to delineate the boundaries between individual, market, and state, we face a new propertization of the building blocks of society: human knowledge in all its facets.

Merely a decade ago, James Boyle warned of the "second enclosure movement," referring to this movement as the legal enclosure of the "intangible commons of the mind" by a rapid expansion of intellectual property rights.[345] Boyle warned against the expansion of copyright and

340. Agrawal et al., *supra* note 336, at 80.

341. James Boyle, *The Second Enclosure Movement and the Construction of Public Domain*, LAW & CONTEMP. PROBS., Winter–Spring 2003, at 33, 33 & n.1 (quoting an anonymous English poem) (emphasis omitted).

342. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

343. *Id.*

344. *Id.*

345. Boyle, *supra* note 341, at 37. The first enclosure movement concerned the expansion of real property and the debates surrounding the effect of private property on the social contract and wealth distribution. *Id.* at 33–36. *See generally* J.A. YELLING, COMMON FIELD AND ENCLOSURE IN ENGLAND 1450–1850 (1977) (chronicling the complex history of parliamentary enclosure in England over hundreds of years).

patent protections, the *outputs* of innovation and human creativity.[346] The new cognitive property expands propertization of the intangibles of the mind beyond the heated IP wars, which have shaped the last two decades. While controversies around the expansion of IP continue, we now face the "third enclosure movement," the under-the-radar enclosure over the *inputs* of knowledge—the creation of property over human capital. Knowledge, experience, skill, creativity, and network are all becoming subject to commodification and litigation.

To understand these developments, it is illuminating to know the history of IP, which is characterized by a shift from the lens of antitrust to the lens of property. If, in the past, patent and copyright protections were understood as state-sanctioned partial monopolies to reward invention, now IP is understood as market assets protected by legal rules. In his canonical 1935 realist essay, *Transcendental Nonsense and the Functional Approach*, Felix Cohen lamented the forgotten logic of IP law designed to aid market competition and instead adopted a formalist view of IP as property: "Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers[e] economically valuable sale devices."[347]

Cohen warned that courts and scholars have become trapped in a vicious circle of labeling IP as a "thing of value" and thereby as property, while refusing to admit any extralegal facts to challenge this entrenched conception.[348] Cohen explained the inherent circularity in the conception of intangible goods as property:

> It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. . . .
>
> The circularity of legal reasoning in the whole field of unfair competition is veiled by the "thingification" of *property*.[349]

William Fisher similarly described the coming of age of IP rights as a shift from the field of antitrust with the terminology of "monopolies" to the field of property with the terminology of "rights."[350] As Fisher suggested,

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346. *See* Boyle, *supra* note 341, at 40, 49–50 (criticizing the expansion of patentable and copyrightable subject matter because of the potential costs and the lack of "convincing" evidence that expansion benefits innovation).

347. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935).

348. *Id.* at 815–16.

349. *Id.* at 815.

350. William W. Fisher III, *Geistiges Eigentum—Ein Ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten*, *in* EIGENTUM IM INTERNATIONALEN VERGLEICH 265 (Hannes Siegrist & David Sugarman eds., 1999), *translated in* William W. Fisher III, The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States 20–23 (1999) (unpublished manuscript), *available at* http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf, *archived at* http://perma.cc/R84P-FRZS; *see also* Michael A. Carrier, *Cabining*

the currency of the term monopoly "derived partly from—and helped to reinforce—a substantive position: like other 'monopolies,' patents and copyrights were dangerous devices that should be deployed only when absolutely necessary to advance some clear public interest."[351] By the twentieth century however, "[f]raming arguments in terms of property rights became increasingly common" in patent, copyright, and trademark disputes.[352] Still, the term itself, "intellectual property," was rare until the second half of the twentieth century.[353] Under contemporary law, however, "the use of the term 'property' to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally 'like' interests in land or tangible personal property—and should be protected with the same generous panoply of remedies."[354] Unsurprisingly then, courts have increasingly been intent on construing misappropriation of IP as outright theft. In a recent copyright case, a federal district court began its opinion about rap music recalling the biblical statement: "'Thou shalt not steal.' has been an admonition followed since the dawn of civilization."[355]

This ever-expanding lens of property into the intangibles of the mind is now reaching the next frontier, targeting not only the outputs of innovation but also people themselves. Once knowledge in all its forms is labeled property, its unauthorized use is deemed theft. As we have seen above, the same lens of theft and property has become increasingly strong in human capital law cases and legislation, including both the expansion of human capital controls and the increased criminalization of trade secrets. A striking illustration of this expansion is the use of the term "piracy" in relation to human capital. The term "piracy" has been a significant metaphor in defense of strong IP protections.[356] Unsurprisingly, as propertization shifts beyond specific information and into the zone of human capital, claims about piracy are carried over into battles to control cognitive capacity. For example, a recent article describes employees, who dare to dream of becoming

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Intellectual Property Through a Property Paradigm, 54 DUKE L.J. 1, 4–8 (2004) (outlining the "revolutionary" legal change of the "propertization" of IP law and proposing limits to correct the imbalance); *cf.* Edward C. Walterscheid, Essay, *Patents and the Jeffersonian Mythology*, 29 J. MARSHALL L. REV. 269, 269–71 (1995) (reviewing Thomas Jefferson's role in patent law and offering perspective on his influence in current interpretations of patent law).

351. Fisher, *supra* note 350, at 20.

352. *Id.* at 21.

353. *Id.* at 22.

354. *Id.*

355. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15).

356. *See, e.g.*, Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 274–75 (1991) (advocating for increased intellectual property protection in the United States because of an increasing vulnerability to piracy); Mike Belleville, Note, *IP Wars: SOPA, PIPA, and the Fight Over Online Piracy*, 26 TEMP. INT'L & COMP. L.J. 303, 333–34 (2012) (noting that because new piracy threats constantly emerge, stronger enforcement mechanisms must be made).

entrepreneurs despite signing noncompetes, as modern day pirates. The article quotes an attorney who explains the difference between these new pirates and the old swashbucklers:

> The owner of a merchant vessel clearly knows when his ship comes under pirate attack. Buccaneers armed with cutlasses board his vessel. In the workplace, employee pirates steal an employer's treasure—trade secrets, proprietary information and customer relationships.
>
> Unlike sea pirates . . . this theft is often carried out by trusted, supposedly honest employees.[357]

The new pirates are stealing their human capital away from the firm. In 1414, the earliest known case on noncompetes, a clothes dyer in medieval England attempted to prevent a former employee from competing in town for six months.[358] The court threatened to imprison the employer for initiating such a frivolous lawsuit that restrained trade.[359] If under the lens of antitrust, harm is done by he who attempts to restrain competition and the use of experience and skill in markets; under the lens of property, the dramatically evolved law of human capital views he who harms as the one who resists such restraints.

B. Understanding Harm

Rather than equating employees with pirates, the challenge of our coming decades is to rid adjudication from the strains of a property paradigm and to urge serious analysis of the implications of economic arrangements surrounding human capital. Debates about human capital law have been rather thin and traditionally tracked the general IP debate. The long-unchallenged assumption has been that human capital controls are necessary because otherwise employers would underinvest in employee training.[360] In other words, the move toward cognitive property is necessary to incentivize corporate investment.[361] Under the traditional analysis, externalities are a type of market failure. Just as tort liability aims to internalize negative externalities—the harm to others—knowledge monopolies are viewed as

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357. Lynne Curry, *Keep an Eye Out for Pirate Employees*, ALASKA DISPATCH NEWS (Feb. 23, 2014) (internal quotation marks omitted), http://www.adn.com/article/20140223/lynne-curry-keep-eye-out-pirate-employees, *archived at* http://perma.cc/HRY8-N8U6.

358. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 631, 635–36 (1960).

359. *See id.* at 636 & n.33 (quoting the judge's declaration: "By God, if the plaintiff were here he would go to prison until he paid a fine to the King").

360. *See* GARY S. BECKER, HUMAN CAPITAL 34 (3d ed. 1993) (theorizing that firms would be unwilling to invest in general training if they could not protect their investment).

361. *See* Eric Posner et al., *Investing in Human Capital: The Efficiency of Covenants Not to Compete* 1 (Univ. of Chi. Law & Econ., Olin Working Paper No. 137, 2004), *available at* http://ssrn.com/abstract=285805, *archived at* http://perma.cc/A4WV-FD29 (noting the argument that covenants not to compete are beneficial because they protect human capital investment).

necessary to internalize positive externalities—or spillovers—that flow from innovation.[362]

The view that IP law is necessary to allow firms to internalize positive externalities has been challenged in recent years. Scholars such as Brett Frischmann and Mark Lemley have argued that in the context of intellectual property, internalization is not a desirable goal and that spillovers actually encourage *greater* innovation.[363] In human capital law, these questions have remained underinvestigated despite mounting evidence that the challenge to conventional economic reasoning in this context is even more compelling.

Contemporary research suggests that a human capital spillover should not be understood as a market failure, but as a constitutive part of the market itself. In 1813 Thomas Jefferson wrote: "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea . . . ."[364] And yet, knowledge, information, and ideas have increasingly become the subject of exclusive property. At the same time, new research overwhelmingly points to a clear connection between human capital flow and economic growth. As the previous sections have shown, human capital law has developed as a patchwork, consisting of important jurisdictional variations. Recent empirical studies in innovation exploit these natural experiments in human capital law.[365] In several recent studies, examining dozens of regions across the United States, human capital restrictions were found to impede not only job mobility but also innovation and entrepreneurship.[366] Mobility in the labor market is correlated with increased competition, deployment of skills in the market, densification of

362. *See* Brett M. Frischmann & Mark A. Lemley, Essay, *Spillovers*, 107 COLUM. L. REV. 257, 264–66 (2007) (describing the argument that private property law should internalize benefits derived from that property to encourage investment in the property).

363. *Id.* at 258.

364. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 326, 333 (Albert Ellery Bergh ed., 1907).

365. *See, e.g.*, Matt Marx et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 875–76 (2009) (utilizing Michigan's change in noncompete enforcement to study the effects of noncompetes on employee mobility).

366. *See* Almeida & Kogut, *supra* note 311, at 916 (concluding that the mobility of engineers in a region affects the distribution of knowledge in that region); Lee Fleming & Koen Frenken, *The Evolution of Inventor Networks in the Silicon Valley and Boston Regions*, 10 ADVANCES COMPLEX SYS., 53, 54–55 (2007) (suggesting employee mobility as a source of increased interorganizational collaboration and noting that this research is consistent with other research supporting relaxed enforcement of noncompetes); Jiang He & M. Hosein Fallah, *Is Inventor Network Structure a Predictor of Cluster Evolution?*, 76 TECH. FORECASTING & SOC. CHANGE 91, 103–04 (2009) (concluding that a region of inventors in which most inventors work for the same company is not as conducive to innovation as one in which inventors freely move between multiple companies); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 436 (2011) (finding that the enforcement of noncompete clauses impedes entrepreneurship and innovation).

knowledge networks, and knowledge spillovers.[367] Running in direct contrast to the simplified predictions that more controls increase growth and innovation, empirical findings suggest that firms increase their research and development efforts and expenditures when employee turnover and knowledge spillovers increase.[368] New models of economic growth help link human capital flows and regional success.[369] For many years, economists have attempted to answer a key puzzle: why do similarly situated regions vary so dramatically in their growth rates? Under endogenous-growth theory, economic growth relies not simply on competitive win–lose production but on processes of positive spillovers, in which knowledge is transferred within industries and regions.[370] Endogenous-growth theory favors investment in human capital as the central ingredient for economic success. Mobility triggers an upward cycle to create agglomeration economies.[371] Regions that encourage human capital mobility are also able to attract more human capital from other regions.[372] High employee turnover, regional human capital concentration, and density of professional networks all contribute to economic growth.[373]

Instead of the simplified prediction that more controls over human capital will lead to more investment in human capital, the richer analysis of the effects of cognitive property coupled with the empirical findings suggests that the increased propertization of knowledge can have devastating effects. Drawing on the terms of commons–anticommons debates in property law,

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367. *See, e.g.*, David B. Audretsch & Maryann P. Feldman, *R&D Spillovers and the Geography of Innovation and Production*, 86 AM. ECON. REV. 630, 639 (1996) (finding that industries in which knowledge spillovers are more common are more likely to geographically cluster); Tomas Havranek & Zuzana Irsova, *Estimating Vertical Spillovers from FDI: Why Results Vary and What the True Effect Is*, 85 J. INT'L ECON. 234, 234–36, 243 (2011) (analyzing studies of spillovers in numerous countries to find that spillovers of outside knowledge into a country increase the productivity of domestic firms).

368. *See* Almeida & Kogut, *supra* note 311, at 915 (finding that firms build upon knowledge acquired through spillovers); G.V. Graevenitz, Spillovers Reconsidered: Analysing Economic Welfare Under Complementarities in R&D 16 (Nov. 21, 2004) (unpublished manuscript), *available at* http://ssrn.com/abstract=625142, *archived at* http://perma.cc/8UJQ-MJRH (finding that the "spillover process induces a supermodular game in R&D investment").

369. *See* Robert Lucas, *Why Doesn't Capital Flow from Rich to Poor Countries*, 80 AM. ECON. REV. (PAPERS & PROC.) 92, 96 (1990) (concluding that the accumulation of human capital is important to regional success); Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002, 1034–35 (1986) (developing a model linking knowledge and capital that can be used in future research).

370. Paul M. Romer, *The Origins of Endogenous Growth*, 8 J. ECON. PERP. 3, 7 (1994).

371. *See* Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S72–S73 (1990) (finding that a larger stock of human capital increases the rate of economic growth).

372. *See* Marx et al., *supra* note 243, at 9 (showing that employees are more likely to move to states with less vigorous noncompete enforcement).

373. Nicholas Bloom et al., *Identifying Technology Spillovers and Product Market Rivalry*, 81 ECONOMETRICA 1347, 1389–90 (2013), suggest that technology and product spillover contribute to overall economic growth. As has been shown, employee mobility and the density of regional human capital networks facilitate these spillovers. *See supra* notes 366–68 and accompanying text.

the underuse of people—the expansion of cognitive property—is perhaps the greatest tragedy of all.[374] In blunt economic terms, the deadweight loss from controls and restrictions over human capital is the person herself who is prevented from using her talent, skill, and passion. Minds are made to suppress ideas, skill remains untapped, knowledge is cut up into small fragments, and people risk their very liberty to move through their careers.

Traditionally, IP regimes are purposely weak and partiality is built into the law. Patent and copyright protections are granted for a limited time and each have thresholds for receiving the right and defenses for certain uses.[375] These laws also guarantee that the underlying information is disclosed to the public as part of the bargain of exclusivity.[376] Looking through the lens of positive externalities, or spillovers, helps explain why these built-in weaknesses are a feature, not a flaw. IP laws are meant to promote progress, "not the creation of private fortunes for the owners of patents."[377] In human capital law, the bargain of a limited monopoly in return for disclosure is subverted. There is no public disclosure of secrets or cognitive ability that is fenced.

In delineating IP rights, the courts have been charged with policing the boundaries between proprietary information and knowledge that constitutes the public domain. Courts regularly refuse to enforce contracts that attempt to restrict information that belongs in the public domain. The Supreme Court has stated that information "which is in the public domain cannot be removed therefrom by action of the States."[378] The Court has also held that the Copyright and Patent Clause of the Constitution[379] prohibited Congress from recognizing rights in the subcopyrightable and subpatentable materials.[380] The Supreme Court has warned that state trade secrecy law should not encourage secrecy over patenting, for example, by prohibiting reverse engineering.[381] In the context of patent licensing, the courts have held that

374. *See* Michael A. Heller, *The Tragedy of Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 687–88 (1998) (discussing that the tragedy of the anticommons is underutilization of property).

375. *See* 17 U.S.C. §§ 102, 302 (setting forth the basic requirements for obtaining and the durational limits on copyrights); 35 U.S.C. §§ 101, 154 (2012) (setting forth the basic requirements for obtaining and the durational limits on patents).

376. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 496–97 (1974) (Douglas, J., dissenting).

377. Bilski v. Kappos, 561 U.S. 593, 648 n.44 (2010) (citing Quanta Computer, Inc. v. LG Elecs., Inc., 553 U.S. 617, 626 (2008)).

378. *Kewanee Oil*, 416 U.S. at 481.

379. U.S. CONST. art. I, § 8, cl. 8.

380. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347–48 (1991) (holding that facts cannot be copyrighted because facts do not meet the originality requirement of copyright law and are, therefore, part of the public domain).

381. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 161 (1989) ("The protections of state trade secret law are most effective at the developmental stage, before a product has been marketed and the threat of reverse engineering becomes real."); *Kewanee Oil*, 416 U.S. at

states are prohibited from allowing tort claims to protect unpatented information, enforcing agreements to license patents after their expiration or enforcing royalty agreements for invalidated patents.[382] As the previous sections have explored, this wisdom has not been applied to the under-the-radar development of human capital law, which propertizes knowledge that IP law has placed in the public domain.

C. *The Scorpion Always Stings*

While propertizing knowledge—tacit, relational, networked, motivational, and disruptive—out of the public domain is in the market at large, the negative effects are also highly patterned. Litigation against former employees is "fueled by emotion as much as financial desire."[383] On the first page of Michael Lewis' new book, *Flash Boys*, Lewis writes about Sergei Aleynikov's imprisonment:

> I'd thought it strange, after the financial crisis, in which Goldman had played such an important role, that the only Goldman Sachs employee who had been charged with any sort of crime was the employee who had taken something from Goldman Sachs.[384]

The new cognitive property benefits firms with superior resources. As Graves and Diboise note: "[C]ourts do not recognize that plaintiff's trade secret claims are too often created after the fact by attorneys to try to trap a former employee, and not so valuable that the plaintiff had previously recorded them as company intellectual property and guarded them as secret before the employee departed."[385] In general, newer and smaller firms are disadvantaged in IP litigation.[386] Uncertain legal boundaries lead to over-enclosures of information by those with fewer resources, who thereby seek

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485 (stating that the patent policy of disclosure is not undermined by trade secret protection because the laws "encourage invention in areas where patent law does not reach").

382. *See* Lear, Inc. v. Adkins, 395 U.S. 653, 670–71 (1969) (holding that a licensing contract could not preclude a licensee from challenging the validity of a patent); Brulotte v. Thys Co., 379 U.S. 29, 30 (1964) (holding that royalties could not be collected when they accrued after all of the machine's patents expired); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 126–27 (1999) (detailing the issues that arise when a patent licensor attempts to use state law to get more than federal patent law will allow).

383. William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 69 (2001).

384. LEWIS, *supra* note 109, at 1.

385. Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323, 339 (2006).

386. Rajshree Agarwal et al., *Reputations for Toughness in Patent Enforcement: Implications for Knowledge Spillovers Via Inventor Mobility*, 30 STRATEGIC MGMT. J. 1349, 1354 (2009); *see also* Erik Larson, *Modem Operandi: In High-Tech Industry, New Firms Often Get Fast Trip to Courtroom*, WALL ST. J., Aug. 14, 1984, at 1, 14 (reporting that the founders of start-ups are the most vulnerable victims of intellectual property lawsuits).

to avoid risk under conditions of unpredictability.[387] In human capital law, these issues are exacerbated by the profound inherent asymmetries in reserves and information.[388] As we have seen, human capital law is comprised from a nebulous set of rules that create uncertainty and chill the prospects of competition. The uncertainty and ad hoc balancing that characterizes human capital law incentivizes firms to deliberately draft human capital clauses broadly and vaguely. Far more than in the context of IP agreements between two companies, in the field of human capital law, employment contracts are typically boilerplate and negotiations are rare.[389] In a recent Delaware case, a court enforced a clickwrap, boilerplate noncompete agreement that the employee received only as an electronic copy, buried as part of an equity compensation contract.[390] The employee signed the contract by clicking "accept" on her computer screen. The court explained that although the way the employer sought agreement to the postemployment restrictive agreement was "certainly not the model of transparency and openness with its employees, [the postemployment restrictive contract] was not an improper form of contract formation."[391]

New research on predation and strategy demonstrates how corporate reputation for "toughness" in patent enforcement suppresses employee mobility. As firms signal that they are willing to be litigious against former employees, "employee-inventors become less likely to join or form rival companies."[392] The research demonstrates how litigation against former employees reduces the expected value *all employees* have in pursuing external professional options, not merely the employees who actually left and were sued.[393] In the context of litigation against a former employee turned

387. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884–85 (2007).

388. *See* Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1712 (2012) (stating that the party with greater bargaining power "deliberately imposes inefficient terms to capture more of the contractual surplus"); Albert Choi & George Triantis, *Market Conditions and Contract Design: Variations in Debt Contracting*, 88 N.Y.U. L. REV. 51, 71 (2013) (stating that contract design is affected by bargaining leverage); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 888 (2010) (describing a risk of failure in contract negotiations when one or more party has private information).

389. Rachel Arnow–Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 978.

390. Newell Rubbermaid Inc. v. Storm, No. 9398-VCN, 2014 WL 1266827, at *1 (Del. Ch. Mar. 27, 2014).

391. *Id.* at *7 (footnote omitted). In another recent case, an Ohio federal court enforced a noncompetition agreement that the employee had never signed. Pharmerica Corp. v. McElyea, No. 1:14-CV-00774, 2014 WL 1876271, at *3–5 (N.D. Ohio May 9, 2014).

392. Martin Ganco et al., *More Stars Stay, But the Brightest Ones Still Leave: Job Hopping in the Shadow of Patent Enforcement*, STRATEGIC MGMT. J. (forthcoming 2015) (manuscript at 2), *available at* http://onlinelibrary.wiley.com/doi/10.1002/smj.2239/pdf, *archived at* http://perma.cc/WP5F-GZ5B.

393. *Id.* (manuscript at 18).

competitor, "[e]ven if the costs of being litigious in a particular dispute outweigh the benefits, the deterrence of future knowledge spillovers can justify the investment."[394] In other words, human capital litigation risks being designed precisely to deter future mobility by other employees. The findings suggest that a firm's patent litigiousness significantly lowers the dissemination of technical knowledge otherwise predicted to flow from employee mobility, leading the researchers to warn:

> [T]he vitality of innovative regions such as Silicon Valley is widely attributed to active job hopping by skilled workers and the corresponding diffusion of technological know-how and discoveries across firm boundaries. If reputations for IP toughness curb the inter-firm dissemination of technological knowledge, particularly to start-ups, regional dynamics could be threatened.[395]

The new cognitive property creates a myriad of penalties on communication that lead to a slower diffusion of knowledge, with a special harm to entrepreneurship and the formation of start-ups,[396] which are vital for the healthy growth of markets.[397] For large, established firms, excluding employees from certain innovative activities mitigates the risks of cognitive property suits. New employers who desire to comply and not risk the civil and criminal implications of using cognitive property are likely to go through inefficient and disruptive inquisitive processes, including the exclusion of employees from the inventive activities in which they are most experienced. To smaller and newer firms however, these divisions, which are greatly inefficient in any firm, are impossible. Larger companies with sufficient legal and financial resources can aggressively drive out competition even when their legal claims rest on weak grounds.[398] Litigation is strategic when it is motivated by and thrives from the uncertainty of claims, high cost of litigation, and asymmetry in the stakes faced by the company and the former employees.[399] Even when claims cannot be substantiated, small companies

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394. Agarwal et al., *supra* note 386, at 1354.

395. *Id.* at 1368 (citation omitted).

396. *See* Steven Klepper & Sally Sleeper, *Entry by Spinoffs*, 51 MGMT. SCI. 1291, 1292–93 (2005) (asserting that diffusion of knowledge plays a key role in the success of spinoffs).

397. *See* Gordon Moore & Kevin Davis, *Learning the Silicon Valley Way*, *in* BUILDING HIGH-TECH CLUSTERS 7, 31–35 (Timothy Bresnahan & Alfonso Gambardella eds., 2004) (discussing the importance of spinoffs and start-ups to the economic growth of Silicon Valley).

398. *See generally* Patrick Bolton & David S. Scharfstein, *A Theory of Predation Based on Agency Problems in Financial Contracting*, 80 AM. ECON. REV. 93 (1990) (discussing deep-pocket predation, by which wealthy firms drive their less wealthy competitors out of business by reducing competitors' cash flows).

399. As such, litigation by companies against their former employees has similar characteristics to trolling in patent and copyright litigation. *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2122 (2013) (describing patent predation cases, in which large firms use patent litigation to stamp out a smaller competitor).

can be driven out of markets.[400] In general, litigation over IP and human capital, even in the absence of structural penalties on target defendants, has the power to create sufficient uncertainty to kill a venture.[401] Thus, under the new cognitive property, employees who face a choice whether to leave to form a new company or to join an established company are likely to consider the potential costs of legal liabilities and decide against entrepreneurship.[402]

The new cognitive property thus advantages firms with superior resources. Asymmetrical litigiousness directed at employees who wish to leave an employer operates similarly to noncompetes. Human capital law—with the rise in noncompetes, expansion of the type of confidential information as protected trade secrets, expansion of innovation pre-assignment, and its aggressive enforcement—has traditionally striven to protect freedom of contract and to encourage businesses' initial incentives to invest in innovation.[403] New research challenges us to rethink our approach to these regimes. The evidence is nearly universal. Overall, excessive controls over mobility and inventiveness are harmful to careers, regions, and innovation. The harm is not simply caused by the aggregate reduction in mobility, knowledge flow, and network richness but is also created by the motivational and behavioral aspects of creative individuals as they interact with their environment. In particular, it stymies the entry of new competitors into the market and suppresses the spirit of entrepreneurship, which is vital to any economy.

Conclusion

Contemporary human capital law is a mongrel, amoebic creature that has grown under the radar for too long. Through doctrine and contract, the rise of the new cognitive property removes not only the outputs of innovation but also its inputs—including skills, experience, tacit knowledge, professional relationships, motivation, and innovative potential—from the public domain. The heightened significance of human capital as a highly valuable resource along with dramatic changes in labor markets has

400. *See* Agarwal et al., *supra* note 386, at 1367 (determining that aggressive patent litigation by established firms may intimidate other businesses from attempting to enter that firm's market, particularly entrepreneurial firms); Jamal Shamsie, *The Context of Dominance: An Industry-Driven Framework for Exploiting Reputation*, 24 STRATEGIC MGMT. J. 199, 209 (2003) (suggesting that a large firm's ability to exploit any competitive advantage it gains from its reputation is a key indicator of that firm's continued dominance over its industry).

401. Alexander E. Silverman, Symposium Report, *Intellectual Property Law and the Venture Capital Process*, 5 HIGH TECH. L.J. 157, 159–60 (1989) (explaining how established tech firms can use the threat of IP litigation to cripple or destroy start-up tech firms).

402. *See* Larson, *supra* note 386, at 14 (explaining that lawsuits against start-ups can "scare off new recruits").

403. *See* Lobel, *supra* note 95, at 519 tbl.18.1 (asserting that the primary motivation behind the growth of all three of these areas of human capital controls rests on protecting employers' investments).

effectuated record numbers of disputes and conflicts. This Article has argued that the rise of cognitive property creates too many walls that enclose vital knowledge and creative potential. In the twenty-first century, human capital law has thus become one of our most acute collective challenges. Restrictions on the flow of knowledge—through noncompetes, nondealings agreements, trailer clauses, and pre-innovation clauses—contaminate market flows and diminish both the incentives to move efficiently in the market and the incentives to innovate. For knowledge to flow, for networks to remain dense, for motivation to keep innovation high, and for new blood to disrupt stagnated paths, the law must upend the rapid rise of the new cognitive property and restore the balance between protected forms of information and a vital public domain.

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Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?

Andrew J. Wistrich,* Jeffrey J. Rachlinski** & Chris Guthrie***

Emotion is a fundamental aspect of human existence. In normal, healthy people, feelings about options exert a powerful influence on choice. Intuition and anecdote suggest that people react more positively toward others whom they like or for whom they feel sympathy than toward others whom they dislike or for whom they feel disgust. Empirical research in the field of psychology confirms that impression. Experiments also show that this effect extends to legal contexts, revealing that emotional reactions to litigants influence the decisions of mock jurors in hypothetical civil and criminal cases. This Article explores the question whether feelings about litigants also influence judges' decisions. Unlike jurors, judges are expected to put their emotional reactions to litigants aside. Can they do it? The first reported experiments on the topic using actual judges as subjects suggest that they cannot.

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> Passion and prejudice govern the world; only under the name of reason.[1]
>
> —Reverend John Wesley

I. Introduction

Eighty years ago the great American trial lawyer Clarence Darrow observed that: "Jurymen seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least, to feel sympathy for him; facts regarding the crime are relatively unimportant."[2] Similarly, United States Circuit Judge Jerome Frank asserted that "Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury."[3] We suspect that these observations are exaggerations but that they also hold some truth.[4] Sympathy and empathy in the jury box can be defended as softening the sometimes sharp edges of our legal system.[5] Judges, however, are supposed to make reasoned

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1. Letter from John Wesley to Joseph Benson (Oct. 5, 1770), *in* SELECT LETTERS, CHIEFLY ON PERSONAL RELIGION: BY THE REV. JOHN WESLEY 192, 193 (New York, T. Mason & G. Lane 1839).

2. EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 431 (8th ed. 1970).

3. Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 62 (2d Cir. 1948) (quoting ALBERT S. OSBORN, THE PROBLEM OF PROOF 112 (photo. reprint 1975) (1926)); *see also* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 130 (1949) ("Many juries in reaching their verdicts act on their emotional responses to lawyers and witnesses . . . .").

4. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 148 (1986) ("We must conclude that sometimes Mr. Prejudice and Miss Sympathy are sitting in the jury box."); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57 (2001) ("Too often, to capture the jury's emotion is to win the case."); James Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197, 221 (1963) ("If a juror feels more sympathy for one party, or takes a strong dislike to a witness, that emotional response will affect, if not wholly determine, the weight he gives to the evidence."). *But see* Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, *in* THE PSYCHOLOGY OF THE COURTROOM 83, 109 (Norbert L. Kerr & Robert M. Bray eds., 1982) ("[I]t remains difficult to state that extralegal characteristics are of sufficient strength to override the legal evidence presented during a trial."). *See generally* DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 91–121 (2012) (reviewing empirical literature on trial participant characteristics, and recognizing that certain characteristics have been shown to influence juror verdicts).

5. *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 340 (2007) (praising the "jury's distinctive approach of commonsense justice" even when a jury diverges from the decision a judge would render). Patrick Henry praised the use of the jury as subjecting defendants to the judgment of "peers" who "are well acquainted with his character and situation in life." Patrick Henry, Speech in the Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 23, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, in 1787, at 576, 579 (Jonathan Elliot ed., 2d ed. 1876); *see also* Ferguson v. Moore, 39 S.W. 341, 343 (1897) ("Tears have always been considered legitimate arguments before a jury . . . .").

decisions based on the facts and the law rather than on the basis of enmity or empathy for litigants.[6] Judicial oaths require judges to put their feelings towards litigants aside.[7] But judges are human beings too. Are they any less swayed by their prejudices and sympathies than juries?[8]

Whether judges can make dispassionate decisions or not, politicians and the public expect and even demand that they do so. When United States Supreme Court Justice David Souter announced his retirement, for example, President Barack Obama stated that he was searching for a replacement who would embrace emotions in at least some settings. As the President put it: "I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving a[t] just decisions . . . ."[9] Innocuous as it might seem to suggest that a Supreme Court Justice should try to understand the perspectives of those who appear before her, the statement ignited a firestorm of criticism.[10] Some suggested that the President's emphasis on empathy was tantamount to abandoning the rule of law.[11] Equating empathy with partiality, Senator

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6. *See* People *ex rel.* Union Bag & Paper Corp. v. Gilbert, 256 N.Y.S. 442, 444 (Sup. Ct. 1932) ("Every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation . . . ."); Ranger v. Great W. Ry. Co., (1854) 10 Eng. Rep. 824 (H.L.) 831 (appeal taken from Eng.) ("[A] judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other."); MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 19 (1986) (describing how a judge often "acquires the capacity of anesthetizing his heart"); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630 (2011) ("Insistence on emotionless judging—that is, on judicial dispassion—is a cultural script of unusual longevity and potency.").

7. *See, e.g.*, 28 U.S.C. § 453 (2012) ("I, ____, do solemnly swear (or affirm) that I will administer justice without respect to persons . . . .").

8. *See* HANS & VIDMAR, *supra* note 4, at 148 ("[I]t is clear that Mr. Prejudice and Miss Sympathy cannot account for most of the disagreement between judge and jury."). Valeria Hans and Neil Vidmar were referring to the research of Harry Kalven and Hans Zeisel, who concluded that in roughly 20% of the criminal cases in which judges and juries disagreed on verdicts, the source of the disagreement was the sympathies of the jury. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 217 (1966).

9. President Barack Obama, Press Briefing on Justice Souter's Retirement (May 1, 2009), *available at* http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09, *archived at* http://perma.cc/6W6M-673F; *see also* Robert Alt, *Sotomayor's and Obama's Identity Politics Leave Blind Justice at Risk*, U.S. NEWS & WORLD REP., May 27, 2009, http://www.usnews.com/opinion/articles/2009/05/27/sotomayors-and-obamas-identity-politics-leave-blind-justice-at-risk, *available at* http://perma.cc/AX85-W442 ("[W]e need somebody who's got the heart—the empathy—to recognize what it's like to be a young teenage mom[,] . . . to be poor or African American or gay or disabled or old—and that's the criteria by which I'll be selecting my judges.").

10. *See* Maroney, *supra* note 6, at 636–40 (describing the reaction to President Obama's statements about judicial empathy and recognizing that criticism of empathy as undisciplined and undemocratic came primarily from those who saw empathy as an emotional standard).

11. *See, e.g.*, Stephen G. Calabresi, Op-Ed., *Obama's "Redistribution" Constitution*, WALL ST. J., Oct. 28, 2008, http://online.wsj.com/articles/SB122515067227674187, *archived at* http://perma.cc/C24B-X82R ("To the traditional view of justice as a blindfolded person weighing

Charles Grassley asserted that "the most critical qualification of a Supreme Court Justice [is] the capacity to set aside one's own feelings so that he or she can blindly and dispassionately administer equal justice for all."[12]

Most judges embrace Senator Grassley's views and routinely reject the idea that emotions should influence their decisions. Asked about the proper role of a judge during her Senate confirmation hearing, United States Supreme Court Justice Sonia Sotomayor responded: "[J]udges can't rely on what's in their heart. . . . [I]t's not the heart that compels conclusions in cases. It's the law."[13] Subsequently, President Obama's second nominee to the Supreme Court, Elena Kagan, articulated the same view during her own Senate confirmation hearings. When asked whether it was ever appropriate for a judge to rely on his or her feelings, even in extremely close cases, she replied, "it's law all the way down."[14] Other judges commonly echo these claims. A recent nominee to the United States District Court for the Northern District of Georgia, Judge Michael Boggs, testified before the Senate Judiciary Committee: "The comforting part about being a judge is that that the law should prevail in each and every case. Sympathy for the party, empathy for the party has no role."[15] Similarly, United States Circuit Judge Denny Chin stated: "Empathy, of course, should play no role in a judge's determination of *what* the law is. . . . We do not determine the law or decide cases based on 'feelings' or emotions or whether we empathize with one side or the other."[16]

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legal claims fairly on a scale, he wants to tear the blindfold off, so the judge can rule for the party he empathizes with the most.").

12. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 17 (2009) (statement of Sen. Charles Grassley, Member, S. Comm. on the Judiciary) [hereinafter *Sotomayor Confirmation Hearing*]; 155 CONG. REC. 20,706 (2009) (statement of Sen. Charles Grassley) ("Justice is blind. Empathy is not. Empathetic judges take off the blindfolds and look at the party instead of merely weighing the evidence in light of what the law is.").

13. *Sotomayor Confirmation Hearing*, *supra* note 12, at 120.

14. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010). Justice Kagan was alluding to the "turtles all the way down" anecdote. *See generally* Stephen Hawking, A Brief History of Time 1 (10th anniversary ed. 1998) (providing a well-known version of the turtle story wherein a woman asserts the world sits on the back of a turtle, which in turn sits on another turtle, and thus "it's turtles all the way down.").

15. Alisa Chang, *Obama Judicial Nominee Gets a Hostile Reception from Democrats*, NPR (May 13, 2014, 4:05 PM), http://www.npr.org/2014/05/13/312197619/obama-judicial-nominee-gets-a-hostile-reception-from-democrats, *archived at* http://perma.cc/W2ZN-8ZJR. The Senate never confirmed Judge Boggs. Peter Sullivan, *Obama Drops Nominee Opposed by CBC*, BRIEFING ROOM, HILL (Dec. 31, 2014, 9:50 AM), http://thehill.com/blogs/blog-briefing-room/228303-obama-drops-controversial-nominee-opposed-by-black-caucus, *archived at* http://perma.cc/T5FG-63XV.

16. Denny Chin, Essay, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1563–64 (2012).

Judges have good reason to adopt a dispassionate perspective. Senator Grassley's concern that empathy equates to partisanship has some bite to it: judges might well feel more empathy for those whose positions in litigation resonate more closely with their own political or cultural views. The idea that one set of rules applies to the sympathetic litigant and another set applies to the unsympathetic litigant is not consistent with the rule of law. Furthermore, cases set precedent. If judges decide cases of first impression based on ephemeral sympathies, then their emotions can direct the course that law follows.[17]

United States Supreme Court Justice William Brennan stands out as a rare exception to the judicial party line on emotion. In a widely discussed article, he expressed deep skepticism about the wisdom of insisting that judges cast aside their emotions.[18] He claimed that "[s]ensitivity to one's intuitive and passionate responses . . . is . . . not only an inevitable but a desirable part of the judicial process . . . ."[19] In an open embrace of emotion in judging, Justice Brennan credited one of his most famous opinions, *Goldberg v. Kelly*,[20] to his empathy for the plight of welfare beneficiaries who might improperly face termination of their benefits.[21] The precedent that *Goldberg* created has resonated through ensuing decades, suggesting that judicial emotion influence the evolution of the law.

Justice Brennan's praise for judicial "passion" sparked debate in the academy,[22] but one searches in vain for other judicial endorsements of his views. In addition to rejecting emotional influences as a general matter, as Justices Kagan and Sotomayor did, judges commonly deny the influence of emotion in specific cases, even as they admit the circumstances tug at their heartstrings. For example, an Ohio appellate judge expressed deep sadness for "the tragic loss of life this case presents" but then added that "when I put on the robe as judge, I must not let my feelings, my emotions . . . influence my review and application of the law."[23] Another judge noted that even though a juvenile defendant's "life circumstances ma[d]e [her]

17. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883–84 (2006) (expressing the concern that common law judges focus on the "this-ness" of each case, and if a case is not representative of the full array of events that a rule or principle will cover, the judge's ruling may lead to a distortion in lawmaking).

18. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988).

19. *Id.* at 10.

20. 397 U.S. 254 (1970).

21. *See* Brennan, *supra* note 18, at 20 ("*Goldberg* can be seen as injecting passion into a system whose abstract rationality had led it astray.").

22. *E.g.*, Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 796–97 (1991).

23. State v. Cutts, No. 2008CA000079, 2009 WL 2170687, at *36 (Ohio Ct. App. July 22, 2009) (Hoffman, J., concurring).

heart weep," she had to set that aside.[24] Suppressing emotion seems like a professional imperative. As one scholar put it, "to call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason."[25] Similarly, United States Supreme Court Justice Felix Frankfurter asserted that judges must "submerge private feeling on every aspect of a case,"[26] even as he expressed doubts about judges' ability to do so.[27] United States Supreme Court Justice Robert Jackson represents a rare exception to the party lime. He described "dispassionate judges" as mythical beings like "Santa Claus or Uncle Sam or Easter bunnies."[28]

Unlike Justices Frankfurter and Jackson, however, most judges claim that they can effectively put emotion aside. In a book on advocacy, Justice Antonin Scalia and his coauthor warned litigants that "[a]ppealing to judges' emotions is misguided because . . . [g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions."[29] In a well-regarded book on judging, Connecticut Superior Court Judge Robert Satter asserted that "[c]learly I do not decide a case on the basis of my liking one party more than the other."[30] In writing about the judicial experience, United States Circuit Judge Frank Coffin acknowledged the tug of emotion when he stated that "[j]udges, no less than lay persons, are subject to instant responses to inflammatory stimuli . . . includ[ing] repugnance to or liking [of] a party" but concluded that "[s]uch reactions do not, in most judicial chambers, flourish under the light of intense study . . . ."[31] United States Circuit Judge Richard Posner agreed that "most judges are (surprisingly to nonjudges) unmoved by the equities of the individual case," although he also conceded that "few judges are fully inoculated against the siren song of an emotionally compelling case."[32] Judge Posner ultimately concluded that emotions influence judges, but only in rational ways.[33]

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24. Commonwealth v. White, 910 A.2d 648, 658 (Pa. 2006) (internal quotation marks omitted).

25. Maroney, *supra* note 6, at 631.

26. Pub. Util. Comm'n v. Pollak, 343 U.S. 451, 466 (1952) (statement of Frankfurter, J.).

27. *Id.* ("But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware.").

28. United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

29. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (2008).

30. ROBERT SATTER, DOING JUSTICE: A TRIAL JUDGE AT WORK 78 (1990).

31. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 255 (1994).

32. RICHARD A. POSNER, HOW JUDGES THINK 119 (2008).

33. *Id.* at 106 ("[Emotion] is triggered by, and more often than not produces rational responses to, information.").

Despite such assertions, we suspect that for judges it is not truly "law all the way down." Courts are emotional places.[34] Judges are exposed to the full spectrum of emotions, many of them unpleasant. Lawyers make impassioned pleas on behalf of their clients, some of whom judges find sympathetic and some of whom judges find repugnant. Judges see gruesome photographs of injuries and crime scenes, witnesses sob while testifying, and spouses fight bitterly for custody of their children. One judge described his work as "seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out . . . ."[35] At times, the judge's moral intuitions may conflict with the outcome dictated by the law. Indeed, one judge lamented that "sometimes . . . [t]he judge has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn't know what to do about it, and it makes him feel sad . . . . Sometimes he even gets angry about it."[36] Only rarely do judges depart from the usual judicial script, however, and admit that emotion influences their judgments.

Concern that judges cannot actually decide cases based entirely on the law rather than on their feelings about litigants has resonated with many non-judge commentators since the dawn of legal realism nearly a century ago.[37] Legal realists argued that judges' moods, emotions, and reactions to litigants influence, or even determine, their judgments.[38] As one scholar put it, "of the many things which have been said as to the mystery of the judicial process, the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part."[39] The belief that judges cannot be as dispassionate as their roles demand is widespread.[40] Indeed, the assertions by Justices Sotomayor, Kagan, and

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34. *See* United States v. Wexler, 79 F.2d 526, 529–30 (2d Cir. 1935) ("It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion.").

35. Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. & SOC'Y 590, 611 (2005).

36. Carrington v. United States, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) (quoting GERRY SPENCE, OF MURDER AND MADNESS 378 (1983)); *see also* Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1208 (2012) ("Judges get angry.").

37. *See, e.g.*, Maroney, *supra* note 6, at 652–57 ("The realist take on judicial emotion, though thin, revolved around two core ideas: it exists, and it exerts greater influence over the processes and products of judging than previously had been acknowledged.").

38. *See* Jerome M. Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 25 (1931) (noting the Holmesian argument that "'[t]he personal element is unavoidable in judicial decisions'"); Maroney, *supra* note 6, at 652–53 (describing the "emotional element" of legal realism).

39. Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 480 (1928).

40. *See* LOUIS P. GOLDBERG & ELEANORE LEVENSON, LAWLESS JUDGES 7 (1935) ("It is puerile to imagine that by the assumption of the ermine a judge is transformed from an ordinary human being of flesh, blood, passions and learnings, to a cold, calculating and disinterested

Scalia bear a striking resemblance to the claims of formalism that most judges and scholars now reject as implausible.[41]

Despite the longstanding debate about whether judges can adhere to their dispassionate roles, little hard data exists on the role emotions play in judging. Numerous studies suggest that judges' political orientation affects their judgment.[42] Research also suggests that judges seem attuned to their public images.[43] One recent study also indicates that judges' affinity for their children affects their decisions.[44] But research on judges' emotional reactions to litigants is lacking. Does Clarence Darrow's pronouncement on sympathy and juries apply to judges as well? This Article provides—for the first time—experimental research using over 1,800 state and federal trial judges as research subjects in an attempt to answer that question. We conclude that judges' feelings about litigants influence their judgments.

II. How Emotion Can Influence Judicial Decision Making

As we noted above, Judge Posner and others have argued that judges either suppress or convert their emotions into rational decisions.[45] If so, then a judge's affinity or dislike for a litigant is unlikely to be a source of

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applier of the law."); Shirley A. Abrahamson, *A View from the Other Side of the Bench*, 69 MARQ. L. REV. 463, 491 (1986) ("Judges, like jurors, have personal predilections and values."); Maroney, *supra* note 6, at 640–42 (noting the "apparent futility of the script of judicial dispassion"); Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 701 (1952) ("The felt drive for the just result, even when hidden below the manipulation of prior cases and statutes, has always been present."); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 665–66 (1989) (labeling the idea that judgment in criminal cases is dispassionate as a "myth").

41. *See* Brennan, *supra* note 18, at 4 (labeling as "almost unimaginable today" the early twentieth-century formalist conception of the judge as "a legal pharmacist, dispensing the correct rule prescribed for the legal problem presented").

42. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 65–85 (2013) (reviewing the literature on political orientation and judicial decision making). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 115–77 (2002) (summarizing how the political orientation of justices has influenced Supreme Court decisions through various periods of United States history); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (presenting a detailed study of the voting patterns of Democratic and Republican appointees on federal appellate courts).

43. *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 4 (2006) (arguing that judges may try to gain approbation of particular audiences through their decisions and policies).

44. *See* Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 38 (2015) (demonstrating that "judges with at least one daughter vote in a more liberal fashion on gender issues than judges with sons").

45. *See supra* notes 29–33 and accompanying text.

concern. We have our doubts, however. Emotions are ubiquitous.[46] They wash across the human brain like water on a flat rock. Joy, anger, disgust, and fear ignite quickly in the mind and easily consume reason.[47] Emotions influence what information people process,[48] what they remember,[49] and how they react.[50] The reach of emotions is also difficult to detect[51] and hard to control.[52] Consequently, even with effort, powerful emotional content can easily influence what otherwise appear to be rational judgments in several different ways. For judges, this means that factors unrelated to the primary legal judgment—including race and gender of the litigants—that trigger emotional responses can creep into their decisions.

Previous research we have conducted on the role of judicial intuition suggests that judges—like most adults—do not easily convert their emotional reactions into orderly, rational responses.[53] Judges too often rely on their intuitive, emotional reactions without subjecting them to "the light of intense study" that is supposed to produce rational choices.[54] Our conclusion rests both on our own empirical investigations and on the widely accepted view that people make decisions in two distinct modes: intuitively (using what psychologists often call "System 1") and deliberatively (using what psychologists often call "System 2").[55] Intuitive or emotional

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46. *See* R.B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 153 (1980) ("There are probably very few perceptions and cognitions in everyday life that do not have a significant affective component . . . .").

47. *See id.* (explaining that emotional reactions can precede deliberative thought processes).

48. *See* R.J. Dolan, *Emotion, Cognition, and Behavior*, 298 SCIENCE 1191, 1191–92 (2002) (describing how emotional stimuli influence perception separate from attentional mechanisms).

49. *See* Seymour Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 716 (1994) ("When a person responds to an emotionally significant event . . . [t]he experiential system automatically searches its memory banks for related events . . . .").

50. *See* Dolan, *supra* note 48, at 1194 (suggesting that "emotion-related processes can advantageously bias judgment and reason").

51. *See* Joshua D. Greene, *The Secret Joke of Kant's Soul*, *in* 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS AND DEVELOPMENT 35, 36 (Walter Sinnott-Armstrong ed., 2008) ("[P]eople make choices for reasons unknown to them, and they make up reasonable-sounding justifications for their choices, all the while remaining unaware of their actual motives and subsequent rationalizations."); Piotr Winkielman & Kent C. Berridge, *Unconscious Emotion*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 120, 120 (2004) (suggesting that entirely unconscious emotional processes may drive a person's behavior and reactions).

52. *See* Ronald de Sousa, *Here's How I Feel: Don't Trust Your Feelings!*, *in* EMOTIONS AND RISKY TECHNOLOGIES 17, 22 (Sabine Roeser ed., 2010) ("Even in our attempts to reason rigorously, we are susceptible to the influence of emotions."); Zajonc, *supra* note 46, at 156 ("Unlike judgments of objective stimulus properties, affective reactions . . . cannot always be voluntarily controlled.").

53. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6–9 (2007).

54. *See supra* note 31 and accompanying text.

55. *See generally* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999) (delineating the history of the dual-process model); DANIEL

judgments are "spontaneous, intuitive, effortless, and fast."[56] Deliberative processes are "deliberate, rule-governed, effortful, and slow."[57] Because intuitive judgments are faster and effortless, people often rely too heavily on intuition alone.[58] Our research indicates that judges also commonly favor compelling intuitive reactions over careful deliberative assessments—even when the intuitive reactions are clearly wrong.[59] Furthermore, judges even make these kinds of mistakes when performing familiar job-related tasks.[60]

The well-known "Linda the Bank Teller" problem, created by psychologists Amos Tversky and Daniel Kahneman, illustrates nicely how excessive reliance on intuition can lead to poor judgment.[61] Tversky and Kahneman described "Linda" as follows: "Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations."[62] When asked to rank various statements concerning Linda by the likelihood that they are true, people ranked the statement "Linda is a bank teller and is active in the feminist movement" as more likely than "Linda is a bank teller."[63] Because the former is necessarily a subset of the latter, this is illogical. The stereotypical script for someone with Linda's characteristics at that moment in American culture, however, fit well with commonly held beliefs about women who were active in the feminist movement. People relied on this intuitive social script to assess statements about Linda's characteristics, rather than relying on deductive logic.[64] Linda does not *sound* like

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KAHNEMAN, THINKING, FAST AND SLOW 20–26 (2011) (explaining this dual-process model of thinking). The labels "System 1" and "System 2" were first used by psychologists Keith Stanovich and Richard West. Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436 (Thomas Gilovich eds., 2002).

56. Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 55, at 49, 49; *see also* KAHNEMAN, *supra* note 55, at 24 ("System 1 continuously generates . . . impressions, intuitions, intentions, and feelings.").

57. Kahneman & Frederick, *supra* note 56, at 49.

58. *See* Daniel T. Gilbert, *Inferential Correction*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 55, at 167, 167 ("[O]ne of psychology's fundamental insights is that judgments are generally the product of nonconscious systems that operate quickly, on the basis of scant evidence, and in a routine manner, and then pass their hurried approximations to consciousness, which slowly and deliberately adjusts them.").

59. Guthrie, Rachlinski & Wistrich, *supra* note 53, at 13–19.

60. *Id.* at 27–28.

61. Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 297 (1983).

62. *Id.*

63. *Id.*

64. *See* KAHNEMAN, *supra* note 55, at 158 (noting that the Linda problem "had pitted logic against representativeness, and representativeness had won"). As Daniel Kahneman noted, the

someone who is only a bank teller, but she does sound like she might be a *feminist* bank teller.[65]

We have found that judges react similarly in responding to a problem involving a litigant we named "Dina El Saba."[66] We told the judges that Dina worked as an administrative assistant but was fired, despite receiving good employment evaluations. We described Dina's behavior in the workplace as consistent with that of an observant Muslim and indicated that she brought a complaint against her employer for unlawful discrimination. When we asked the judges to rank the likelihood of various statements about the case, most of the judges ranked the compound statement "[t]he agency actively recruited a diverse workforce but also unlawfully discriminated against Dina based on her Islamic beliefs" as at least as likely as the separate components.[67] As with the story of Linda, an account of an employer that adopts reasonable policies but fails to implement them seems like a compelling script. Judges—like most adults—find stories that fit into their preexisting beliefs to be emotionally compelling[68] and hence rate a more detailed account as more likely, in defiance of deductive logic.

Responding to a compelling social script like those in the Linda or Dina problems is a form of intuitive, System 1 reasoning.[69] The sense that Linda seems like a bank teller, or that Dina seems like she was a target of discrimination, arises quickly with little effort. Intuitions like these are not necessarily wrong. Intuitive reasoning is often helpful, and sometimes even

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Linda problem is "a magnet for critics," but it has nevertheless withstood numerous efforts to discredit the basic result that people use the intuitive social script rather than deductive logic to respond to the question. *Id.* at 164–65.

65. *See* STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY 469 (1991) ("I know that the [combined] statement is least probable, yet a little homunculus in my head continues to jump up and down, shouting at me—'but she can't just be a bank teller; read the description.'").

66. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1510–12 (2009).

67. *Id.* at 1511.

68. *Cf.* Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 253–55 (1986) (arguing that jurors use stories to assess and organize complicated evidence, particularly in criminal trials).

69. *See* ROBIN M. HOGARTH, EDUCATING INTUITION 65 (2001) ("Emotions and affect are clearly part of our intuitive processes . . . ."); DAVID G. MYERS, INTUITION: ITS POWERS AND PERILS 38 (2002) ("Some of our emotional reactions apparently involve no deliberate thinking."); Hayley Bennett & G.A. Broe, *Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning*, 31 AUSTL. J. FORENSIC SCI. 11, 15–16 (2010) (explaining that emotions will be accessed automatically by the ventromedial cortex as an aspect of System 1 processing). *But see* de Sousa, *supra* note 52, at 22 ("In relation to the mind's two tracks, emotions are intrinsically hybrid. . . . They belong to both the Intuitive and the Analytic Systems.").

essential, to sound judgment.[70] But complacency about the adequacy of intuition is the doorway through which emotion sneaks in.[71] Social scripts about people who seem like bank tellers or bank robbers can and do influence judgment if left unexamined. Safeguarding against sympathy and prejudice requires active effortful reflection.[72] Our previous research on judges supports Justice Brennan's admonition that "the judge who is aware of the inevitable interaction of reason and passion, and who is accustomed to conscious deliberation and evaluation of the two, is the judge least likely in such situations to sacrifice principle to spasmodic sentiment."[73]

In some cases, an emotional response can completely determine people's judgments, preempting any rational or deliberative choice.[74] Emotions like sympathy or disgust toward a person occur rapidly and powerfully.[75] They can cause people to make immediate snap judgments. Psychologists refer to wholesale reliance on an emotional response to make a judgment as "the affect heuristic."[76] In effect, "people [sometimes] make judgments and decisions by consulting their emotions: Do I like it? Do I

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70. *See* ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 51 (1994) (concluding that the inability to experience feelings rendered an otherwise normal person incapable of making sound decisions).

71. *See* KAHNEMAN, *supra* note 55, at 103 (explaining that "[i]n the context of attitudes . . . System 2 is more of an apologist for the emotions of System 1 than a critic of those emotions—an endorser rather than an enforcer"). Essentially, System 2 searches for information in a way "consistent with existing beliefs," so an "active, coherence seeking System 1" can provide answers to an "undemanding System 2." *Id.* at 103–04. This proposition is consistent with Kahneman's assertion that "[a]s we navigate our lives, we normally allow ourselves to be guided by impressions and feelings, and the confidence we have in our intuitive beliefs and preferences is usually justified. But not always." *Id.* at 4.

72. *See* Sang Hee Park, Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice Moderates the Effect of Cognitive Depletion on Unintended Discrimination*, 26 SOC. COGNITION 401, 402 (2008) (noting that biases cannot always predict behavior because "[i]ndividuals who are both biased and high in egalitarian motivation deliberately prevent their biases from resulting in overt manifestations").

73. *See* Brennan, *supra* note 18, at 11–12.

74. *See* Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 COGNITION 11, 32 (1993) ("People's choices may occasionally stem from affective judgments that preclude a thorough evaluation of the options."). *See generally* Paul Slovic et al., *The Affect Heuristic*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 55, at 397, 400 ("In the process of making a judgment or decision, people consult or refer to an 'affect pool' containing all the positive and negative tags consciously or unconsciously associated with the representations.").

75. *See* Paul Slovic et al., *Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioral Economics*, 31 J. SOCIO-ECON. 329, 329 (2002); *see also* WILLIAM WUNDT, OUTLINES OF PSYCHOLOGY 216 (Charles Hubbard Judd trans., 1897) (noting that "the clear apperception of ideas in acts of cognition and recognition is always preceded by special feelings"); William H. Ittelson, *Environmental Perception and Contemporary Perceptual Theory*, *in* ENVIRONMENT AND COGNITION 1, 16 (William H. Ittelson ed., 1973) ("The first level of response to the environment is affective.").

76. Slovic et al., *supra* note 75, at 329–30.

hate it? How strongly do I feel about it?"[77] Emotion might dictate our choices of what car or home to buy, with rationality only an epiphenomenal afterthought.[78]

Reliance on the affect heuristic is not always a mistake. Rapid emotional responses doubtless have played a vital role in our evolutionary survival and in our continued success as a species.[79] Ancestors who immediately ran from a predator, rather than pausing to reflect on whether the cost of flight was worth the benefit, remained in the gene pool. Even in a modern setting, affective responses can help us make quick decisions that can be accurate in many circumstances, especially where the choice is complex and the decision maker is constrained by time, fatigue, or cognitive load.[80] There are times when we would be clueless—or even incapable of making any decisions—without relying on our emotions.[81] The danger of the affect heuristic, however, like most forms of intuitive reasoning, lies in unexamined reliance on it in inappropriate circumstances. As psychologists have noted: "The affect heuristic appears at once both wondrous and frightening: wondrous in its speed, and subtlety, and sophistication, and its ability to 'lubricate reason'; frightening in its dependency upon context and experience, allowing us to be led astray or manipulated—inadvertently or intentionally—silently and invisibly."[82]

For judges, the danger of the affect heuristic is obvious. Judicial reliance on an emotional reaction to a litigant alone goes far beyond what President Obama meant when he articulated his desire for empathetic judges.[83] One of us (Rachlinski) encountered the affect heuristic early on in his legal career. Appearing in front of a judge as a young attorney, the judge asked him a single question: "Your client is basically an 80-year-old

77. KAHNEMAN, *supra* note 55, at 139.

78. *See* Zajonc, *supra* note 46, at 155 (explaining that while "[w]e sometimes delude ourselves that we proceed in a rational manner and weigh all the pros and cons of the various alternatives," that is "seldom the actual case" because "often 'I decided in favor of X' is no more than 'I liked X'"). Zajonc believes that "[w]e buy the cars we 'like,' choose the jobs and houses we find 'attractive,' and then justify those choices by various reasons that might appear convincing to others . . . ." *Id.*; *see also* JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 287 (2011) ("If a man wants to do something, and he is intelligent, he can give a reason for it. . . . You've got to get [the juror] to want to do it . . . That is how the mind acts.").

79. *See* Zajonc, *supra* note 46, at 170 (contending that before humans developed higher order language and cognitive capabilities, "it was the affective system alone upon which the organism relied for its adaptation").

80. *See* KAHNEMAN, *supra* note 55, at 139 ("The affect heuristic is an instance of substitution, in which the answer to an easy question (How do I feel about it?) serves as an answer to a much harder question (What do I think about it?).").

81. *See* DAMASIO, *supra* note 70, at 50–51 (illustrating this principle with a case study suggesting that individuals with certain brain abnormalities lack the ability to feel emotion, which impairs their ability to make decisions).

82. Slovic et al., *supra* note 75, at 339.

83. *See supra* note 9 and accompanying text.

widow, is that correct?" She was. The judge then granted the pending motion in her favor without further inquiry. However valuable empathy might be for a judge, single-minded reliance on an emotional reaction to a litigant reflects a lawlessness that most judges would repudiate.[84] Judicial reliance on the affect heuristic would create one law for the sympathetic and another for the unsympathetic.

Furthermore, prejudice is the pernicious cousin of sympathy. Emotion pervades our reactions to people who are different from us. Two psychologists describe reactions to groups much like others describe the affect heuristic:

> [T]he mere perception of belonging to two distinct groups—that is, social categorization per se—is sufficient to trigger intergroup discrimination favoring the in-group. In other words, the mere awareness of the presence of an out-group is sufficient to provoke intergroup competitive or discriminatory responses on the part of the in-group.[85]

In effect, we tend to view in-group members with sympathy and solidarity and out-group members with suspicion and hatred.[86]

Groups may be based on a variety of characteristics, such as gender, race, religion, political ideology, Manchester United fan, and so on. Membership in these groups provokes sympathy or suspicion. Once we join a group, our membership in it forms part of our identity.[87] We immediately begin to prop up our self-image by seeking and exaggerating the negative traits of out-group members and by seeking and exaggerating the positive traits of in-group members.[88] As a consequence, "in-group members will favour their own group over other groups."[89] Quite consistently, people readily share more resources with in-group members

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84. *See supra* text accompanying notes 13–16.

85. Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7, 13 (Stephen Worchel & William G. Austin eds., 2d ed. 1986).

86. *See* WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS para. 15, at 13 (1906) ("[Ethnocentrism is the] view of things in which one's own group is the center of everything, and all others are scaled and rated with reference to it. . . . Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders.").

87. *See* Yan Chen & Sherry Xin Li, *Group Identity and Social Preferences*, 99 AM. ECON. REV. 431, 431 (2009) ("When we belong to a group, we are likely to derive our sense of identity, at least in part, from that group.").

88. *See* ANNE S. TSUI & BARBARA A. GUTEK, DEMOGRAPHIC DIFFERENCES IN ORGANIZATIONS: CURRENT RESEARCH AND FUTURE DIRECTIONS 51 (1999).

89. *See* Charles Stangor & John T. Jost, *Commentary: Individual, Group and System Levels of Analysis and Their Relevance for Stereotyping and Intergroup Relations*, *in* THE SOCIAL PSYCHOLOGY OF STEREOTYPING AND GROUP LIFE 336, 346 (Russell Spears et al. eds., 1997).

than with out-group members[90] and tend to treat transgressions of in-group members more leniently than those of out-group members.[91] These tendencies create widespread problems in a pluralistic society and can cause injustice if they also influence judges.

The assertion that judges manage to suppress their emotional reactions represents a clear rejection of the idea that the affect heuristic influences judges. Even when people do not rely wholesale on an affective reaction, however, emotions can guide their judgment. People try to avoid experiencing the cognitive dissonance that accompanies making positive assessments of people they dislike or negative assessments of people they like.[92] It is unpleasant to think of an enemy as competent or a friend as incompetent. To avoid this dissonance, affective preferences "trigger . . . the operation of cognitive processes that lead to the desired conclusions."[93] Emotions influence how people perceive others,[94] what they remember about others,[95] and how they process information about others.[96] Emotions guide "people's attitudes, beliefs, and inferential strategies"[97] so that they see people they like as having positive qualities and people they do not like as possessing negative ones.[98] Consequently, even deliberative reasoning can be influenced by intuitive, emotional reactions.[99] Psychologists often refer to this tendency to seek consistency between judgment and emotion as "motivated cognition."[100]

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90. *See* Mark Van Vugt & Tatsuya Kameda, *Evolution and Groups*, *in* GROUP PROCESSES 297, 316 (John M. Levine ed., 2012)

91. *Id.* ("People also tend to be more forgiving of moral transgressions from outgroup members than ingroup members.").

92. *See* FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 204–05 (1958) (presenting statistical evidence in support of a theory of a "balance theory" whereby individuals exhibited a "significant tendency for harmonious situations" over "unbalanced ones"). *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (hypothesizing that the psychological stress of holding contradictory beliefs motivates individuals to strive toward internal consistency and to avoid situations that highlight or enhance their inconsistent beliefs).

93. Ziva Kunda, *The Case For Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 493 (1990).

94. *See* Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853 (2012) (discussing how emotional loyalty to a group influences perceptions of a rival group).

95. *See* Kunda, *supra* note 93, at 494 (describing how motivated beliefs "enhance the accessibility of those knowledge structures—memories, beliefs, and rules—that are consistent with desired conclusions").

96. *See id.* at 480 (hypothesizing that motivation may lead to reliance on biased cognitive processes).

97. *Id.* at 493.

98. *See id.* at 483 (explaining how people use memory and belief to construct support for their desired conclusions).

99. *See id.* at 495 ("People are more likely to arrive at those conclusions that they want to arrive at.").

100. *See* Brent L. Hughes & Jamil Zaki, *The Neuroscience of Motivated Cognition*, 19 TRENDS COGNITIVE SCI. 62, 62–63 (2015) (describing motivated cognition as the phenomenon

Some judges have expressed concern that the tendency toward motivated reasoning affects their judgment. Tapping into the psychology of his day, Jerome Frank, quoting United States Circuit Judge Joseph Hutcheson, Jr, described this phenomenon among judges:

> The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics.[101]

English trial and appellate judge Patrick Devlin echoed the claims of modern psychologists concerning motivation and perception when he observed that:

> Once a judge has formed a view of the justice of the case, those facts which agree with it will seem to him to be more significant than those which do not. A judge's longhand note, necessarily incomplete, will consist mainly of what he thinks to be significant; the insignificant, being omitted, will disappear from memory.[102]

Dan Kahan and his coauthors provided a powerful demonstration of how motivated inferences work in legal settings.[103] In their study, they showed adults a short video of a protest that was dispersed by police. For half of the research participants, Kahan and his collaborators identified the protestors as pro-life activists picketing at an abortion clinic; for the other half, they were described as gay-rights advocates protesting the military's "don't ask, don't tell" policy at a military recruitment station. In both cases, the videos were identical. The researchers also quizzed the participants concerning their political orientation. When the protest was identified as a pro-life rally at an abortion clinic, liberal democrats branded it as a violent demonstration. When the protest was instead identified as a gay-rights rally at a military recruitment station, however, liberal democrats claimed they saw a peaceful protest. Socially conservative research participants expressed a mirror image of the experience, seeing violence when the protestors were labeled as a gay-rights group but not when they were labeled as a pro-life group. People's perceptions of the very same video depended upon their affinity for the position adopted by the group undertaking the protest.

The influence of political attitudes on judgment is widely thought to be powerful,[104] and Kahan's results confirm that belief by demonstrating that

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"by which the goals and needs of individuals steer their thinking towards desired conclusions" and explaining that it affects a "wide array of judgments and perception").

101. JEROME FRANK, LAW AND THE MODERN MIND 112 (Anchor Books 1963) (1930).

102. PATRICK DEVLIN, THE JUDGE 91 (1979).

103. Kahan et al., *supra* note 94.

104. *See supra* note 42 and accompanying text.

political affinity even influences how people perceive events. Other research, however, shows that ordinary, apolitical affinities can influence legal judgments. Dan Simon, for example, has shown that people make legal judgments so as to reward or punish litigants with whom they have positive or negative associations.[105] In one example, Simon and his collaborator, Keith Holyoak, described a case in which the legal issue was whether a posting to a website bulletin board was more like a newspaper article (and hence subject to liability for libel) or a telephone call (and hence not subject to such liability).[106] They also described the plaintiff as either a likeable individual or a somewhat odious character.[107] These background characteristics were not relevant to the legal judgment as to whether the Internet posting was more like a newspaper article or a telephone call, but their subjects nevertheless manipulated their legal assessments so that the likeable litigant won or the odious litigant lost.[108] What is more, the researchers found that the subjects' determinations as to whether the posting was more like a newspaper article or a telephone call carried over into an unrelated case that presented the same legal issue.[109] Simon and Holyoak's research shows that people seek consistency in their judgments of individual litigants, even to the point of bending legal rules and repudiating or distinguishing precedent in order to achieve it.

Sometimes the characteristics that make a litigant seem repugnant or sympathetic are relevant to the decision a judge must make. But as Simon and Holyoak and others[110] have shown, emotional reactions reach far beyond rational bounds. In particular, one of the more pernicious manifestations of motivated cognition for judges is the tendency for in-group favoritism to produce motivated reasoning. People treat others whom they like more leniently and make more forgiving judgments about their character;[111] give greater weight to evidence that supports their preference

105. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 537–38 (2004) (demonstrating that subjects were more likely to return a verdict in favor of a hypothetical defendant if they received positive information about him).

106. Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 5 (1999).

107. *Id.* at 11–12.

108. *Id.* at 13–14.

109. *See id.* at 14–16 ("Perhaps most remarkably, the experimental manipulation of Smith's character in the Quest case influenced the Q-score for Credit in the Infoscience case.").

110. *See* Rainer Greifeneder, Herbert Bless & Michel Tuan Pham, *When Do People Rely on Affective and Cognitive Feelings in Judgment?: A Review*, 15 PERSONALITY & SOC. PSYCHOL. REV. 107, 134 (2011) (concluding that people use feelings as information "much more frequent[ly] than is often assumed" and calling for "more faith in the evidentiary status of feelings").

111. *See* Peter H. Ditto, David A. Pizarro & David Tannenbaum, *Motivated Moral Reasoning*, *in* 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL JUDGMENT AND DECISION

than to evidence that undercuts it;[112] believe that people whom they like bear less responsibility for negative outcomes than people whom they dislike;[113] remember facts about conduct differently for people whom they like than for people whom they dislike;[114] and are more inclined to conclude that those whom they dislike had the ability to control consequences and intended them to occur when those consequences are negative.[115] Even if emotional reactions sometimes arise from factors relevant to the legal judgment being made, emotional reactions arising from favoritism toward a litigant of the judge's own race or gender are indefensible.

The power of motivation is not unlimited, of course. Unless people view themselves as crusaders or care nothing about their reputation for objectivity, there is a limit on how far they will go. As psychologist Ziva Kunda stated:

> People do not seem to be at liberty to conclude whatever they want to conclude merely because they want to. Rather, . . . people motivated to arrive at a particular conclusion attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer. They draw the desired conclusion only if they can muster up the evidence necessary to support it. In other words, they maintain an "illusion of objectivity."[116]

Thus, where objective factors clearly dictate one outcome and make it impossible to justify the opposite result with a straight face, one's desire to maintain a self-image of objectivity will prevail over achieving the desired outcome. In the face of uncertainty, however, the desired outcome can be plausibly justified while preserving the illusion of objectivity.[117]

A desire to remain objective might be an especially effective constraint for judges. Most people may want to appear (both to themselves and to others) to be fair and objective. For judges, however, being impartial is a key element of their official role and their personal identity.[118] They are

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MAKING 307, 310 (Daniel M. Bartels et al. eds., 2009) (explaining that "[p]eople make more charitable attributions for the behavior of people they like than for those they dislike").

112. *See id.*

113. *See id.* at 316.

114. *See id.* at 317.

115. *See id.* at 316–17.

116. Kunda, *supra* note 93, at 482–83 (citations omitted).

117. *See* Ditto et al., *supra* note 111, at 314 ("People only bend data and the laws of logic to the point that normative considerations challenge their view of themselves as fair and objective judges, and motivated reasoning effects are most pronounced in situations where plausibility constraints are loose and ambiguous." (citations omitted)); Kunda, *supra* note 93, at 495 ("[M]otivation will cause bias, but cognitive factors such as the available beliefs and rules will determine the magnitude of the bias.").

118. *See* POSNER, *supra* note 32, at 106 ("A judge is likely to set some emotional reactions to one side, such as a personal liking for a litigant or his lawyer, because they are forbidden moves in the judicial game . . . ."); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99

strongly motivated to project such an image of themselves.[119] As Karl Llewellyn put it:

> He *can* throw the decision this way or that. *But not freely.* For to him the logical ladder, or the several logical ladders, are ways of keeping himself in touch with the decisions of the past. This, as a judge, he wishes to do. This, as a judge, he would have to do even if he did not wish. This is the public's check upon his work. This is his own check on his own work. For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly.* And of these few there are some, or there is one, toward which the prior cases pretty definitely press. Already you see the walls closing in around the judge.[120]

The idea that judges suppress the sway of their emotional reactions is certainly the model most judges embrace.[121] Nevertheless, the many pathways by which emotion can influence judgment all undermine the idea that judges can (or perhaps even should)[122] avoid emotional influences.

Systematic empirical research as to whether emotion guides judicial reasoning is lacking, however. Political ideology influences judges' judgment,[123] but it is unclear whether that influence arises from an emotional response to a case presenting a potential conflict between the law and their beliefs or a conscious attempt to implement their social policy preferences. One experimental study concluded that judges appeared to engage in motivated cognition about social science, although this too was prompted by social or political attitudes rather than affect.[124] The recent study indicating that conservative judges who have daughters decide cases involving gender issues differently than conservative judges who have sons suggests that empathy plays a role in judging,[125] although it cannot pinpoint the mechanism by which the effect occurs. The studies by Kahan and

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CALIF. L. REV. 1485, 1496 (2011) ("For judges, the ideal of judicial dispassion supplies the workplace norm; they are expected both to feel and project affective neutrality.").

119. *See* BAUM, *supra* note 43, at 158 ("[J]udging can be understood as self-presentation to a set of audiences. Judges seek the approval of other people, and their interest in approval affects their choices on the bench."); POSNER, *supra* note 32, at 61, 62 ("Most judges . . . derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges." (footnote omitted)).

120. KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 73 (1930).

121. *See supra* notes 13–33 and accompanying text.

122. *See* Maroney, *supra* note 118, at 1494 (arguing that judges should embrace, rather than suppress, emotion in their decision making).

123. *See supra* note 42 and accompanying text.

124. Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 51 (1999).

125. Glynn & Sen, *supra* note 44, at 38.

Simon show the kind of motivated reasoning that would be of concern to judges but these researchers do not investigate decisions by judges.[126] We therefore recruited judges to participate in experimental research designed to assess whether judges' emotional reactions to litigants influence their judgments.

III. Methodology

The methodology that we employed to study the influence of emotion on judicial decision making is the same methodology we have used to study the influence of other factors on judicial decision making for over a decade.[127] Essentially, we are invited to make presentations at continuing education programs for judges. Before describing our research, we ask the judges to respond to a written questionnaire containing three to five hypothetical cases. We use presentation titles that are vague (such as "judicial decision making") so as not to reveal what our research involves before the judges respond to the questionnaire. Most of our presentations are made during plenary rather than parallel sessions, so the judges who participated did not attend our presentation because they had a special interest in psychology.

We collected the data described in this Article during the period 2008–2013 at eighteen separate presentations made by one or more of us at judicial education programs. At each of these programs, we gave judges one of the scenarios listed in Table 1. We describe each scenario in detail in discussing the individual experiments, and all scenarios are included in the appendices.

126. *See supra* notes 103–09 and accompanying text.

127. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 7k84–87 (2001) (describing our methodology).

Table 1: Summary of Presentations

Scenario	Judges (*N*)	% Female	Experience (Median Years)	% Democrat
Illegal Immigration	U.S. District & Magistrate Judges (34)	n/a	7.5	85
	U.S. Magistrate Judges (new) (66)*	30	0	72
	New York (new, trial) (86)*	31	0	70
	Ohio (trial) (242)	20	14	62
	Orlando (appellate) (80)	26	n/a	62
Medical Marijuana	Canada (mixed**) (33)	35	6.5	n/a
	Canada (criminal) (37)	44	6	n/a
	New York (criminal) (68)*	42	5	89
Strip Search	Minnesota (231)	28	12	72
Credit Card	U.S. Bankruptcy Judges(201)	37	10	77
Narcotics Search	New York City ALJs (53)	59	8	88
	Nevada (trial) (103)	42	7	41
	Connecticut (trial) (145)	n/a	n/a	n/a
	New York (new, trial) (65)	35	0	74
Pollution	Minnesota (mixed) (115)	29	12.5	68
	New Jersey (mixed) (157)	26	12.4	61
	Ohio (trial) (116)	53	13.0	59

*The New York judges, U.S. Magistrate Judges, and new New York judges each consisted of two sessions.

** In all cases of mixed trial and appellate sessions, the vast majority of the judges were trial judges.

We used a between-subjects experimental design throughout.[128] That is, we created two (or more) versions of a hypothetical case in which one factor varied from version to version. Each judge was randomly assigned to only one condition and thus reviewed only one version of each scenario. Differences between the aggregated decisions made by the individual judges comprising the two (or more) conditions can thus be attributed to the factor that we varied. We also usually ask the participants to provide demographic information, such as gender, political affiliation, and years of judicial experience.[129] We do not, however, ask participants to identify themselves. We give judges the opportunity to complete the survey for pedagogical purposes but to opt out of allowing us to use their questionnaire in any further research. Nearly all of the judges who attended

128. *See generally* ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 104 (2010) (describing "between-subjects" experimental designs).

129. When we do not mention demographic effects in describing the results of an experiment it is because we did not observe any significant effects.

our presentations completed the voluntary survey and authorized us to use their results in the research described below.[130]

In employing controlled experiments with anonymous responses, our research fills a gap in the existing research about the role of affect in judicial decision making.[131] "[E]xpressions of judicial emotion are heavily stigmatized"[132] and, consequently, often concealed.[133] Because the judges in our study were not told what we were studying, were not aware that we varied the emotional content of the materials, and were responding anonymously, we do not believe that judges engaged in any kind of strategizing about what we are studying.

IV. Experiments and Results

A. Illegal Immigration

Few contemporary social issues produce the kind of polarizing, emotional responses that immigration does. Not only do people hold strong views concerning immigration policy, but that policy might conflict with the emotionally charged reality of individual stories confronting judges on a daily basis. One can adopt a hard line on immigration policy and yet be moved by the plight of individual illegal immigrants. One can also strongly favor more open immigration policies and yet be horrified at a violent crime committed by an illegal immigrant. Not surprisingly, decisions in immigration cases are highly unpredictable.[134] Hence, we chose an immigration problem as a vehicle for studying the role of emotion in judicial decision making.

We gave versions of a hypothetical case involving an immigration case[135] to six groups of judges: three groups of federal trial judges from a variety of districts, totaling 100 in all; 80 state and federal appellate judges;

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130. Typically only one or two judges in each session indicated that they would prefer that we do not use their surveys in our analysis, and we always honor such requests. We report the number of judges who failed to respond to a particular hypothetical in our description of the results of each experiment.

131. *See* Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1357 (2012) ("Judicial samples are difficult to come by, but further experimental research is needed to explore the extent to which judges may be subconsciously susceptible to the type of motivated cognition demonstrated in the present studies.").

132. Maroney, *supra* note 118, at 1496.

133. *See* Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (the "role of emotion and intuition . . . is concealed" in judicial opinions because such a basis for decision "would not provide helpful guidance to bench or bar").

134. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) (documenting wide disparities between judges in asylum cases).

135. *See infra* Appendix A.

86 newly appointed New York trial judges; and 242 Ohio judges, most of whom served in trial courts. Altogether, 508 judges responded to this problem. We varied the wording of the problem slightly from one jurisdiction to another so that the judges would be applying the law of their own jurisdiction. The structure of the problem, however, remained the same except as described below.

In Ohio, for example, the judges were told that they were presiding over the prosecution of an illegal immigrant. The defendant was a Peruvian citizen who had purchased a forged United States entry visa, which he then pasted into his genuine Peruvian passport. The judges were informed that the defendant had filed a motion to dismiss the charges. The issue raised by the motion to dismiss was whether pasting a false United States entry visa into a genuine foreign passport constitutes "forging an identification card" under Ohio Revised Statutes § 2931.13(B)(1), which we cited and quoted. If the answer is "no," then the motion to dismiss should be granted, with the consequence that the defendant will simply be turned over to federal immigration authorities for deportation. But if the answer is "yes," then the motion to dismiss should be denied, with the result that the defendant will almost certainly be convicted of a misdemeanor and sentenced to serve up to 180 days in prison before he is deported. The New York judges reviewed a similar problem, except that the materials referred to New York law governing forgery.[136]

The version of this problem that we presented to federal judges differed somewhat. We asked the federal judges to sentence the defendant instead of ruling on a motion to dismiss. The materials indicated that if the act constituted forgery, it would add two levels under the U.S. Sentencing Guidelines,[137] increasing the total offense level from eight (which would yield a sentencing range of 0–6 months) to ten (which would yield a sentencing range of 6–12 months). The federal judges were making the same determination as the state judges: that is, assessing whether pasting a fake visa onto a genuine passport constituted forgery of an identification document. The effect of an adverse ruling, however, differed slightly. Rather than ruling to dismiss the case, the federal judges were determining the appropriate range for sentencing. We also asked the federal judges to assign a sentence.

Each group of judges reviewed one of two versions of this problem. For half of the judges, the materials indicated that the defendant had been hired to sneak into the United States illegally to track down someone who had stolen drug proceeds from the cartel ("killer"). For the other half of the judges, the materials indicated that the defendant was a father who had tried

136. N.Y. PENAL LAW § 221.15 (McKinney 2008).

137. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2L2.1(b)(5)(B) (2013).

to sneak into the United States illegally to earn more money so that he could pay for a liver transplant needed to save the life of his critically ill nine-year-old daughter ("father").

Obviously, there is a yawning gap in the level of sympathy elicited by these two defendants. Did this difference influence the judges' rulings? Yes, it did. Among the judges who reviewed the father version, 44% (102 out of 234) ruled that the act constituted forgery, as compared to 60% (154 out of 257[138]) of the judges who reviewed the killer version. This difference was statistically significant.[139]

Table 2 reports the sentences that the federal judges assigned, by condition and ruling. Regardless of how they ruled, the average sentence was higher for the killer than for the father. Among the 21 judges who ruled against the father, 7 assigned sentences of less than six months (which is why the average is below six months), thereby sentencing outside the guidelines range. All of the other judges sentenced within the guideline range. Analysis of the sentence on the condition, ruling, and an interaction revealed a significant effect of condition and ruling, but no significant interaction.[140]

Table 2: Average Sentence by Condition, in Months (and *N*)

	Condition	
Ruling	**Father**	**Killer**
Not Forgery (0–6 months)	2.9 (20)	5.3 (21)
Forgery (6–12 months)	5.2 (19)	7.9 (36)

Because our data include two groups of newly appointed or elected judges, we were able to test the effect of inexperience on susceptibility to sympathy. The results showed that the variation in the defendant affected both new and experienced judges, although the newer judges seemed less sympathetic to both defendants overall. Logistic regression of the choice on the condition, experience, and an interaction revealed only significant main effects for condition and experience[141]—meaning that the new judges were neither more nor less sympathetic than the experienced judges.

138. Among the judges who reviewed the version with the father, 10 did not respond; among those who reviewed the version with the killer, 7 did not respond.

139. Fisher's exact test, $p = 0.0003$.

140. $F(1, 95) = 23.8$, $p < 0.001$; $F(1, 95) = 26.4$, $p < 0.001$; $F(1, 95) = 0.16$, $p > 0.5$ (respectively for condition, ruling, and interaction).

141. $z = 3.09$, $p = 0.003$; $z = 1.97$, $p = 0.05$; $z = 0.25$, $p = 0.81$ (respectively for condition, experience, and interaction).

Table 2A: % Ruling Against the Defendant by Experience of Judge, Condition (and *N*)

	Condition	
Judge	**Father**	**Killer**
New	54 (67)	67 (83)
Experienced	40 (167)	56 (174)

Male and female judges reacted differently to the materials. The male judges were more inclined to rule against the defendant. Female judges were more influenced by the condition, exhibiting a twenty-two percentage point difference, as opposed to the fourteen percentage point difference exhibited by the male judges. Logistic regression of the ruling on the condition, gender, and an interaction revealed that all three parameters were significant or marginally significant statistically.[142]

Table 2B: % Ruling Against the Defendant by Gender of Judge, Condition (and *N*)

	Condition	
Gender	**Father**	**Killer**
Male	47 (168)	61 (168)
Female	28 (47)	50 (59)

Logistic regression of the ruling on the condition, political party, and an interaction revealed that political orientation did not have a statistically significant main effect or interaction.[143]

The dramatic difference between the two defendants influenced the judges. In a sense, this is understandable. Almost anyone would feel sympathy for the father's plight, while, in light of the highly publicized concerns about violent drug-cartel-related crime spilling into the United States from Mexico, the judges probably reacted quite negatively toward the cartel's assassin. As one judge has observed: "[W]here two results are almost equally defensible he would be an inhumane judge who, in deciding between them, succeeded in pushing the merits out of his mind."[144] Nevertheless, the judges were asked to decide a pure question of law. Pasting a forged visa into a genuine passport either does or does not constitute "forging an identification card" under the relevant statute. The ultimate objective of the forgery is not an element of the offense, so it should be irrelevant. So should the likability of the defendant. Both

142. $z = 2.17$, $p = 0.03$; $z = 2.68$, $p = 0.007$; $z = 1.98$, $p = 0.05$ (for condition, gender, and interaction, respectively).

143. $z = 0.71$, $p = 0.48$; $z = 0.44$, $p = 0.66$ (for party and interaction, respectively).

144. DEVLIN, *supra* note 102, at 94.

defendants performed the same act (pasting a fraudulent visa into their genuine passport) for the same purpose (illegal entry into the United States). Accordingly, the decision should have been the same regardless of how the defendant was described. But it was not.

The federal judges also sentenced the defendants differently. This difference is normatively defensible. Judges should consider a wide variety of factors in sentencing, including the background and motives of the defendant.[145] The federal judges, in fact, could have channeled their emotional reaction to the litigants entirely into the sentence. Like their state counterparts, however, the federal judges allowed their sympathies to spill over into their interpretation of the law.

Even as the results show that emotion influences judges, they also support the view that judges try to suppress their emotional reactions. The character and motives of the defendants could hardly have been more extreme, and yet the difference between the defendants produced only a sixteen-percentage-point shift. In effect, most judges would have decided these two scenarios the same way. We also find the lack of a political influence on these results notable, given the widespread findings that politics influences appellate judges.[146] At the trial level, facts might matter much more than politics. Review of facts, however, should not necessarily influence a judgment of law—and yet that is what we found.

B. Medical Marijuana

To determine whether the results of the first experiment could be replicated with a different problem and different judges, we performed an experiment on 138 judges: 68 trial judges serving in New York City's criminal court, 37 Canadian judges specializing in criminal trials, and 33 non-specialist Canadian judges. A few of the Canadian judges were appellate judges, but the majority were trial judges serving in various courts throughout Canada.

The judges were told that they were presiding over the prosecution of a defendant charged with possession of marijuana.[147] The judges were asked to imagine that the state of New York had enacted the Medical Marijuana Access Law. The fictional statute provides that an individual should not be arrested for possession or use of no more than 2.5 ounces of marijuana if he or she holds a valid medical-marijuana registration card. It further provides that individuals who have not obtained such a card may raise an affirmative

145. *See, e.g.*, 18 U.S.C. § 3553(a) (2012) (requiring judges to consider a number of factors separate from the elements of a given offense, such as "the nature and circumstances of the offense and the history and characteristics of the defendant," so as to impose a sentence that is "sufficient, but not greater than necessary").

146. *See supra* note 42 and accompanying text.

147. *See infra* Appendix B.

defense if a "physician *has stated* in an affidavit or otherwise under oath . . . that the person is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the person's serious or debilitating medical condition or symptoms." The Canadian version of the problem was similar but referred instead to a governing regulation that had been adopted by the relevant Canadian health agency.

The materials indicated that the defendant was caught with the maximum amount of marijuana allowed by statute during a routine traffic stop and was arrested because he lacked a valid medical-marijuana registration card. The judges were informed that the defendant had filed a motion to dismiss the charges because he had obtained an affidavit from a physician after his arrest. The issue raised by the motion to dismiss was whether a physician's affidavit containing the testimony required by the statute, but obtained after the defendant has been arrested, satisfies the "has stated" requirement under the statute. If the answer is "no," then the motion to dismiss should be denied, and the defendant would almost certainly be convicted of illegal marijuana possession. But if the answer is "yes," then the motion to dismiss should be granted, and the charges will be dropped.

The judges were divided into two groups. One group read about a defendant who was nineteen years old, currently unemployed, on probation for beating his ex-girlfriend, and had a juvenile record for drug possession and drug dealing. The physician's affidavit indicated that the defendant was being treated for occasional mild seizures and that the illness was not debilitating and might abate within a year. The second group read about a defendant who was fifty-five years old, married with three children, employed as an accountant, and lacked a criminal record. The physician's affidavit stated that the defendant was being treated for severe pain caused by bone cancer and that the illness was debilitating and would likely kill him within a year. For both defendants, the physician added that marijuana had been shown to be effective for patients suffering from similar symptoms.

Would the greater level of sympathy inspired by the older, gravely ill defendant lead the judges before whom he appeared to interpret the same statutory language differently than the judges who encountered the younger, less sympathetic defendant? The results are summarized in Table 3.

Table 3: % Granting Motion to Dismiss by Condition (and *N*)

	Jurisdiction			
Version	**New York (Specialist)**	**Canada (Generalist)**	**Canada (Specialist)**	**Total**
19-year-old	38 (34)	65 (17)	74 (19)	54 (70)
55-year-old	81 (32)	100 (15)	76 (17)	84 (64)

Overall, 54% of the judges (38 out of 70) dismissed the charges against the nineteen-year-old defendant, while 84% of the judges (54 out of 64[148]) dismissed the charges against the fifty-five-year-old defendant. This difference was statistically significant.[149] Male judges and female judges did not differ much in their reactions to the problem. Among male judges, 55% (21 out of 38) ruled in favor of the nineteen-year-old defendant, while 82% (28 out of 34) ruled in favor of the fifty-five-year-old defendant, and among female judges 58% (15 out of 26) and 83% (19 out of 23) ruled in favor of the two defendants, respectively. Years of experience on the bench also did not affect the judges' willingness to side with the defendant overall, nor did their decision interact significantly with the age of the defendant.[150]

The three groups of judges differed somewhat in their reactions. The non-specialist Canadian judges were the most sympathetic to both defendants, with 65% (11 out of 17) ruling in favor of the nineteen-year-old defendant versus 100% (15 out of 15) ruling in favor of the fifty-five-year-old defendant. The Canadian judges who specialized in criminal trials, however, displayed little difference, with 74% (14 out of 19) and 76% (13 out of 17) ruling in favor of each defendant, respectively. The New York judges were somewhat less sympathetic to the defendants overall compared to the non-specialist Canadian judges but also exhibited a large difference between the two defendants, with 38% (13 out of 34) ruling in favor of the nineteen-year-old defendant and 81% (26 out of 32) ruling in favor of the fifty-five-year-old defendant. Analysis of these variations suggests that the New York judges were affected more by the variation of the defendant than the other judges.[151]

Once again the difference between the two defendants was stark. The sympathetic defendant was a respectable family man suffering from a grave illness. The unsympathetic defendant was a disreputable slacker who suffered from a much milder illness. Clearly the former inspires more sympathy, seems more likeable, and poses a lesser risk of manipulating the statutory scheme than the latter. Judges also might have felt that the gravely ill defendant had suffered enough because of his illness.[152] Such

148. Among the judges who reviewed the case of the nineteen-year-old, three did not respond; among the judges who reviewed the case of the fifty-five-year-old, one did not respond.

149. Fisher's exact test, $p = 0.0002$.

150. This analysis was performed by running a logistic regression of the decision on the condition, years of experience, and an interaction term. Neither experience nor the interaction term was significant ($z = 0.90$, $p = 37$; $z = 0.57$, $p = 57$, respectively).

151. A logistic regression of the ruling was run on the condition—a dummy code for the Canadian criminal judges, a dummy code for the New York judges, and interaction terms for these dummy codes. In addition to the significant effect of condition ($z = 12.6$, $p < 0.001$), only the dummy code for the interaction term for the New York judges was significant in this model ($z = 8.04$, $p = 0.001$).

152. *See* KALVEN & ZEISEL, *supra* note 8, at 194 n.5 ("If the defendant has suffered certain misfortunes between crime and trial, the jury may take the view that life or providence has

considerations, however, are not reflected in the text of the statute. A post-arrest physician's affidavit is either sufficient to qualify as a defense or it is not.

It is possible that the age of the defendant was a factor in the judges' decisions. We cannot rule out that possibility. However, the research concerning whether older offenders are sentenced either more harshly or more leniently than younger offenders is equivocal.[153] Moreover, even if age was a factor, the judges were simply basing their decisions on a different consideration that is not contemplated by the statute.

Presumably, if we had asked, the judges could have provided plausible rationales for their decisions. Those granting the motion to dismiss could have pointed to the plain language of the statute, which draws no distinction based on when the physician's affidavit is obtained. Those denying the motion to dismiss could have pointed to the danger of manipulation as suggesting that the legislature likely intended that the affidavit be acquired before marijuana was used rather than as a belated attempt to thwart prosecution. But for many of the judges, those were not the reasons that actually drove their decisions; instead, they coated a decision that had already been made based upon affect with a patina of legitimacy.

C. *Strip Search*

To explore whether the influence of emotion might vary based on the procedural posture of a case, we constructed a third hypothetical.[154] We gave this problem to 231 Minnesota judges. The overwhelming majority of them were trial court judges.

The judges were told that they were presiding over a case presenting a facial challenge[155] to the constitutionality of a city's recently instituted blanket policy requiring that all arrestees who were to be introduced into the general jail population be strip searched. The plaintiff had been arrested,

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sufficiently punished him and that further legal punishment would serve no useful social purpose.").

153. *See* Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ. ELDER'S ADVISOR 237, 241–42 (2006) (stating that, although "[r]esearch is mixed regarding whether age plays a substantial role in sentencing," the weight of scholarly opinion tends toward leniency against elderly offenders); Darrell Steffensmeier & Mark Motivans, *Older Men and Older Women in the Arms of Criminal Law: Offending Patterns and Sentencing Outcomes*, 55 J. GERONTOLOGY, SERIES B: PSYCHOL. & SOC. SCI. S141, S149 & tbl.4 (2000) (concluding that older offenders of both genders were sentenced less harshly than younger offenders, except for drug-related offenses).

154. *See infra* Appendix C.

155. A so-called "facial challenge" to the constitutionality of a state, local rule, or policy alleges that the rule or policy is unconstitutional in every context in which it might be applied. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 472 (2010) ("To succeed in a typical facial attack [the plaintiff] would have to establish that no set of circumstances exist under which [the statute, rule, or policy] would be valid, or that the statute lacks any plainly legitimate sweep." (citations omitted) (internal quotations marks omitted)).

forcibly strip searched by an officer of the same gender in the jail hallway, and then kept naked in a cold room for two hours, where he or she was regularly viewed by other officers of the same gender. The search uncovered no contraband.

The materials stated that the parties had filed cross-motions for summary judgment. The issue raised by the motions was whether the city's blanket strip-search policy was reasonable under the then-controlling case, *Bell v. Wolfish*,[156] which established that the constitutional rights of prisoners could be restricted based on legitimate institutional needs and objectives, that prison officials must be free to take appropriate actions to ensure prison safety, and that courts should defer to their judgments.[157] If the answer is "yes," then the city's motion for summary judgment should be granted (and the plaintiff's motion should be denied). But if the answer is "no," then the plaintiff's motion for summary judgment should be granted (and the city's motion should be denied), with the consequence that the plaintiff will receive declaratory relief and damages for the violation of the plaintiff's Fourth Amendment rights.

The materials then described the arguments the parties made. The city argued that its policy was reasonable under *Bell*, which upheld a blanket search policy for persons choosing to participate in contact visits with prisoners. The plaintiff responded that *Bell* is distinguishable because, unlike arrests, contact visits are elective (so that the visitor can choose to not be searched by agreeing to forego the visit) and planned (so that they pose greater risk of smuggling). The plaintiff also argued that a blanket policy fails to distinguish among those as to whom jail officials possess a reasonable suspicion that the arrestee may be carrying or concealing contraband and those as to whom they lack such reasonable suspicion. At the time we ran this experiment, the federal circuits were deeply divided on whether blanket strip-search policies were reasonable under *Bell*.[158] Since then, however, the Supreme Court has resolved the issue.[159]

The judges were divided into four conditions. The first group of judges read that the plaintiff was male, thirty-four years old, unemployed, and had a violent criminal record. He had been arrested for attempted murder and armed robbery after attacking a liquor-store clerk with a razor blade and was eventually convicted and sentenced to eleven years in prison. The second group of judges read about the same male plaintiff, but they

156. 441 U.S. 520 (1979).

157. *Id.* at 545–58.

158. *See* Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2744–52 (2011).

159. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1518–20 (2012) (holding that even persons arrested for minor offenses or traffic violations may be strip searched before being introduced into the general population of a jail).

were told that he was bringing the claim as a representative of a class of plaintiffs rather than as an individual. The third group of judges read that the plaintiff was female, nineteen years old, a student at a public university in the city, and had no criminal record. She had been arrested for trespassing at a protest targeting planned tuition increases at her university. She was released the next day, and no charges were ever filed against her. The fourth group of judges read about the same female plaintiff, but they were told that she was bringing the claim as a representative of a class of plaintiffs. By creating a class action condition and an individual condition, we sought to determine whether the judges' response to the particular plaintiff before them would vary depending on how strongly they were reminded that their decision would impact not only that plaintiff but also others who may be dissimilar to that plaintiff.[160]

Table 4: % Ruling in Favor of the Plaintiff (Against City) by Condition (and *N*) [161]

	Plaintiff	
Procedural Posture	**Student (female)**	**Thug (male)**
Individual Action	84 (62)	50 (44)
Class Action	65 (60)	51 (61)

Among the Minnesota judges in groups one and three, where the plaintiffs were suing as individuals, the gender and characteristics of the plaintiff made a large difference. Among judges who assessed the female plaintiff, 84% (52 out of 62) granted her motion for summary judgment (and denied the city's motion), while only 50% (22 out of 44) of the judges granted the male plaintiff's motion.

Although we also observed a difference between the male plaintiff and the female plaintiff in groups two and four, where the plaintiff was suing as a class representative rather than an individual, it was less pronounced: 65% (39 out of 60) of the judges granted the female plaintiff's motion for summary judgment (and denied the city's motion), while 51% (31 out of 61) of the judges granted the male plaintiff's motion. Logistic regression of the judges' rulings on plaintiff, procedure, and an interaction revealed a main effect of plaintiff and a marginally significant interaction.[162] As the

160. We have previously found that steering judges' attention toward one aspect of a case and away from another can influence their decisions. Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586, 1589–90 (2013) (summarizing the results of four experiments examining the effects of drawing a judge's attention to a specific part of a case).

161. One judge in the female–individual condition, one judge in the female–class action condition, and two judges in the male–individual condition did not respond.

162. $z = 0.08$, $p = 0.93$; $z = 3.60$, $p < 0.001$; $z = 1.80$, $p = 0.07$ (for procedure, plaintiff, and interaction, respectively).

results in Table 4 show, the judges treated the male plaintiff identically in the individual and class action cases but were less favorably disposed toward the female litigant in the class action variation. Gender, years of judicial service, and political orientation did not influence the judges' reactions to this problem significantly.[163]

Like the judges in the first two experiments, the judges in this study were asked to decide a question of law: specifically, was the city's blanket strip-search policy unconstitutional in every possible context involving every conceivable plaintiff? Both plaintiffs were subjected to the same degrading treatment, but they could not have been more different. The male plaintiff was a violent adult career criminal who had just used a dangerous but easily concealed weapon. He was accustomed to jail procedures and the prototype of the kind of arrestee that prison officials would legitimately most need to search. The female plaintiff, by contrast, was an apparently harmless and vulnerable student. The judges evidently felt sympathy for the teenager, who was probably terrified to be in a jail and traumatized by the search.[164]

A facial challenge to the constitutionality of a statute, regulation, ordinance, or policy can be thought of as an "implicit class action." The sole plaintiff is also "representing" others. In a broader sense, this element of implicit representation is present not merely in the strip-search experiment but also (albeit less clearly) in the illegal-immigration experiment and medical-marijuana experiment. In the latter two as well as the former, the judges' attention was directed to the individual plaintiff or defendant, and they were misled into giving undue emphasis to the characteristics of the particular litigant appearing before them, thereby neglecting adequately to consider the absent "litigants" who would also be affected by their ruling.

The fact that the outcome in conditions one and three, in which the plaintiff was male, was essentially fifty–fifty suggests what a close legal issue this scenario posed for the judges. One aspect of the results, however, is puzzling. Why did the percentage of the judges ruling for the plaintiff

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163. Logistic regression produced no significant main effects or interactions.

164. We also presented a different version of these materials to 60 Ohio appellate judges. We asked these judges to reverse or affirm a lower court ruling declaring the city's policy unconstitutional. We described the plaintiff either as an armed robber (who was nearly identical to the one in the problem above) or as a Catholic nun arrested in an antiwar protest. Among the 24 judges who read about the robber, 63% upheld the lower court ruling declaring the policy unconstitutional, but only 48% of the 29 judges who read about the nun did so. Although that trend is in the reverse direction of what we predicted, it was not significant. Fisher's exact test: $p = 0.41$. Concern that the politics of antiwar protests might also be influencing the judges and that we needed all four conditions to assess whether and to what extent the judges were being influenced by sympathy led us to conduct the study we report in full. Furthermore, unlike virtually all of our other studies, our initial study involved appellate review of a trial court decision.

decline in condition four (where the female plaintiff was a class representative) relative to condition two (where the female plaintiff was suing as an individual) but not in condition three (where the male plaintiff was suing as a class representative) relative to condition one (where the male plaintiff was suing as an individual)? We suspect the explanation is that the male plaintiff was viewed by the judges as typical of the class of all arrestees, while the female was viewed by the judges as an exceptionally vulnerable and sympathetic outlier. Therefore, when the judges were prompted to think of arrestees other than the plaintiff appearing before them by the presence of the class action context, the other arrestees they imagined closely resembled the male plaintiff but were very different from the female plaintiff. In effect, the procedural posture of the case as a class action served as a reminder to judges to think about the bulk of litigants who were not appearing before them. Doing so then muted the influence that the emotional reaction had on the judges.

One possible alternative explanation is that the judges based their decisions on the plaintiff's gender rather than on sympathy or some other aspect of affect. Of course, we cannot entirely rule that out. Research indicates that women are treated more leniently in the sentencing context, perhaps because, on average, they are stereotyped as being less dangerous.[165] Similarly, courts appear to treat women more protectively than men in the context of prison guards viewing inmates of the opposite gender naked.[166] Nevertheless, gender was just one of the several differences between the male plaintiff and the female plaintiff. And in our next experiment, changing the gender of the litigant did not produce a significant difference.

D. Credit Card Debt

To explore whether affect might influence non-law determinations, we performed an experiment on 201 bankruptcy judges, approximately 57% of all sitting bankruptcy judges at the time.[167] They were instructed to assume that a debtor, who had filed for relief under Chapter 7 of the Bankruptcy Code, sought to have all of her debt discharged, including the balance owed on a new credit card. The bank holding the credit card debt opposed the discharge, arguing that the debtor had run up the charges knowing perfectly

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165. *See, e.g.*, Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 96 (2013) ("Males also received longer sentences than females.").

166. *See* John Dwight Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity Versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 14–15 (2000).

167. *See Status of Bankruptcy Judgeships*, U.S. COURTS (Sept. 30, 2013), http://www.uscourts.gov/Statistics/JudicialBusiness/2013/status-bankruptcy-judgeships.aspx#t12, *archived at* http://perma.cc/XQ7D-MWQU (listing 350 authorized bankruptcy judgeships in 2012).

well that she could not pay them off, so that discharging the credit card debt would facilitate the commission of a fraud.[168] The circumstances were that the debtor was a single, twenty-nine-year-old female who had struggled with debt for much of her adult life.[169] She had never earned more than the minimum wage, had been delinquent in making credit card payments, and was once evicted for nonpayment of rent. Fortunately, she had recently landed a job, but she lost it when she almost immediately took a trip, even though her new employer had warned her that she would be fired if she went. During the trip, she ran up $3,276 in charges on a credit card she had recently obtained. The debtor had essentially no assets, had consulted attorneys about filing for bankruptcy in the past, and had filed for bankruptcy about three months after returning from her trip.

We created four conditions. Half of the judges read a version of the problem in which the debtor had incurred the credit card debt during a vacation to Florida for spring break, where she charged her hotel room, meals, and rounds of drinks for friends on her new credit card. The other half of the judges read a version of the problem in which the debtor had incurred the credit card debt during a visit to her mother in Florida. Her mother, the judges were told, was battling cancer, lacked health insurance, and needed assistance recovering from a recent surgery. The credit card charges were for the cost of the trip and the mother's medicine. We also varied the gender of the debtor. Half of the judges in each condition were told that the debtor was Janice, while the other half were told that the debtor was Jared.

Would the bankruptcy judges be influenced by the reason—whether laudable or deplorable—for the debt? It arguably should not matter because in either event the debtor incurred the debt knowing perfectly well that he or she could not repay it, so the debt was equally fraudulent.[170] The debtor's gender also should not make a difference, of course, but since the justice system occasionally treats women differently than men,[171] we decided to determine whether that was true in this context. Table 5 summarizes the results.

168. *See* 11 U.S.C. § 523(a)(2)(A) (2012) (exempting from discharge a debt obtained by "false pretenses, a false representation, or actual fraud").

169. *See infra* Appendix D.

170. *See* 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (defining "actual fraud" as "any deceit, artifice, trick, or design involv[ing] direct and active operation of the mind, used to circumvent and cheat another"); 1 CONSUMER BANKRUPTCY LAW AND PRACTICE § 15.4.3.2.2.6 (Henry J. Sommer ed., 10th ed. 2012) (describing factors considered in determining whether a debtor intended to deceive).

171. *See supra* notes 165–66 and accompanying text.

Table 5: % Granting Discharge of Debt (and *N*)

	Gender		
Version	**Male**	**Female**	**Combined**
Vacationer	28 (53)	36 (39)	32 (92)
Caretaker	51 (55)	53 (51)	52 (106)

Among the judges who reviewed the "spring break" version of the problem, 32% (29 out of 92) discharged the debt, as compared to 52% (55 out of 106) of the judges who reviewed the "sick mother" version.[172] This difference was statistically significant.[173]

The gender of the debtor did not affect the results. Among judges who read about a female debtor, 36% (14 out of 39) discharged the debt in the vacationer condition, and 53% (27 out of 51) discharged the debt in the caretaker mother condition. Among judges who read about the male debtor, 28% (15 out of 53) and 51% (28 out of 55) discharged the debtor in the two versions, respectively. These differences were not statistically significant.[174] Thus, our hypothesis that the judges might be influenced by gender stereotypes, which could lead them to reward the female debtor for performing a traditional caretaker role in the sick mother condition or to punish her for the supposedly "unladylike" behavior of spring-break partying in the vacation condition, was not borne out by the results.

Male judges and female judges did not differ much in their reactions. Among male judges, 27% (15 out of 55) ruled for the vacationer, while 51% (35 out of 68) ruled for the caretaker, and among female judges 34% (12 out of 35) and 54% (18 out of 35) ruled in favor of the vacationer and the caretaker, respectively. The gender differences were not statistically significant.[175]

Other demographic variables had little impact. Years of experience did not affect the judges' willingness to side with the debtor overall, but older judges were somewhat more harsh on the vacationer and more lenient on the caretaker than their younger counterparts.[176] Political affiliation also

172. Among the judges who reviewed the version involving the sick mother, three did not respond. All of the judges who reviewed the version involving the spring break responded.

173. Fischer's exact test, $p = 0.0041$.

174. Logistic regression of the decision on condition, gender of debtor, and an interaction revealed no significant effect of gender ($z = 0.21$, $p = 0.83$) or of the interaction ($z = 0.45$, $p = 0.63$), respectively.

175. Logistic regression of the decision on condition, gender, and an interaction revealed no significant effect of gender ($z = 0.27$, $p = 0.79$) or of the interaction ($z = 0.35$, $p = 0.73$), respectively.

176. This analysis was performed by running a logistic regression of the decision on the condition, years of experience, and an interaction term. Neither experience nor the interaction term were significant ($z = 0.92$, $p = 0.36$; $z = 1.66$, $p = 0.098$, respectively).

had no effect. Republican and Democratic judges did not differ much in their reactions.[177]

Deciding whether debt should be discharged is a task bankruptcy judges perform frequently. They are intimately familiar with the relevant law. This problem asked them to do something that they had done hundreds—perhaps even thousands—of times. Nevertheless, the judges apparently allowed their sympathy or respect for the debtor who fraudulently incurred the credit card debt to care for his or her mother to influence their decisions.

E. Narcotics Search

One curious aspect of Fourth Amendment law is that the seriousness of the offense is not considered when assessing the reasonableness of a search or seizure.[178] Allowing a defendant guilty of low-level marijuana possession to be released because of infirmities in a police search seems much less troublesome than releasing a major drug kingpin owing to similar deficiencies, even though the law requires that they be treated exactly the same. We wondered whether judges really follow this regime.[179]

Our fifth experiment involved another task that judges perform frequently: ruling on a motion by the defendant to suppress allegedly improperly obtained evidence.[180] This time we had a total of 366 judges as participants: 103 Nevada state judges, 145 Connecticut state judges, 65 newly elected New York judges, and 53 administrative law judges serving in New York City. The Nevada, Connecticut, and New York judges were trial court judges.

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177. The political party differences were not significant. Logistic regression of the decision on condition, party, and an interaction revealed no significant effect of political party ($z = 0.11$, $p = 0.91$) or of the interaction ($z = 0.18$, $p = 0.86$), respectively. This result conflicts with a previous study in which we found that political party influenced bankruptcy judges' willingness to discharge debt. Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1247–48 (2006).

178. *See* Jeffrey Bellin, *Crime-Severity Distinctions in the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 4–5 (2011) (noting that "the legal standard for evaluating a search (or seizure) is the same whether a police officer suspects that a person jaywalked or is the Green River Killer"); William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and The Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869 (2001) ("Fourth Amendment law generally treats all crimes alike.").

179. Costs and benefits of suppressing evidence are weighed in some aspects of Fourth Amendment law but are not based on the severity of the offense. *See* Herring v. United States, 555 U.S. 135, 141 (2009) (holding that, when applying the exclusionary rule, "the benefits of deterrence must outweigh the costs"); United States v. Calandra, 414 U.S. 338, 348 (1974) (explaining that the application of the exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served").

180. *See infra* Appendix E. This scenario was inspired by Sood & Darley, *supra* note 131, at 1328.

We asked the judges to assume that they were presiding over a case against a maintenance worker in a ferryboat terminal run by the Department of Transportation for the relevant jurisdiction. The materials indicated that the defendant had failed a random test for use of illicit drugs, and a subsequent search found illicit drugs in his locker. He was then charged with possession of the drugs. The defendant moved to suppress the test results and the drugs, arguing the drug test was unconstitutional because although he is a public employee, he is not one who performs a job "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" under *Skinner v. Railway Labor Executives Association*.[181]

The materials described the defendant's job duties and the contentions of the parties in detail. Although federal regulations permit random drug testing of employees who perform unsupervised "safety-sensitive tasks,"[182] which can include ferryboat maintenance,[183] the defendant pointed out that he did not work on a ferryboat but as a janitor in the terminal buildings. Further, although he was theoretically available to perform "minor electrical repairs" on ferryboats in emergencies, he had never been asked to do so in five years on the job. The Department responded that even though the bulk of the defendant's work was onshore and custodial, he might be asked to perform unsupervised repairs on a ferryboat, thereby placing ferryboat riders at risk.

Unbeknownst to the judges, there were two conditions. Half of the judges read that the defendant had tested positive for marijuana and that an unsmoked joint was found in his locker. The other half of the judges were told that the defendant had tested positive for heroin and that heroin was found in his locker.

All of the judges were then asked whether they would suppress the evidence. They were told that the parties had stipulated that if the drug test was improper then both the test results and the drugs found in the locker room should be suppressed. Table 6 summarizes the results.

181. 489 U.S. 602, 628 (1989).

182. *Id.* at 633–34.

183. Am. Fed'n of Gov't Emps., AFL-CIO v. Skinner, 885 F.2d 884, 886–87 & n.4 (D.C. Cir. 1989).

Table 6: % of Judges Who Admitted the Evidence (and *N*)

	Jurisdiction				
Version	New York ALJs	New York (new)	Nevada	Connecticut	Combined
Marijuana	52 (31)	38 (32)	50 (52)	34 (29)	44 (144)
Heroin	50 (22)	59 (32)	63 (51)	46 (46)	55 (151)

In total, 366 judges in four jurisdictions reviewed the question involving the search of the employee locker that revealed either marijuana or heroin. Among the judges who reviewed the marijuana version, 44% (64 out of 144)[184] admitted the evidence, while 55% (83 out of 151[185]) of the judges in the heroin version suppressed it. This difference was marginally statistically significant.[186]

The responses varied by jurisdiction. The lack of an effect among the New York administrative law judges is likely attributable to the facts of the version we used with these judges. The New York judges suggested that finding $4,000 worth of heroin as the materials indicated had been uncovered in the search might not seem remarkably more troublesome than finding marijuana. For the other three groups, we therefore increased the amount to $15,000 worth of heroin and indicated that the search also revealed "a list of contacts at a local high school." Among these three groups of judges, 42% (48 out of 113) of those who reviewed the marijuana case admitted the evidence as opposed to 56% (72 out of 129) of those who reviewed the heroin case. This difference was statistically significant.[187]

When analyzing the effect of the variation by demographic data, we omitted the New York City administrative law judges, who showed no effect. We also did not have demographic data on the Connecticut judges. Finally, the New York trial court judges were all newly elected, so they were omitted from the analysis of whether experience affected the judges'

184. The high rate of nonresponses among the Connecticut judges is attributable to the format used at the Connecticut presentation. Judges responded to the questions using both audience response cards and by completing the questionnaire on paper. In Connecticut, 27 judges responded only with the response cards or responded occasionally; these judges are not included in the analysis (and were not counted, as we cannot be certain they read and responded to this scenario). Only the 145 judges who turned in paper surveys were included in the analysis.

185. Among the judges reviewing the marijuana version, 36 did not respond; among the judges reviewing the heroin version, 35 did not respond.

186. Fisher's exact test, $p = 0.08$.

187. Fisher's exact test, $p = 0.04$.

assessments. The analysis on what remained revealed no significant main effects or interactions of gender, experience, or political party.[188]

Of course, it should not matter whether the defendant used marijuana or heroin. The judges responded as if there is a Fourth Amendment for marijuana that is different than the Fourth Amendment for heroin. The fruits of the search are irrelevant.[189] Regardless of which illicit drug he was using, the defendant's job responsibilities either did or did not render him subject to random drug testing under *Skinner*, from which the search of his locker emanated. The defendants are obviously different, however—one is likely a casual drug user while the other is likely selling a dangerous narcotic to high school kids. And the judges treated them differently.

These results suggest that judges bend the law to adapt to the severity of crimes. Other studies show similar effects. We have found that judges were able to disregard an unlawfully obtained confession more easily when the underlying crime was less severe.[190] Archival research on the application of the exclusionary rule also concludes that "judges take into account the egregiousness of an alleged crime when making search and seizure exclusionary rule decisions . . . ."[191] In effect, even though the exclusionary rule does not permit judges to consider the gravity of the offense, judges nevertheless seem to use a sliding scale that takes it into account.

F. Environmental Pollution

Federal diversity of citizenship jurisdiction[192] was created by the Judiciary Act of 1789[193] and has endured ever since. Diversity jurisdiction was designed to protect out-of-state litigants against local bias in state courts.[194] It was controversial when it was enacted, and it remains so

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188. For each demographic parameter, we ran a logistic regression on the condition, the demographic parameter, and an interaction term. In all cases, z's < 1.5 and p's > 0.15.

189. *See* SATTER, *supra* note 30, at 148 ("When faced with motions to suppress, I disregard the incriminating nature of the evidence being challenged and rigorously concentrate on the constitutional question of whether or not the evidence was obtained legally.").

190. *See* Rachlinski, Wistrich & Guthrie, *supra* note 160, at 1613–15 (summarizing findings showing that judges were less able to disregard a confession obtained as a result of severe police misconduct when the crime was murder than when the crime was robbery).

191. Jeffrey A. Segal & Benjamin Woodson, Motivated Cognition on the Bench: Does Criminal Egregiousness Influence Judges' Beliefs About Police Wrongdoing? 23 (April 23, 2014) (unpublished manuscript), *available at* http://isps.yale.edu/sites/default/files/files/segal-woodson.pdf, *archived at* http://perma.cc/5KNE-NXE5.

192. 28 U.S.C. § 1332 (2012).

193. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (codified as amended at 28 U.S.C. § 1332).

194. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553–54 (2005); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3.2 (6th ed. 2012); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 614–15 (2004).

today.[195] The contemporary debate "centers on whether state courts are likely to be biased against out-of-staters"[196]: "Critics of diversity jurisdiction argue that there is insufficient proof of bias against out-of-staters in state courts. . . . The defenders contend that bias still exists against out-of-staters . . . ."[197] The debate has resisted resolution because "the question of whether state courts are biased against out-of-staters is an empirical question, and it is extremely difficult to devise studies that can adequately measure the differences between court systems."[198] We decided to gather empirical data that might inform it.

Do judges actually favor in-state litigants in this day and age? Although it seems unlikely, consider what a former Chief Justice of the West Virginia Supreme Court had to say on the topic:

> [A]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families, and their friends will reelect me.[199]

Assuming that he was serious, Justice Neeley's remark suggests that he was openly biased against out-of-state litigants.[200] Other judges might

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195. *See* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 123 (2003) ("The historical purpose behind diversity jurisdiction is unclear, and its utility has long been controversial." (footnotes omitted)); Tammy A. Sarver, *Resolution of Bias: Tort Diversity Cases in the United States Court of Appeals*, 28 JUST. SYS. J. 183, 186 (2007) ("[J]ust as controversy and debate plagued the Framers in the establishment of such a powerful grant of federal jurisdiction, disagreement continues to characterize the discussions regarding the modern propriety of retaining diversity jurisdiction.").

196. CHEMERINSKY, *supra* note 194, § 5.3, at 313.

197. *Id.* § 5.3, at 311–12. Lawyers appear to disagree about whether state court bias against out-of-state litigants still exists. *Compare* Nima Mohebbi, Craig Reiser & Samuel Greenberg, *A Dynamic Formula for the Amount in Controversy*, 7 FED. CTS. L. REV. 95, 110 (2013) ("[T]he original justifications for diversity jurisdiction have eroded over time."), *with* Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 98 & tbl.1 (1980) (reporting that 40% of attorneys sureyed cited "bias against an out-of-state resident" as a reason for choosing a federal forum), *and* Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 179 & tbl.1 (1965) (reporting that 60.3% of attorneys surveyed considered local prejudice against an out-of-state plaintiff as a reason for preferring a federal forum).

198. CHEMERINSKY, *supra* note 194, § 5.3, at 313.

199. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 142 n.248 (1993) (quoting Joani Nelson-Horchler, *Lobby the Courts, State Judge Says, but Critics Balk*, IND. WK., Nov. 1988, at 36, 36.) (internal quotation marks omitted).

200. This might be an example of so-called "cause judging." *See* JAN PAULSSON, THE IDEA OF ARBITRATION 259 (2013) ("Judicial corruption or bias (such as local favoritism) involves pathologies that need to be studied as such."); Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 10 (2014) ("[T]he cause judge rejects the core idea of non-accountability so important to the standard conception of the judge's role, . . . and instead takes moral responsibility for the impact of his or her rulings on the community.").

share that attitude, but we suspect that most do not and instead do their best to treat both in-state and out-of-state litigants impartially.[201] We wondered, however, whether even judges who were not openly biased, and who believed themselves to be fair, might nevertheless be biased against out-of-state litigants.

To attempt to find out, we performed an experiment on 391 state judges from Minnesota, New Jersey, and Ohio.[202] The materials asked them to assume that they were presiding over a bench trial. The plaintiff alleged that the defendant had polluted the plaintiff's lake and downstream waters, by surreptitiously dumping toxic chemicals generated by his dental-adhesive manufacturing business into the lake at night. The defendant had been doing this for several months to avoid the hassle and expense of safe disposal. Shortly thereafter, the plaintiff swam in the lake and suffered acute arsenic poisoning. His injuries were severe and included loss of a kidney, persistent nausea and headaches, and facial disfigurement. The judges were informed that the parties had reached a partial settlement, pursuant to which the defendant conceded liability and agreed to pay $500,000 in compensatory damages, but that the amount of punitive damages, if any, that should be awarded still needed to be decided. The judges were told that the defendant's business was highly profitable and had a book value of approximately $10,000,000. They were then asked how much, if anything, they would award in punitive damages.

For all three groups of judges, we used two conditions. For the Minnesota judges, either the defendant lived and worked in Minnesota, making adhesives for Minnesota dentists, or he lived and worked in Wisconsin, making adhesives for Wisconsin dentists. We wanted to determine whether Minnesota judges would render higher punitive damage awards against a Wisconsin resident who crossed the state border to pollute a precious natural resource and caused serious injury than they would if the defendant was a Minnesota resident. One potential difficulty with this version of the problem, however, is that it confounds the variation in the defendant's residency with whether the tort involves travelling across a state line. Although whether the defendant travelled across a state line has no legal significance, the judges might have thought that crossing the border to commit the tort against a Minnesotan was somehow worse than committing it without crossing a state border. (The problem identifies the distance travelled as twenty miles in both cases.). To account for this, in New Jersey and Ohio, we described the defendant's actions as consistently

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201. *See* Thomas v. Gillen, 491 F. Supp. 24, 26 n.1 (E.D. Va. 1980) ("This Court will not conceal its disaffection for the notion that federal jurisdiction over disputes between citizens of different States is necessary to protect out-of-State parties from local prejudice. State judges, no less than federal judges[,] are obligated to provide a neutral forum.").

202. *See infra* Appendix F.

involving a cross-border tort but varied the residency of the parties: in New Jersey, the judges either read about a New Jersey plaintiff being poisoned by a Pennsylvania resident or about a Pennsylvania resident being poisoned by a New Jersey resident; in Ohio the judges either read about an Ohio plaintiff being poisoned by a Michigan resident or about a Michigan resident being poisoned by an Ohio resident.[203]

Thus, in all three states, the scenario either provided the judges with an opportunity to benefit an in-state resident at the expense of an out-of-state resident, or it did not. Could the judges put the natural human tendency toward in-group favoritism aside? On the one hand, bias against an out-of-state resident seems plausible because he is a member of an out-group.[204] On the other hand, the conduct, the intent, and the harm are exactly the same, and judges are steeped in the norm of judicial impartiality.

Among the 371 judges who responded to this problem,[205] 350 (or 94%) awarded punitive damages (10 in the in-state and 11 in the out-of-state versions did not. We scored these judges as having awarded $0 in damages in assessing the size of the judges' awards.).

203. The only other variation among the states was that we used the appropriate standard for punitive damages in that state. Under Minnesota law, punitive damages are allowed where clear and convincing evidence shows that the defendant deliberately disregarded the rights or safety of others. MINN. STAT. ANN. § 549.20(1)(a) (West 2010). The law in New Jersey and Ohio is similar. *Compare* N.J. STAT. ANN. § 2A:15-5.12(a) (West 2000) (requiring a showing by clear and convincing evidence that acts or omissions were actuated by actual malice or wanton and willful disregard for an award of punitive damages), *with* OHIO REV. CODE ANN. § 2315.21(C) (West Supp. 2014) (mandating a demonstration of malice or aggravated or egregious fraud and requiring the trier of fact to return a verdict on compensatory damages before a plaintiff may recover punitive damages).

204. Some have argued that punitive damage awards are based on emotion rather than cognition. *See, e.g.*, Slovic et al., *supra* note 75, at 415 ("[A] punitive damage award is a personal injury lawsuit seem[s] to be derived from attitudes based on emotion rather than on indicators of economic value.").

205. 17 judges did not respond: 8 in the in-state version and 9 in the out-of-state version.

Table 7: Damage Awards (in $1,000s) by Condition

State	Defendant (*N*)	25th Percentile	Median	75th Percentile	Average
Minnesota	In-State (56)	500	1,000	2,000	1,954
	Out-of-State Def (58)	1,000	1,750	3,000	2,060
New Jersey	In-State (75)	1,000	1,500	2,500	2,432
	Out-of-State (73)	1,000	2,000	2,500	2,553
Ohio	In-State (59)	500	1,000	1,500	1,417
	Out-of-State (50)	500	1,000	2,000	1,674
Total	In-State (190)	500	1,000	2,000	1,982
	Out-of-State (181)	1,000	1,500	2,500	2,151

Table 7 reveals that judges punished the out-of-state defendant more harshly than the in-state defendant. The average award was higher for out-of-state defendants than for in-state defendants in all three states, although the differences were small. The average can be a misleading statistic, however. Like most distributions of damage awards, these damage awards are positively skewed, with a small number of high awards having a disproportionate effect on the average. The percentiles are more stable and reveal that the amounts awarded against out-of-state defendants tended to be higher. The overall difference was statistically significant.[206]

We also performed a parametric analysis (a *t*-test) on a transformation of the damage awards that produced a distribution that was not skewed; this test showed a marginally significant overall effect.[207] ANOVA of the transformed awards on the condition, gender (or party or experience), and an interaction term revealed no significant main effect for the demographic variables (gender, years of experience, and political orientation) nor any significant interactions.[208]

206. The Mann–Whitney test (a non-parametric analysis based only on the rank order of the awards) was significant: $z = 2.36$, $p < 0.05$.

207. The transformation was a Box–Cox transformation: $t(348) = 1.93$, $p = 0.06$.

208. All F's > 0.90, p's < 0.35 for the main effect of demographics and interactions.

The results suggest that in-group preferences are about as salient to judges as they are to jurors.[209] The effect was more pronounced among the judges in Minnesota, thereby raising the possibility that judges might also have been reacting more negatively to a tort that involved crossing a state line. That said, we doubt it, as the judges surely knew that fact has no legal significance.[210] It is also possible that variation in the degree of interstate rivalries played a role. Perhaps New Jersey judges see Pennsylvania (and Ohio judges see Michigan) as less foreign or as less of a rival than Minnesota judges see Wisconsin. Nevertheless, the effect persisted across the three jurisdictions, which—taken as a whole—showed a notable bias against out-of-state defendants.

The implications of our results for the debate over the continued need for diversity of citizenship jurisdiction are murky. Our experiment does not directly compare, for example, Minnesota state judges with Minnesota federal judges. Whether a Minnesota federal judge who enjoys life tenure would treat a Wisconsin defendant the same as a Minnesota defendant, we cannot say.[211] Merely because Minnesota state judges exhibit in-group bias does not mean that a federal judge who also lives and works in Minnesota would do so as well, although it is possible that a lifetime of ties to Minnesota would trump her membership in the federal—rather than state—judiciary. If that is true, then a Wisconsin defendant who removed a case from a Minnesota state court to a Minnesota federal court might simply be substituting one forum biased by in-group favoritism for another.

V. Discussion

A. Summary

With the aid of 1,800 state and federal judges from all over the United States and Canada, we uncovered clear evidence that emotions influence judges. Our results encompass civil and criminal cases and a wide range of tasks (interpreting and applying law, exercising discretion, awarding damages) and procedural contexts (motion to dismiss, motion for summary judgment, motion to suppress, motion to discharge debt, award of punitive damages, sentencing). Sympathetic parties fared better—often far better—

209. *See* Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445, 466 (1999) (finding that mock jurors awarded local plaintiffs significantly more in punitive damages than geographically remote plaintiffs).

210. They might have thought that the defendant believed it had legal significance or perhaps that crossing the border reflected a greater effort to cover up his crime.

211. One study suggests that federal appellate judges do not exhibit in-group bias in diversity cases. Sarver, *supra* note 195, at 195 ("[I]t seems that the citizenship of neither the litigant nor the federal judge was found to exert any influence on the outcome of a tort diversity case in the courts of appeals.").

than unsympathetic ones in our study. On the other hand, we did not observe any party preference in the judges' responses. They did not favor either plaintiffs or defendants systematically. We also found little support for the proposition that political ideology drives much judicial decision making at the trial level. Further, the gender of the judges hardly mattered either. Except for a small variation in the first experiment, male and female judges reacted similarly. Overall, judges simply favored the litigant who generated the more positive affective response.

Some have assumed that affect may influence jury—and even judge—fact-finding at trial.[212] Our experiments go a step further, showing that affect influences law interpretation and application and that it does so even in the relatively emotionally arid (compared to trial) setting of pretrial motions,[213] where some have argued that law is most likely to be correctly applied.[214]

Although we cannot say for certain, we doubt that the judges in our study consciously intended to do what they did. More likely, it was the result of motivated cognition. When the judges decided our hypothetical cases, they were not saying to themselves: "I like or feel sympathy for *X* so I am going to resolve this uncertain legal issue in his favor." Rather, they likely were arguing (in their minds) in conventionally relevant terms, such as the language of the statute, the legislative history, the dictates of precedent, or policy implications. But without being consciously aware of it, their thumbs were on the scale, covertly tipping the balance toward the more likeable or sympathetic litigant so that she consistently prevailed more often than the less likeable or sympathetic litigant on seemingly objective and legitimate grounds.

Our problems placed judges in a dilemma between "heart" and "head," requiring them to choose between faithfully applying the law and reaching an unjust result in the particular case before them or bending the law to achieve justice.[215] To the extent that the law and the facts are distinct,[216]

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212. *See* Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41, 101 (2014) ("Evidence at trial will inevitably induce emotional responses in factfinders, whether the cases are being tried to judges or juries.").

213. Many pretrial motions are decided on the papers. Even when a hearing is held, it is usually limited to oral arguments by counsel. The litigants themselves are seldom seen and almost never heard, except in criminal cases, of course. *See generally* Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50 (1999) (arguing that the lack of face-to-face interaction among parties, judges, and lawyers is detrimental to the federal justice system).

214. *See* Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307, 319–20 (2007) (suggesting that legal rules may be applied more accurately in motions than in trials, in part because exposure to extraneous factors is less likely).

215. *See generally* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA 8–15 (1997) (noting that the nineteenth century saw the emergence of new or modified legal doctrines designed to preserve a sense of justice).

facts are notoriously uncertain,[217] so one might expect that the former is less subject to affective influence than the latter. That may be true and might suggest that our experiments, which did not involve fact-finding, actually underestimate the impact of emotion on judicial decision making. What our experiments show, however, is that whatever the impact of emotion on fact-finding, legal determinations are also malleable.

The results of our experiments involving interpretation of law tend to confirm a relatively "tame" version of legal realism, specifically, one in which judges are presumed to follow the law when it is clear and to be influenced by emotional and other extralegal factors only when it is not. They do not, however, confirm the stronger, "untamed" version of legal realism, in which it is hypothesized that judges decide cases based on emotion or other extraneous factors even when the law is clear.[218] Therefore, rather than indicating that judges are lawless, our results merely suggest that affect influences how judges use their discretion.

Our experiments also indicate that judges react in much the same way that jurors do but perhaps require a stronger affective influence to do so. Although we did not test jurors or juries using our problems, partly because that is not our research focus and partly because our problems were tailored to tasks judges, rather than jurors, perform, we would expect the divergence between conditions to be even larger with jurors or juries than it was with judges. We know from prior research that judges and jurors do not react in the same way to affective motivation.[219] What our results show is that although judges may be less susceptible than jurors, they are not immune.

In sum, as one British judge put it: "Does the wind of the law blow equally upon the meritorious and the unmeritorious litigant? No, it does not. At all judicial levels and in all systems the law is sometimes stretched, a little shamefacedly perhaps."[220]

B. Limitations

Like all studies, ours has limitations. First, our experiments are unavoidably artificial. They did not involve real cases or take place in a courtroom. It is possible that a judge presiding over a real case might not be as influenced by affect as our experimental subjects were. The serious

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216. *See* Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (proposing that the distinction between fact and law is inherently flawed and instead questions of law are part of the larger category of questions of fact).

217. *See* FRANK, *supra* note 3, at 16 ("Accordingly, the court, from hearing the testimony, must guess at the actual, past facts. Judicially, the facts consist of the reaction of the judge or jury to the testimony.").

218. *See* Frederick Schauer, *Legal Realism Untamed*, 91 TEXAS L. REV. 749, 779–80 (2013) (distinguishing between "tame" and "untame" versions of legal realism).

219. *See* KALVEN & ZEISEL, *supra* note 8, at 217.

220. DEVLIN, *supra* note 102, at 92.

consequences of a real case, the accountability to an appellate court, and the like could cause judges to behave differently. On the other hand, a real case simply raises the stakes; it does not necessarily trigger a different way of thinking. Moreover, real litigants will obviously provoke more emotional responses than hypothetical ones.[221] We find it somewhat remarkable, for example, that the judges reacted to the severity of the underlying crime in our materials involving the search of a locker, even though the judges knew perfectly well that the issue was only hypothetical.

Second, some of the litigant characteristics we manipulated arguably might be relevant to the underlying legal issue in some of the scenarios. In the bankruptcy scenario, for example, the debtor who was caring for a sick parent is obviously more responsible than the spring breaker. The judges might have thus viewed the caregiver as less likely to run up credit card debt with the knowledge that they will be filing for bankruptcy and never pay it back. We think this is the only one of our scenarios, however, that is vulnerable to this criticism. In the first (illegal-immigration) and second (medical-marijuana) experiments, the relevant statute either did or did not cover identical conduct. While it might seem more likely that the nineteen-year-old defendant in the medical-marijuana scenario was faking his medical condition (which was seizures) than the fifty-five-year-old defendant (who suffered from a terminal illness), the statute is either best construed as covering post-arrest medical affidavits or it is not. Distinguishing between the more and less sympathetic litigants in these criminal scenarios as a matter of sentencing discretion might make sense, but interpreting the statute to include the same conduct if defendant *A* committed it but not if defendant *B* committed it sets the law off on an uneven path. The differential reaction to the strip-search problem also cannot be reconciled with a rational response to the characteristics of the parties because the judges in all cases are responding to a facial challenge—in effect deciding the case for all potential litigants. They should not be swayed by the particular one who happened to be appearing in front of them, and yet they were. Likewise, in our search-and-seizure problem, the defendant is either in a safety-sensitive position or he is not; the outcome of the search simply does not speak to that legal question. Finally, we can construct no reasonable basis for penalizing a Wisconsin defendant more severely than the Minnesota defendant for the same conduct.

Third, judges also have more information in real cases than they have in our one-page hypothetical cases. That said, we consistently provided the

221. *See* Vicki L. Fishfader et al., *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention, and Level of Emotionality*, 20 LAW & HUM. BEHAV. 565, 568–69 (1996) (finding that subjects who watched a video of portions of a trial experienced greater emotional reactions than those who read transcripts); Piotr Winkielman, *Bob Zajonc and Unconscious Emotion*, 2 EMOTION REV. 353, 359 (2010) ("[A]ffective pictures are more efficient than words in eliciting physiological reactions, which reflect changes in core affective systems.").

gist of the facts and the applicable law just as judges would receive in an actual case. Because, in life, people form attitudes about others immediately using superficial traits or "thin slices" of information, which then tend to persist because subsequent information is viewed through the lens of that first impression,[222] it is unlikely that making our scenarios more detailed would have made much difference. Across all six scenarios, it is clear that the judges reacted to extralegal feelings or sympathies.

Fourth, our problems presented extreme contrasts between the sympathetic litigant and the unsympathetic litigant. Although judges encounter litigants occupying all points on the affective continuum, in many of our experiments our litigants occupied either one end or the other. The dramatic differences might have exaggerated the strength of the affective responses likely to be observed in most cases. We cannot say whether the influence we observed would occur in cases in which the motivational intensity or strength of the affect or feeling is less, but we expect that it might be reduced. On the other hand, the way in which we presented the differences between the litigants was restrained. We did not, for example, show the judges gruesome photographs of severed limbs, or the like.

Fifth, most of our hypothetical cases were challenging. In the illegal-immigration, medical-marijuana, and strip-search problems the legal issues were toss-ups, and in the credit card debt, environmental pollution, and narcotics-search scenarios the tests the judges were supposed to apply were vague and standardless. The mix of cases in actual courtrooms includes both easy cases and hard cases. It certainly contains more of the former than of the latter.[223] Although it could be argued that challenging cases are the most likely to be litigated (because easy cases are not filed or are quickly settled),[224] they are also relatively rare. Usually, even in cases that are litigated through trial, the facts, the law, or both are clear enough that the judge is at least nudged in one direction rather than the other. That might leave less room for affect to influence the outcome in ordinary cases.[225] None of our scenarios invited out-and-out nullification by judges into the teeth of clear law. We expect that few judges would intentionally

222. *See* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 819–20 (2001).

223. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 60 (1924) ("Nine-tenths perhaps more, of the cases that come before a court are predetermined . . . by inevitable laws that follow them from birth to death. The range of free activity is relatively small. . . . None the less, those are the fields where the judicial function gains its largest opportunity and power.").

224. *See* Schauer, *supra* note 218, at 757–58 (arguing that "the field of litigated cases thus systematically under-represents the easy cases and over-represents the hard ones").

225. *Cf.* Frank B. Cross, *Law as Courtesy?*, 47 TULSA L. REV. 219, 223 (2011) ("An indeterminate law leaves more room for other influences on decisions.").

do that. Our expectation is consistent with the research on juries.[226] On the other hand, maybe unclear cases matter most.[227]

Relatedly, we severely limited the choices that were available to the judges. Judges have great discretion to find creative remedies so as to avoid the kinds of difficult choices we asked our judges to make. A judge in our medical-marijuana case, for example, might convict the fifty-five year old but issue a suspended sentence—an option we did not provide. Judges in the search-and-seizure problem might well do the same thing for the defendant convicted only of marijuana possession. The combination of difficult legal questions and constrained outcomes might have exacerbated the effect of emotion in our scenarios.

Sixth, our experiments were limited in scope. For example, we did not attempt to manipulate judges' moods directly, such as by attempting to make them feel happy, sad, or angry, as opposed to manipulating their feelings about a particular litigant. Although the line separating them is blurry, mood and affect are distinct.[228] Our experiments focused on the latter. Some have concluded that the mood of a decision maker can have a profound impact on decision making.[229] The narrowness of our study may

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226. Acknowledging the role of the jury as legislator, Harry Kalven, Jr. and Hans Zeisel note:

> [T]he jury imports its values into the law not so much by open revolt in the teeth of the law and the facts, although in a minority of cases it does do this, as by what we termed the liberation hypothesis. The jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values. It will not often be doing this consciously; as the equities of the case press, the jury may, as one judge put it, "hunt for doubts." Its war with the law is thus both modest and subtle. The upshot is that when the jury reaches a different conclusion from the judge on the same evidence, it does so not because it is a sloppy or inaccurate finder of facts, but because it gives recognition to values which fall outside the official rules.

KALVEN & ZEISEL, *supra* note 8, at 495.

227. *See* Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 5 (1963) ("Turning now to the small area requiring creative effort in the treatment of the new cases, its importance of course far transcends its numbers. For these cases are what give tone and color to the entire judicial process.").

228. Moods are "less intense, more diffuse, relatively enduring, and tend[] to lack a readily identifiable source." Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143, 144 (2006); *see also* Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 3 (2005) ("The distinction is important; *emotion*[s]—anger, fear—tend to be more stable, focused, and attributable to a particular source; *moods*—anxiety, elation, depression—tend to be more transient, diffuse, and less attributable to particular sources.").

229. *See, e.g.*, ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 120 (George A. Kennedy trans., 1991) ("[T]hings do not seem the same to those who are friendly and those who are hostile, nor . . . to the angry and the calm . . . ."); Feigenson & Park, *supra* note 228, at 147 ("Many studies . . . have shown that people in moderately positive moods tend to think more creatively and to be better at drawing associations and at inductive reasoning than people in a neutral mood, whereas people in moderately negative moods tend to be better at analytical and deductive reasoning.").

have caused us to overlook the potential role of mood as a mediator of affect.

Seventh, our experiments also were limited to the interpretation or application of law and the exercise of discretion. They did not involve pure fact-finding. The impact of affect could be either greater or lesser for factual uncertainty than for legal uncertainty. We cannot say for sure, of course, but we believe that emotion exerts even greater influence on fact-finding. Many believe that facts are more uncertain than law,[230] and the greater the indeterminacy the greater the opportunity for extrinsic influences, such as affect, to intrude.

Eighth, sympathy might not be the only factor influencing judges in these scenarios. We did not measure judges' sympathies or antipathies for the parties directly, preferring instead to frame our questions in the way that they would appear to judges at trial. We are nevertheless confident that the litigants in our scenarios vary markedly in the degree to which they are sympathetic. Other differences between the scenarios might have produced the effects we observed as well—such as variations in the gender or age of the litigants. Furthermore, the variation in the search-and-seizure scenario changes the cost of suppressing the evidence to society considerably, which might have driven the effect more than sympathy for the parties. At the very least, we have demonstrated that a wide range of extralegal factors influence judges. And across six different scenarios, the dominant variation is the relative degree of sympathy the two parties evoked.

Finally, we only examined aggregate results. No two judges are alike and some might have been unaffected by the characteristics of the parties. Any attempt to predict the outcome of a particular case based on our data must be viewed with suspicion. Our results are merely probabilistic. Some judges might be impervious to the affect altogether, while others may be susceptible to merely a subset of potential affective stimuli or may be influenced only if the affective stimulus is very strong.

The results, however, indicate that emotion will often influence judges in real cases. In our study, the judges performed familiar, common judicial tasks and were unable to avoid reacting to the sympathetic or unsympathetic character of the parties. Even though the features we varied were largely unrelated to the legal judgments they had to make, the judges ruled more favorably for the sympathetic litigants.

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230. *See* FRANK, *supra* note 3, at 4 ("[T]rial-court fact-finding is the toughest part of the judicial function."); Clark, *supra* note 227, at 3–4 ("At the trial level the ratio of cases turning upon certain substantive principles is obviously yet higher [than on the appellate court], though the then open contest of facts—the actual events—may well make the outcome less predictable.").

C. *Implications*

1. For Lawyers.—Our results have several implications for lawyers. First, when they have a choice, lawyers should attempt to select clients that are likeable, sympathetic, or otherwise appealing. This applies most clearly to the selection of representative litigants in class actions, but also to long run institutional reform litigation strategies, such as the approach taken by Charles Hamilton Houston in crafting a long-term strategy to overturn segregation for the NAACP.[231] This will not make a difference in every case, but it might increase the odds in some cases and be decisive in few. Of course, this is not always possible. Typically, lawyers must take their clients as they find them.

Second, lawyers might think twice before accepting cases from unappealing clients—especially if they represent plaintiffs in contingent fee cases. The client's lack of appeal might reduce the odds of success and hence the value of the claim, at least in close cases. We expect that savvy lawyers do this and also take the appeal of their clients into account when valuing cases for settlement purposes.[232] This preference for sympathetic clients is troubling, however, because it suggests that less appealing or less sympathetic clients may have more difficulty obtaining counsel (or at least competent counsel) than more appealing or more sympathetic ones, thereby widening the gap between their relative rates of success even further.

Third, contrary to the advice of Justice Scalia,[233] lawyers should not neglect emotion in presenting their cases. "Provocations of emotion are much superior to provocations of the mind alone."[234] Like jurors, judges are susceptible to emotional appeals, although they may be both less responsive than jurors[235] and more sensitive to lawyers' attempts to manipulate them.[236] To maximize their effectiveness, lawyers need to do

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231. *See NAACP History: Charles Hamilton Houston*, NAACP, http://www.naacp.org/pages/naacp-history-charles-hamilton-houston, *archived at* http://perma.cc/ZVB6-SGYB (noting that Houston's litigation strategy to attack Jim Crow segregation included exploiting the inequality of "separate but equal" as applied to public education).

232. *See* James E. Fitzgerald & Sharon A. Fitzgerald, *Settlements*, *in* 3 LITIGATING TORT CASES § 33:4 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003) (including client likeability in a list of factors to consider when valuing a case for the purposes of settlement).

233. *See supra* note 29 and accompanying text.

234. WORDS OF POWER: VOICES FROM INDIAN AMERICA 34 (Norbert S. Hill, Jr. ed., 1994) (quoting Vine Deloria, Jr., Standing Rock Sioux).

235. *See* KALVEN & ZEISEL, *supra* note 8, at 497–98 ("The judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude."); SCALIA & GARNER, *supra* note 29, at 32 (suggesting judges are impervious to and resentful of strong emotional arguments).

236. *See* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189, 1193 (2013)

everything reasonably possible to ensure that their motions, arguments, and trial presentations are emotionally, as well as logically, appealing.[237] Devoting more attention to helping their clients appear more appealing or more sympathetic, by making them more presentable, by "humanizing" them during direct examination, and by assembling the facts into a compelling story that places the client in a favorable light is worth the effort. We suspect that most talented and experienced lawyers already do these sorts of things intuitively, but our results provide an empirical basis for doing them and underscore their significance, even in the context of pretrial motions and bench trials.

2. For the Justice System.—Is the effect we observed good or bad? For strict formalists, who believe that legal rules are clear and should be applied consistently,[238] our results probably are deeply troubling. The rest of us may feel more conflicted. The answer depends on the relative importance one places on technically accurate as opposed to societally acceptable outcomes. To the extent that one comes down on the side of the latter—which many would agree cannot be ignored altogether—the decisions may seem acceptable when considered solely in terms of their outcomes on the specific facts presented. The perceived legitimacy of the justice system is important to maintaining social order. Where the law is unclear or discretion is available, it may be sensible for decisions to conform to the community's intuitions about fairness and morality.[239] The law perhaps can be bent at times without it breaking.

("Because judges so frequently hear apologies, judges might become inured to their influence and might even react cynically or negatively to apologies.").

237. *See* FARRELL, *supra* note 78, at 287 (quoting Clarence Darrow, in part: "'You try to throw around the case a feeling of pity, of love, if possible, for the fellow who is on trial,' he said. If the jurors can be made to identify with the defendant and his 'pain and position' they will act 'to satisfy themselves.'").

238. *See* Burt Neubourne, Essay, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992) ("Pure formalists view the legal system as if it were a giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively 'true' pre-existing facts providing the minor premise. The judges' job is to act as a highly skilled mechanic . . . ."); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520–23 (1988) (defining formalism (or legalism) as the view that judicial decisions are determined and bound by law, which is a clear set of rules contained in preexisting canonical legal materials such as statutes and case precedents).

239. *See* Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 811–13 (2012) (emphasizing that compliance with criminal law in "borderline cases" is accomplished through "deference" to the criminal system's "moral credibility," which is in part premised upon punishments conforming with a community's view on what is morally condemnable); *cf.* FRANK, *supra* note 101, at 188 (explaining that the public "turns to the jury for relief from . . . dehumanized justice," which relief is often accomplished by means of occasional hidden case-by-case bending or nullification of law); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) ("Jury lawlessness is the great corrective of law in its actual

The common law process, which influences not merely the evolution of case law, but also the interpretation of statutes, regulations, and constitutions,[240] places judges in an awkward position because they must focus on deciding the case before them based on the past, but they must also keep one eye on the future and the ramifications of the ruling in the case before them for the class of eventual cases that is not before them.[241] Considered in that context, emotion could have two negative implications.

First, judges' emotional reactions can be unfair to individual litigants. If litigant *A* wins and litigant *B* loses simply because litigant *A* is more appealing than litigant *B*, that is problematic. Litigants who are alike in all relevant respects ought to be treated alike.[242] The relative appeal of *A* and *B* should be irrelevant. Both are entitled to equal justice on the merits (both substantive and procedural) of their claims. Our results suggest that cases that are alike in all legally relevant respects will nonetheless sometimes be decided differently. Judges might be creating one set of rules for the sympathetic and a different set for the unsympathetic.

Second, emotion might cause doctrinal distortion because the law could evolve in one direction if litigant *A*'s case is decided first and in a different direction if litigant *B*'s case is decided first.[243] The sequence in which cases arise can shape the evolution of the law. Assume two plaintiffs, *A* and *B*, and that *A* is likeable but *B* is not. On a close question of statutory interpretation *A* may prevail but *B* may not. As a result, the scope of a statute may either be broadened (to provide *A* with a remedy) or

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administration."). That judges may also play a role in this process is not necessarily a bad thing. For example, it allows the law to flex "without tampering with the brittle rule-structure." Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 209 (1998). Nevertheless, because there are fewer trials and more dispositions on pretrial motions, relying on jurors to perform this function may no longer be adequate.

240. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (1949) (explaining that courts reason by example or analogy regardless of whether they are applying cases, statutes, or constitutions); POSNER, *supra* note 32, at 83 ("Ours is a case law system that includes but is not exhausted in common law. Not only constitutional law (obviously), but also to a considerable extent statutory law, is shaped by judicial decisions . . . .").

241. *See* Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 51–52 (1983) ("[T]he impact of judicial dispute-resolution looks forward; future potential litigants are affected by a case they did not participate in.").

242. *See* Ward v. James, [1966] 1 Q.B. 273 (C.A.) 293–94 (opinion of Denning, L.J.) ("It is an essential attribute of justice in a community that similar decisions should be given in similar cases . . . ."); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 4 (3d ed. 1977) ("It is a basic principle of the administration of justice that like cases should be decided alike.").

243. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 127 (2006) ("[A] doctrine of precedent . . . produces a form of path-dependence: the content of law becomes highly sensitive to the order in which cases arise . . . ."); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (noting that courts' decisions are "path-dependent" in the sense that "courts' early resolutions of legal issues can become locked-in and resistant to change").

narrowed (to deny *B* a remedy).[244] Now when *C*, a plaintiff of average or neutral likeability comes along, the likeability of the plaintiff who preceded him may matter. If it was *A*, and the statute received a broad interpretation, then *C* may prevail. But if it was *B*, and the statute received a narrow interpretation, then *C* may lose. Even if the next plaintiff to come along is *D*, who is likeable, he may lose if he was preceded by *B*, an unlikeable plaintiff who generated a narrow interpretation of the statute, even though he would have prevailed if he had been preceded by *A*, a likeable plaintiff who would have generated a broad interpretation of the statute, or even if his case had been the first to arise.

Perhaps appellate courts can avoid the influence of emotion. If so, then the danger of doctrinal distortion is limited. After all, trial courts are not bound by each other's decisions,[245] although they may be influenced by them. If court 1 decides likeable litigant *A*'s case first, and gives a statute a generous interpretation, court 2, which subsequently decides unlikeable litigant *B*'s case next, is not obligated to follow court 1's generous interpretation of the statute and is free to adopt a narrower one instead. Although trial court decisions can operate as persuasive precedents for other trial courts, the most serious danger of distortion by affect is at the appellate level.

Appellate courts differ from trial courts in several potentially relevant ways: (1) typically three (or more) judges decide as a group rather than one judge deciding alone; (2) they have merely indirect contact with litigants and witnesses; (3) they enjoy a favorable decision-making situation that allows greater opportunity for reflection and better appreciation of the big picture; and (4) they review a lower court decision rather than starting from scratch. These differences might or might not make appellate courts less susceptible to the impact of affect than trial courts.

As to the first factor, it seems likely that appellate judges, at least when deciding individually rather than as a panel, would also be vulnerable to the affect effect.[246] It is also not clear whether groups are better than individuals at avoiding the influence of emotion.[247] One would expect the

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244. *See* LEVI, *supra* note 240, at 23 ("[A] court's interpretation of legislation is not dictum. The words it uses do more than to decide the case. They give broad direction to the statute.").

245. Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011).

246. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957) ("If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges."). *But see* POSNER, *supra* note 32, at 74 ("[A] former trial judge promoted to the court of appeals may be more likely to focus more on the 'equities' of the individual case—the aspects of the case that tug at the heartstrings—and less on its precedential significance than would . . . colleagues who had never been trial judges.").

247. *See* Hastie et al., *supra* note 209, at 467 ("The conclusion of a substantial empirical literature is that deliberating groups exhibit no general advantage over individuals in the performance of judgment tasks.").

second factor to aid appellate judges in avoiding emotional responses to litigants, but the distance from which appellate judges view a case—the "cold record"—might not matter. The judges in our research, after all, decided on the basis of an equally cold record, in which they did not see people or even photographs, but instead—like appellate judges—based their decisions on verbal descriptions alone. The third factor should tend to diminish the influence of affect by offering appellate judges a greater opportunity to second-guess their intuitive responses and by helping them to focus on all potential litigants rather than merely the particular litigants before them.[248] The impact of the fourth factor may be to reinforce the trial judge's affect-based error. Although appellate review of issues of law is de novo,[249] the phenomenon of social proof[250] and high affirmance rates[251] suggest that the trial judge's decision, even on a question of pure law, may exert some persuasive influence on appellate judges in close cases. These structural differences between trial courts and appellate courts, then, do not strongly suggest that appellate judges are better able to place affect aside than are trial judges.

3. For Judges.—First, judges should be cognizant of their susceptibility to affect. Most people fail to recognize its hidden influence.[252] Awareness is not sufficient to ensure that judges keep emotional responses in check, but it is a necessary first step.[253]

Second, avoidance—a technique commonly relied upon to attempt to evade affective stimuli—is foreclosed for judges. Judges cannot control what is presented to them, and it would be inappropriate for them to attempt to distract themselves from attending to litigants' submissions. On the other hand, courts might be able to do more to separate case management and admissibility functions from case resolution functions by assigning two

248. *See* POSNER, *supra* note 32, at 119 ("One value of a system of precedent is that it invites judges to think about the impact of their decisions on future litigants.").

249. *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 27 (1994) ("Judicial review of issues of law is straightforward. The standard is always *de novo*. There are no exceptions.").

250. *See generally* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 95 (3d ed. 1993) ("We view a behavior as correct in a given situation to the degree that we see others performing it.").

251. *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 359 (2005) (stating that federal circuit courts affirm over 90% of the cases they review).

252. *See* Emily Balcatis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCHOL. 612, 623 (2006) ("If they knew that they believed some pleasant thought merely because they wanted to believe it, they would also know, at least in part, how illegitimate that thought was.").

253. *See* Bennett & Broe, *supra* note 69, at 17 ("It is only by accepting, and expecting, that emotion may be playing a role in decision-making, that it can be actively evaluated, and rejected if inappropriate.").

judges to each case.[254] This might shield the judge deciding the case from exposure to emotionally laden suppressed evidence, for example.

Third, judges should attempt to consider the opposite, a technique that has proven successful in mitigating some cognitive biases.[255] As an example, harkening back to the strip-search experiment, judges confronted by a vulnerable, sympathetic, and unthreatening female arrestee should ask themselves whether the case would appear differently to them if the arrestee was a male career criminal.

Fourth, judges should engage with their reactions to emotional stimuli rather than attempt to repress them. Although some judges profess to follow suppression strategies,[256] there is no evidence that such strategies are effective. In general, trying not to think about something not only is ineffective but may even have an ironic rebound effect.[257] Moreover, repression is effortful and cognitively costly, so it may diminish decision making quality.[258] Analyzing and sharing feelings, stepping through a multifactor test or other decision protocol, explaining the basis for decision in a written opinion, or simply allowing the force of affective responses to dissipate with the passage of time, by contrast, can facilitate helpful deliberation.[259]

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254. Andrew J. Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1325 (2005).

255. *See* Charles G. Lord, Elizabeth Preston & Mark R. Lepper, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239 (1984) (concluding that considering the opposite was more effective at correcting judgment biases than admonitions to be fair and unbiased).

256. *See, e.g.*, People v. Carter, No. C053369, 2009 WL 626113, at *5 n.2 (Cal. Ct. App. Mar. 12, 2009) ("I'm not moved by emotion one way or the other. I'm just kind of like an iceberg . . . ."); Anleu & Mack, *supra* note 35, at 612 (describing how judges, in attempting to manage emotions, may "grow a skin . . . as thick as a rhino"). *But see* Spottswood, *supra* note 212, at 100 (arguing that "the current regime is clearly suboptimal because it treats judges as if they have a mystical superiority in terms of their levels of emotional control").

257. *See* Wistrich et al., *supra* note 254, at 1262–64 (describing how refraining from thinking a thought can actually result in an individual thinking that thought more often as the brain continuously monitors mental activity to verify that suppression is successful, thereby keeping the thought constantly available).

258. *See* Maroney, *supra* note 118, at 1511 (concluding that when an individual expends effort to regulate emotions, that expenditure consumes cognitive resources and leaves a person with fewer resources with which to perform other tasks).

259. *See* Maroney, *supra* note 36, at 1273–79 (delineating a similar approach to controlling and channeling judicial anger with three factors: preparing realistically for emotion, responding thoughtfully to emotion, and integrating lessons about emotion into judging).

VI. Conclusion

In the war between judicial heart and judicial head,[260] we do not doubt that judicial head prevails most of the time. Frequently, the law is perfectly clear and there is little doubt about the relevant facts. Emotion likely exerts little influence in such cases. The results of our experiments, however, suggest that judicial heart wins many skirmishes. Most judges try to faithfully apply the law, even when it leads them to conclusions they dislike,[261] but when the law is unclear, the facts are disputed, or judges possess wide discretion their decisions can be influenced by their feelings about litigants. This may occur without their conscious awareness and despite their best efforts to resist it. In such circumstances, where the judge is in equipoise and judicial head does not plainly indicate which decision is correct, if the case creates a strong affective response, judicial heart can carry the day.

Our results are somewhat troubling. The notion of a motivated judge swayed by her feelings about litigants is anathema to our justice system. It unacceptably blurs the boundary between two roles we endeavor to keep separate: the partisan advocate and the detached magistrate.[262]

Troubling or not, judges' emotional reactions are inevitable. Judges are not computers. By design, the justice system is a human process, and, like jurors, judges are influenced by their emotions to some degree, even when we would prefer that they were not, and however sincerely they may try to prevent it.[263] This is simply reality. If we criticize judges for this "shortcoming"—which, of course, entails advantages as well as disadvantages—then we might as well criticize successful species such as alligators for their inability to fly. The problem is not that judges cannot do something that they are supposed to do; rather, the problem is that we ought

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260. *See* KARSTEN, *supra* note 215, at 4 (describing the concepts of the "Jurisprudence of the Head" and "the Heart" and emphasizing that Jurisprudence of the Head is driven by the existence of rules and precedent while Jurisprudence of the Heart is driven by conscience, principle, and "justice").

261. *See* ROBERT E. KEETON, JUDGING 54 (1990) ("The obligation sometimes to reach a result one considers unjust, by one's own standards of right and wrong, is inherent in the role of judging lawfully."); POSNER, *supra* note 32, at 119 (explaining that "setting aside one's natural sympathies is a big part of playing the judicial game").

262. *See Sotomayor Confirmation Hearing*, *supra* note 12, at 7 (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary) ("Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other. Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law."); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 319 (2013) ("[T]he infiltration of motivated cognition into the judgments of [legal] decision makers can undermine the rule of law.").

263. *See* Maroney, *supra* note 118, at 1494 (noting that emotion plays an "inevitable" role in the judicial decision-making process).

never to have expected them to be able to do it in the first place.[264] Our unrealistic expectations set them up for failure and set us up for disillusionment. The more constructive approach is to acknowledge the reality that judges are influenced by affective responses to litigants, and to the extent that we are uncomfortable with that fact, to take steps to ameliorate it.

We do not believe that judicial decisions are based upon "feelings/ nothing more than feelings."[265] We do believe, however, that in some circumstances a judge's feelings about the litigants can nudge him in one direction or the other. That may be good or bad, but it is a reality which an honest theory of judging must take into account.

264. *See* Hayley Bennett and GA (Tony) Broe, *Judicial Neurobiology, Markarian Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?*, 31 CRIM. L.J. 75, 90 (2007) ("Judges can only make decisions according to the rule of law, however, to the extent that their neurobiology allows.").

265. MORRIS ALBERT, *Feelings*, on OLDIES BUT GOODIES VOL. 3 (Original Sound Entertainment 1987).

Appendix A: Illegal Immigration

You are presiding over a case in which the defendant, Joe Hernandez, was charged with "forging an identification card" under Ohio Revised Code § 2913.31(B)(1) (which is a "misdemeanor of the first degree," and can be punished by a prison sentence of up to 180 days).[266] Hernandez, a Peruvian citizen, was arrested in Ohio after cashing a check using his passport. He was carrying a genuine Peruvian passport, but he had a forged U.S. entry visa pasted into his passport. This was discovered when a teller at a check-cashing service noticed that the forged visa had expired. She called immigration officials and Hernandez was arrested.

Option 1: Hernandez admits that he used the false documentation to try to enter the United States to find a job that would allow him to earn money to pay for a liver transplant for his critically ill nine-year-old daughter.

Option 2: Hernandez admits that he used the false documentation to try to enter the United States to track down a rogue member of a drug cartel who had stolen drug proceeds from the cartel.

The Immigration and Naturalization Service plans to deport Hernandez without other penalties. A local prosecutor, however, is concerned with illegal immigration and wants to impose a greater penalty in this case. He has charged Hernandez with forgery, arguing that affixing the fake visa into the passport means that the passport was used fraudulently. Hernandez's lawyer has moved to have this case dismissed, arguing that although the visa was a fake, the passport was still valid. This appears to be a question of first impression under Ohio law and under Federal law. Hernandez will be deported after he serves his sentence in either case.

How would you rule in this case:

____The attachment of the fake visa does not make the passport a "forgery" and thus the case should be dismissed.

____The attachment of the fake visa does make the passport a "forgery" and thus the case should not be dismissed.

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266. OHIO REV. CODE ANN. § 2913.31(B)(1), (C)(2) (West 2006 & Supp. 2014). We gave this problem to three groups of federal magistrate judges from a variety of districts, to state judges from New York and Ohio, and to appellate judges from a variety of state and federal appellate courts. The New York and Ohio judges were mostly trial court judges. In each jurisdiction we varied the text of the problem in minor ways to refer to the applicable law in that jurisdiction. The version presented above was given to Ohio judges.

Appendix B: Medical Marijuana

Imagine that the State of New York acts to legalize the consumption of medical marijuana through the adoption of the Medical Marijuana Access Law (MMAL). The MMAL provides that a person may not be arrested for possessing and consuming marijuana if he or she holds a valid medical-marijuana registration card, which can be obtained from State Health authorities with the support of a treating physician. The MMAL also provides that individuals who do not obtain a registration card may raise an affirmative defense against prosecution for possession of marijuana if a "physician *has stated* in an affidavit or otherwise under oath . . . that the person is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the person's serious or debilitating medical condition or symptoms."

Imagine that after the MMAL has gone in effect, you preside over a case in which the defendant, John Nyquist, has been charged with violating § 221.15 of the New York Penal Law for possession of 2.5 ounces of marijuana (which is a Class A Misdemeanor, punishable by up to one year in prison).[267] Police officers found the marijuana in Nyquist's car during a routine traffic stop and arrested him.

> **Option 1**: Nyquist is 19 years old and has a juvenile record for drug possession and drug dealing. He is currently unemployed and on probation for beating his ex-girlfriend.
>
> **Option 2:** Nyquist is 55 years old, married, and has three adult children. He is employed as an accountant and has no criminal record.

Nyquist has moved to have the charges against him dismissed pursuant to the MMAL. Nyquist does not have a registration card for the use of medical marijuana. At the time of his arrest, he also lacked a physician's affidavit that would support an affirmative defense under the MMAL.

> **Option 1:** After his arrest, however, Nyquist's treating physician provided an affidavit indicating that he had been treating Nyquist for experiencing two low-level seizures and that marijuana use would be of therapeutic or palliative benefit to him to prevent these seizures. The physician indicated that Nyquist's illness was not debilitating and might abate within a year. He also stated that marijuana has been demonstrated to be effective at controlling seizures in patients with Nyquist's symptoms.
>
> **Option 2:** After his arrest, however, Nyquist's treating physician provided an affidavit indicating that he had been treating Nyquist for

267. N.Y. PENAL LAW § 221.15 (McKinney 2008); *id.* § 70.15(1).

> severe pain caused by bone cancer and that marijuana use would be of therapeutic or palliative benefit to him to reduce his pain. The physician indicated that Nyquist's illness was debilitating and would likely kill him within a year. He also stated that marijuana has been demonstrated to be effective at controlling pain in patients with Nyquist's symptoms.

Medical records confirm that the physician had been treating Nyquist before his arrest. The physician also stated that Nyquist's condition would have made him eligible to use marijuana at the time of his arrest. Furthermore, 2.5 ounces is the maximum amount of marijuana that a person may possess under the MMAL.

Based on the affidavit, Nyquist has moved to have his case dismissed. Because the statute is new, this is a question of first impression under the MMAL.

How would you rule on the motion to dismiss:

____"Has stated" should be interpreted to mean that a physician stated medical marijuana use would be beneficial to the defendant before his arrest. Therefore, I would deny the motion to dismiss.

____"Has stated" should be interpreted to mean that a physician stated that medical marijuana use would be beneficial to the defendant either before or after the arrest. Therefore, I would grant the motion to dismiss.[268]

268. This is the version given to New York judges. The version given to Canadian judges varied only slightly.

Appendix C: Civil Rights Claim

You are presiding over a civil rights suit against a small city in Minnesota. The City recently instituted a blanket policy requiring that all arrestees who were to be introduced into the general jail population were to be strip searched. The complaint alleges that this policy is unconstitutional on its face and demands declaratory relief and damages for violations of Fourth Amendment rights. Because the facts are not in dispute and the case presents purely legal issues, the parties have filed cross-motions for summary judgment.

> **Option 1**: The plaintiff [class representative] is Joe Smith. He is unemployed, is 34 years old, and has previously been convicted of shoplifting, burglary, spousal battery, and selling drugs at a local high school. He was arrested for attempted murder and armed robbery after he attacked a liquor-store clerk with a razor blade. He was forcibly strip searched by a male officer in a hallway and then was kept naked in a cold room for two hours, where he was regularly viewed by other male officers. No contraband was found. Smith eventually was convicted of attempted murder and armed robbery and sentenced to 11 years in prison.
>
> **Option 2:** The plaintiff [class representative] is Joan Smith. She is 19 years old, is a student at a public university in the City, and has no criminal history. She was arrested for trespassing at a protest targeting planned tuition increases at the university she attends. She was forcibly strip searched by a female officer in a hallway and then was kept naked in a cold room for two hours, where she was regularly viewed by other female officers. No contraband was found. Smith was released the next day. No charges were ever filed.

The controlling case is *Bell v. Wolfish*. That case established the following principles: (1) the constitutional rights of prisoners are subject to restrictions and limitations based on legitimate institutional needs and objectives; (2) prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel; and (3) courts should defer to the judgments of prison officials regarding what policies and practices are necessary to preserve internal order and discipline and to maintain institutional security.[269] *Bell* applies to arrestees and pretrial detainees, such as the plaintiff.

The City argues that its policy is reasonable under *Bell*, which upheld a blanket strip-search policy for persons choosing to participate in contact visits with prisoners. The plaintiff[s] responds that *Bell* is distinguishable because, unlike arrests, contact visits are elective (so that a visitor can

269. *See supra* note 157 and accompanying text.

choose not to be searched by foregoing the visit) and planned (so that they pose greater risk of smuggling). The plaintiff[s] also argues that a blanket policy of strip searching every arrestee fails to distinguish among those as to whom jail officials possess a reasonable suspicion that the arrestee is carrying or concealing contraband and those as to whom they lack such reasonable suspicion.

How would you rule on cross motions for summary judgment?

____Grant the City's motion for summary judgment because the City's blanket strip-search policy does not violate the Constitution (and deny the plaintiff's motion).

____Grant the plaintiff's motion for summary judgment because the City's blanket strip-search policy violates the Constitution (and deny the defendant's motion).[270]

270. This is the version of the problem given to Minnesota. We varied the text of the problem in insubstantial ways when we gave it to judges in other jurisdictions.

Appendix D: Credit Card Debt

Janice has filed for relief under Chapter 7. Janice is single, twenty-nine years old and has had debt problems for much of her adult life. She has never held a job that paid more than minimum wage. She has never filed for bankruptcy protection before but has defaulted on a prior loan and is often delinquent in making credit card payments. She was also once evicted from an apartment for nonpayment of rent.

> **Option 1**: Nevertheless, Janice frequently manages to find the money to take vacations in Florida with her friends. They have been taking trips together for years. Many of Janice's financial problems arise from the fact that she frequently uses what money she has to travel with her friends. She often drives hundreds of miles to Florida with them, especially during the times when the beaches there fill up with college students out on spring break.
>
> **Option 2**: Nevertheless, Janice frequently manages to find the money to support her sick mother. Her mother has been battling cancer for years and has no health insurance. Many of Janice's financial problems arise from the fact that she frequently uses what money she has to visit her mother and help buy her mother medicine. She often drives hundreds of miles to Florida to see her mother, especially during the times when she is having surgery or other treatments.

This past year, Janice has been particularly short of cash because of several periods of unemployment. She had just begun working at a minimum wage job at a fast food restaurant, known as Gino's Pizza, when she learned her [**Option 1**: friends were planning a trip to Florida on spring break; **Option 2**: mother would be having surgery].

At the time, Janice's income from Gino's was barely enough for her to meet her rent, car insurance, food, and payments on debt that she had run up while unemployed. Despite her financial problems, Janice was able to obtain a new credit card with a credit limit of $3,500. Janice used the card to pay for her trip. When she asked for time off, her employer informed her that she would be fired if she took a week off so early in her new job. Janice went anyway. While there, she charged all of her expenses, including a motel room and meals. [**Option 1:** She also bought many rounds of drinks for friends with her new credit card. **Option 2**: She also purchased several months of medication for her mother with her new credit card.]

Gino's Pizza fired Janice upon her return. She sank more deeply in debt, as it took her some time to find another job. Janice ultimately filed for bankruptcy in Chapter 7, three and a half months after taking her trip.

Janice is seeking to have all of her debt discharged, including the $3,276 on her new credit card. She has essentially no assets (her car is worth very little) and no savings. The bank that issued her the credit card has brought an adversary proceeding under 11 U.S.C. § 523(a)(2)(A) (which excepts from discharge a debt for "false pretenses, a false representation, or actual fraud")[271] to have her debt deemed to be nondischargeable. The bank contends that Janice knew that she would have no way of repaying this debt when she essentially maxed out the card. Janice asserts that although she knew she was deeply in debt and that her income would not be adequate to pay the debt, she was hopeful that she might be able to obtain a promotion quickly, which would increase her income. She stated that she had considered filing bankruptcy in the past and there is evidence she had consulted bankruptcy attorneys at several points over the past two years.

How would you rule on the bank's claim?

___I would find in favor of the bank and rule that this debt is nondischargeable

___I would find against the bank and rule that this debt is dischargeable.[272]

271. 11 U.S.C. § 523(a)(2)(A) (2012).

272. In the male debtor version of the problem, we changed the debtor's name from "Janice" to "Jared," and switched the gender of the pronouns "she" and "her" to "he," "his," or "him," as appropriate.

Appendix E: Employment Case

You are presiding over a disciplinary proceeding against D.H., a maintenance worker employed by the Staten Island Ferry Division of the Department of Transportation (the Department). D.H. tested positive for [marijuana/heroin] in a random drug test. Immediately after the results, a search of his locker revealed [an unsmoked marijuana cigarette/several bags of heroin worth about $4,000 on the street]. Based on the evidence the Department has brought this disciplinary proceeding against D.H.

D.H. has moved to suppress evidence of the test results and the contents of his locker on the ground that the drug test was an unreasonable search under the Fourth Amendment to the United States Constitution. The parties agree that under relevant statutes and regulations, if the respondent's drug test was unreasonable, the remedy is suppression of this evidence and dismissal of the charges. The results of a drug test that is undertaken in violation of the Constitution cannot provide grounds for disciplinary action. The parties also agree that the search of D.H.'s locker was founded on the drug test and cannot be admitted unless the drug test was reasonable.

The U.S. Supreme Court has upheld random testing of public employees who perform jobs that are "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[273] The Court's decision has been codified into federal regulations that allow—and even require—random drug testing on employees who perform "unsupervised safety-sensitive functions," which can include maintenance work on a ferryboat.[274]

D.H. does not work on a ferryboat, however, he works in the terminal buildings. His job entails performing daily inspections of the grounds and building, changing light bulbs, repairing broken doors, and fixing broken equipment in the restrooms. He also assists in the office by moving supplies or equipment and cleaning. He is available for "minor electrical repairs" on ferryboats if regular ferry maintenance personnel are unavailable, although he has never been asked to perform such repairs in five years on the job. Furthermore, his job description does not allow him to perform unsupervised electrical repair work absent emergency circumstances. A supervisor who would supervise him is almost invariably present on ferryboats.

D.H. argues that his job description does not qualify him as an employee for whom "momentary lapses" can have disastrous consequences. He asserts that his position in the terminal amounts to custodial work that puts no one at risk. He also contends that should he be asked to work on a

273. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 628 (1989).

274. *See supra* notes 182–83 and accompanying gtext.

ferry on an emergency basis, he would not be allowed to do any unsupervised repairs. The Department contends that any workers who might perform repairs on the ferries, particularly electrical work, could put thousands of commuters at risk if they try to perform their duties while under the influence of controlled substances.

Based on the information provided, how would you rule in this case?

____Suppress the evidence against D.H. because he does not perform a "safety-sensitive" function.

____Admit the evidence against D.H. because he performs a "safety-sensitive" function.

Appendix F: Environmental Pollution

Imagine that you are presiding over a bench trial of a tort case brought by Eric Swensen against Fred Brewster. Swensen owns a large farm in a rural area of Minnesota. Brewster lives nearby [also in Minnesota/in Wisconsin] where he operates, as a sole proprietorship, a small business making and selling adhesive used by dentists in [Minnesota/Wisconsin]. (Brewster could have removed the case to federal court on diversity jurisdiction, but chose not to do so.) Some of the chemicals he mixes are toxic and contain arsenic and other poisons. They must be carefully disposed of by a licensed hazardous waste disposal facility for a hefty fee.

During his deposition, Brewster admitted that he got tired of paying the expenses associated with proper disposal of his waste chemicals. Instead, he began driving his pickup truck loaded with 40-gallon plastic containers a few miles (across the border into Minnesota) to a lake that he remembered swimming in as a child. Month after month, Brewster rinsed the residue of the toxic chemicals from the 40-gallon plastic containers into the lake in the middle of the night without anyone noticing.

The lake lies in a forested corner of Swensen's property, far from his farmhouse. Water from the lake drains into a stream and then into other lakes (in Minnesota) used by local residents for swimming, fishing, and boating. Normally, no one uses the lake, but on one hot summer day, Swensen decided to go for a swim in his lake. He noticed nothing unusual about the water. He became very ill that evening with severe cramps, vomiting, and a debilitating headache. Swensen was eventually diagnosed with arsenic poisoning. Although he was treated immediately, he has suffered some long term effects. One of his kidneys was severely damaged and doctors had to remove it. He continues to suffer from chronic nausea and headaches that have made it hard for him to work. His skin has become severely mottled, and his face looks quite disfigured as a result. Doctors attribute all of the effects to arsenic poisoning.

Brewster agreed to pay $500,000 to cover all of Swensen's compensatory damages, including medical expenses, lost wages, and pain and suffering. The case proceeded to trial on Swensen's claim that Brewster's conduct "showed deliberate disregard for the right and safety of others" and therefore warrants an award for punitive damages. Brewster admits that his conduct was wrong, but denies that he showed "deliberate disregard." He testified that "I did not know anyone still swam in that lake, and I did not think anyone could get so sick from those chemicals."

Evidence at trial revealed that Brewster's business is highly profitable, and had a book value of approximately $10 million before this lawsuit.

Would you award punitive damages against Brewster?
Yes_____.

If Yes, how much would you award? _____

No _____.

* * *

Book Reviews

Whither/Wither Alimony?

THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW. By Cynthia Lee Starnes. New York, New York: NYU Press, 2014. 235 pages. $45.00.

June Carbone* & Naomi Cahn**

Introduction

Kristen and Derek divorce after ten years of marriage.[1] At the time of the divorce, Derek makes $120,000 per year and Kristen works part-time, earning $22,000 per year. Kristen has degrees in nursing and dance, but she quit working to care for the couple's two children and had only recently gone back to work part-time. Should she be entitled to alimony? Should it matter that she left Derek after she discovered that he was having an affair, even though he told her that the affair was over and he wanted to stay married?

Greg and Sharon have also been married for about ten years. Sharon is a teacher and the artistic director of a Brooklyn dance company.[2] Greg is an actor. After their son was born, Greg's acting jobs dried up. Sharon increased her hours, effectively working two jobs to keep them afloat. To save money, Greg took care of the boy rather than send him to day care and has been a stay-at-home dad for the last five years. Sharon's income is about $120,000 per year. If they were to part, should Greg be entitled to alimony? Would it matter if Sharon left Greg because she felt that they no longer had anything in common and Greg is devastated by the divorce?

Marriages like these may be over. The question is whether, in the context of such relationships and subsequent divorce proceedings, alimony can be saved. This is the issue that Cynthia Starnes addresses in *The Marriage Buyout: The Troubled Trajectory of U.S. Alimony Law*.[3] Starnes argues that whatever else has changed about marriage, the one thing that

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1. Kristen and Derek are based on the parties in *Berger v. Berger*, 747 N.W.2d 336, 351 (Mich. Ct. App. 2008).

2. Greg and Sharon are loosely based on Susan Gregory Thomas, *When the Wife Has a Fatter Paycheck: Female Breadwinners Can Make for Frustrated Husbands—Unless the Man Holds His Own with Income*, WALL ST. J., July 27, 2012, http://online.wsj.com/news/articles/SB10000872396390444873204577537161203859878, *archived at* http://perma.cc/4WPS-EVKT.

3. CYNTHIA LEE STARNES, THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW 4–6 (2014).

hasn't is the impact of caretaking on income. She observes that in 2011, over 40% of women with a child under six were not in the paid labor market[4] and workers who take time off experience a significant lifelong drop in income.[5] *The Marriage Buyout* suggests that in an era of no-fault divorce and greater female independence (if not equality), marriage should be understood as a partnership, and it should address the possibility of dissolution the same way other partnerships do. Business entities often provide that where remaining parties wish to continue what had been the partners' joint undertaking, they arrange for a "buyout."[6] That is, to the extent the partnership holds title to the enterprise's accumulated capital and ongoing income stream, the party continuing the business must buy out the other. In a similar fashion, Starnes suggests that when one spouse leaves the relationship with an earnings stream accumulated over the course of a marriage, the other spouse should be credited with contribution to that earnings stream, and the party who "keeps" the higher income must buy out the other.[7] The analogy to partnership law is evocative. She emphasizes that married parties are engaged in a joint enterprise[8] and that the modern employment literature shows that an "ideal worker," who has a supportive spouse, earns more than a similarly situated worker who does not.[9] Marriage is thus about gains as well as losses, and absent some type of an accounting at divorce, one party may keep a disproportionate share of the gains while the other party is accorded most of the losses.[10]

The book, which builds on two decades of her past scholarship, ends with detailed proposals for alimony guidelines.[11] Unlike child support or most state property approaches,[12] alimony remains subject to a great degree of judicial discretion, discretion that has largely been used to scale back awards.[13] Starnes's proposals draw on the history of alimony, its historic

4. *Id.* at 54.

5. *Id.* at 22–23.

6. *See, e.g.*, UNIF. P'SHIP ACT § 701, 9C U.L.A. 175 (1997). The Uniform Partnership Act has been adopted by more than half of the states, including Delaware. *Legislative Fact Sheet—Partnership Act*, UNIFORM L. COMMISSION (2014), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership%20Act%20%281997%29%20%28Last%20Amended%202013%29, *archived at* http://perma.cc/H6V5-ZAAS.

7. STARNES, *supra* note 3, at 156.

8. *Id.* at 155.

9. *See id.* at 131, 138–39 (describing the "gain theory" principle that having a supportive spouse allows the working spouse to dedicate less time to household duties and more time to earnings).

10. *Id.* at 130.

11. *Id.* at 161–68.

12. Starnes discusses the Indiana statute presuming an equal property division. *Id.* at 42–43. For a discussion of the move away from discretionary standards, see generally Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319.

13. *See* STARNES, *supra* note 3, at 40–42, 69–73 (reporting that this broad discretion often hinges on the claimant's need for alimony).

justifications and contradictions, and contemporary realities to make the best possible case for its continuation and to link the rationale she advances to a detailed framework for implementation.

The case Starnes makes is the most convincing case that can be made for the retention of alimony awards at divorce, and we admire her advocacy. Is her case enough? We are not entirely persuaded, in part, because the invocation of partnership law obscures as well as illuminates.

At its core, Starnes's partnership proposal is contractual. That is, it rests on the spouses' presumed consent to partnership principles at the time of the nuptials. The partnership notion sounds reasonable. It describes marriage as "a mutual commitment to pool labor, time, and talent in the expectation that these contributions will generate shared value in the form of income and a family home."[14] Yet, applying this definition to Greg and Sharon, the couple we described at the beginning of this Review, raises as many, if not more, questions than the ones it is intended to resolve. When Greg and Sharon married, they may well have assumed that they would "pool labor, time, and talent." And, if they are like many young couples today, at the time they married they both had jobs, expected to stay employed, and assumed that each spouse would work in accordance with the family's needs. That changed when Greg lost his job and could not quickly find another one, something neither anticipated at the time of the marriage. If fifteen years later Greg has still not returned to paid employment, can we still say that he has "pooled his labor, time, and talent" in support of the marital enterprise? Or has he breached his promise to do so? Starnes's assertion, that the commitment to pool resources defines the marital partnership, avoids several important questions.

First, in an era in which almost all employment has become less secure and wages have stagnated for much of the population, does marriage today rest on dual-earner families? We believe that it is entirely plausible that most couples today enter marriage believing that neither will or should assume a full-time caretaking role and that even if a spouse does, he or she must be prepared to resume paid employment in fairly short order in accordance with the family's needs.

Second, to the extent that a spouse does leave the labor market because of illness, involuntary unemployment, or a decision to concentrate more time and attention on the children, when do the consequences become the responsibility of the other spouse? Starnes assumes that disparities in income arise largely because of the advantages the higher earning spouse enjoys through the contributions of the other spouse, but in many cases the disparities arise because of misfortune. The promise to remain married is a promise to share not only gains but losses. Do Starnes's buyout proposals

14. *Id.* at 156.

extend to disparities caused by misfortunes that may be random or unpredictable?

Finally, can we say that any single model describes the majority of American marriages? As we have documented elsewhere, American couples may not necessarily share the same assumptions about what will happen to their families. For the upper ten percent or so of the public, evidence points toward a neotraditional path,[15] in which marriage precedes childbearing, husbands continue to earn more than wives, and wives are more likely to cut back on work hours in the interest of the children. For the middle and the bottom, public sentiment is moving in the opposite direction, with growing distrust of marriage and a majority of births outside of marriage.[16] Male employment is more unstable outside the elite, and in these groups wives are more likely to out earn husbands at some point in the marriage; yet, this group also remains more committed to a traditionally gendered division of family responsibilities. Do Starnes's proposals span the class divide? We suspect that the answer is no. Alimony, both in Starnes's book and elsewhere, remains associated with a traditional division of family responsibilities that no longer describes the majority of American marriages dependent on two incomes or the increasing complexity of family arrangements in a time of economic insecurity.[17]

In this Review, we will explore Starnes's book, assess the current state of American marriages, and propose separating the developments at the top from those affecting everyone else. This Review highlights the book's strengths in developing a sophisticated and insightful perspective on alimony and a persuasive justification for ongoing payments after divorce, even as it questions the meaning of the caretaker role in today's families.

I. Justifying Alimony

Starnes considers the history of alimony, primarily to reject it in providing an adequate basis for alimony today—and for good reason. The

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15. *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014) (stating that the prosperous and highly educated have "reembraced marriage").

16. *See id.* at 16–19 (showing that the least educated are far more likely to divorce within ten years and have children outside of marriage).

17. Moreover, in a society where the majority of American households no longer consist of marital partners, alimony—which was never awarded in most divorces anyway—is increasingly less relevant. *See* GORDON H. LESTER, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, P60-173, CHILD SUPPORT AND ALIMONY: 1989, at 13 (1991) (showing that alimony was awarded to only 15.5% of the over 20 million women who in 1990 were currently separated or had ever been divorced); JONATHAN VESPA ET AL., U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, P20-570, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 3 (2013) (reporting that of 115 million households in the United States only 56 million were married-couple households); Lyudmila Workman, *Alimony Demographics*, 20 J. CONTEMP. LEGAL ISSUES 109, 109 (2012) ("[A]ccording to Census Bureau data, from 1887 to 1906, alimony was awarded in 9.3% of all cases. During the next twenty years, its frequency increased somewhat to 15.4% in 1916 and 14.7% in 1922.").

history of alimony is deeply rooted in the inferior status of women, and even considering its role in protecting vulnerable women, it has been the subject of claims of incoherence in every generation.[18] Indeed, in 1880, Frederic William Maitland commented: "The law of Husband and Wife is in an awful mess (I don't think that a layman would readily believe how bad it is) . . . ."[19] More than a century later, the American Law Institute's *Principles of the Family Dissolution* would introduce the project by again referring to "the current disarray in family law."[20]

The sources of the disarray, at least as it applies to alimony, are threefold. The first problem is the nature of the divorce proceeding itself. Legal coherence comes from judicial resolution of lawsuits through a focus on one cause of action at a time. If, for a given claim, the plaintiff prevails, the courts tailor a remedy designed to address the precise wrong inflicted. If Kristen, for example, brought a breach of contract action against Derek because of his adultery, the measure of damages would be tied to the harm his infidelity inflicted on her.[21] Divorce actions, however, are not so pristine. They more closely resemble the distribution of an estate because of death or bankruptcy, a corporate reorganization, or, as Starnes argues, a partnership dissolution.[22] These actions are necessarily different because they do not address one legal claim at a time. Instead, they combine a number of potentially conflicting assertions in a single proceeding that unwinds the entangled finances of former intimates, with the financial issues relating not just to the partners but to their children. In doing so, the courts are necessarily limited by the parties' income and assets, as they attempt to leave both ex-spouses with a post-divorce financial foundation.[23] Precision inevitably suffers.

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18. For a modern example, see Ira Mark Ellman and Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 211–12 (2012) (questioning the role of law in the emotional realm of family).

19. Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 808 (internal quotation marks omitted).

20. Geoffrey C. Hazard, Jr., *Foreword* to AM. LAW INST., THE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xiii (Proposed Final Draft 1997).

21. *See* June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1472–76 (1990) (considering how expectation damages for a breach of contract claim are victim oriented and only consider the nonbreaching party's loss by imposing that loss on the wrongdoer).

22. STARNES, *supra* note 3, at 154–55.

23. As Carbone has argued previously:

> In family dissolutions, the financial awards proceed as though the court combined all of the distributable assets, and all of the claims against them into a large pot and stirred. The resulting portions need bear no necessary relationship to any single theory of distribution. . . . The goal is not to do justice in the precise sense of vindicating any particular claim, but to put family members in a position to untangle their comingled affairs and move on.

June Carbone, *The Futility of Coherence: The ALI's* Principles of the Law of Family Dissolution, *Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 43–44 (2002).

The second factor that contributes to the disarray is the relationship between the purpose of alimony and the status of women. The justification for alimony has been debated in every era, but in almost every era that debate has intermingled claims of property ownership with discussion of the vulnerabilities associated with women and childbearing. As the status of women changes, so do the assumptions that underlie the debate, sometimes in subtle ways.

The historically dependent status of women and their presumed capacity for financial management informed the assumptions underlying alimony. Women were not just considered vulnerable because of their assumption of the caretaking role, they were considered vulnerable because of the fact of the marriage itself.[24] Women, who needed to marry to raise children, were expected to be virgins at the altar; a marriage followed by a divorce made a woman damaged goods and not just because divorce itself carried a considerable stigma.[25] As a result, marriage was expected to last a lifetime and it generally did. Divorce was rare, and some states, such as New York, only recognized divorce *a mensa et thoro* (from bed and board), in effect, a legal separation in which neither party could remarry.[26] Since the marriage continued, there was no property division, and the husband, who in accordance with the law of coverture administered the parties' combined assets, kept all of the property, including the wife's separate property.[27] And since the marriage continued, the husband owed the wife continued support.[28] Alimony in this context constituted specific performance of the continued duties of the marriage. The radical part of the determination lay in the courts' willingness to specify an amount, and this reflected, in part, the husband's fault. If he had not acted egregiously enough to justify the separation, he would still have had to support his wife, but the courts typically deferred to the husband's view of what level of support was appropriate.[29]

Yet even historically, questions about the amount of alimony reflected an underlying disagreement as to whether alimony was just support or

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24. STARNES, *supra* note 3, at 33.

25. Indeed, over the first half of the nineteenth century, the shotgun marriage declined precipitously. *See* JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 90–96 (2000) (indicating that both African-American and white shotgun-wedding rates fell before or as abortion was legalized).

26. Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 828–29; Starling Thomas Morris, Comment, *Full Faith and Credit in the Enforcement of Alimony Decrees*, 24 TEXAS L. REV. 491, 491 (1946).

27. STARNES, *supra* note 3, at 33; *see also* Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 198–99 (1939) (describing that a husband retained control over all property and was required to only pay a permanent alimony after a divorce *a mensa et thoro*).

28. STARNES, *supra* note 3, at 33.

29. *See, e.g.*, McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) ("The living standards of a family are a matter of concern to the household, and not for the courts to determine . . . .").

concerned notions of property ownership. In 1843, for example, in the context of an alimony award that exceeded the combined salaries of the chancellor, the secretary of state, the attorney general, and the comptroller,[30] the highest court in New York debated whether alimony should be understood as maintenance for a wife who could not be expected to earn enough to support herself or her just share of a grand estate that included the property she brought into the marriage.[31] Ordinarily the difference between the two did not matter, but the dispute between the Burrs made the assumptions visible. The court resolved the case by finessing the issue, holding only that the wife was "entitled to a support corresponding to her rank and condition in life, and the fortune of [her] husband."[32]

The tension in cases like *Burr*[33] lay in how to determine the amount.[34] A trial court had awarded the wife an amount comparable to the life estate she would have been accorded at her husband's death,[35] while a dissenting opinion objected that "[a]t her age it would be unsuitable, even ludicrous, to lavish the revenues of a principality in the adornment of her person, and she will not require to be fed like the profligate Egyptian courtezan [sic] with pearls dissolved in acid."[36] Alimony is arguably coherent during this period, as it reinforces the indissoluble nature of marriage, women's inability to manage their own property, and the husband's ongoing duty of support, but those serving on the New York high court of the 1840's still found the distinction between distribution of an estate and support unresolved—and

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30. Burr v. Burr, 7 Hill 207, 233 (N.Y. 1843) (opinion of Bockee, Sen.).

31. *Compare id.* at 209–12 (opinion of Nelson, C.J.) (discussing what portion of the estate was suitable "for the support and maintenance of the wife during separation" and finding that an alimony of one-fifth to one-sixth of the husband's income was appropriate), *with id.* at 244 (opinion of Root, Sen.) (finding that a $6,000 alimony was sufficiently "suitable [for] support and maintenance").

32. *Id.* at 211 (opinion of Nelson, C.J.).

33. Burr v. Burr, 7 Hill 207 (N.Y. 1843).

34. Indeed, even among those supporting the award, some noted that the largest alimony awards tended to come in cases where the wife contributed a substantial part of the marital estate. *Id.* at 219–22 (opinion of Strong, Sen.). The opinion by Senator Strong also embraced something close to a partnership analysis:

> Whatever increases his fortune is regarded by the law of civilized life as adding also to her prosperity. If he becomes rich, she is not to continue poor. . . . If a great abundance of wealth is thought so desirable by the husband that he has devoted a life of toil and perplexity to its accumulation, a just and fair proportion of it . . . is supposed to be equally desirable and necessary for her, who has traveled with him for a long period in the same path of acquisition, whose mind has been bent and moulded constantly and for years towards the same objects of pursuit which have engrossed his thoughts and invited his energies, and whose domestic economy, directed to the same purposes, has been, if not the starting point, at least a leading auxiliary of his success.

Id. at 215–16.

35. *Id.* at 208.

36. *Id.* at 233 (opinion of Bockee, Sen.). The couple had been married for over thirty years. *Id.* at 212 (opinion of Nelson, C.J.).

therefore the type of precision that constitutes coherence in other parts of the legal system to be lacking.

Today, the first two tensions that produce incoherence (the pragmatic complexities that distinguish cases involving resolution of a single claim and divorce cases, and between ownership claims grounded in desert-versus-need-based claims based on policy considerations) persist. At the same time, a third reason for the incoherence of alimony comes into play: the changing meaning of marriage in an era of economically independent women. In the marriages of today, the solo bread earner and permanent homemaker of the traditional model are anachronisms, and "shared financial and domestic contributions [serve] as the foundation for marriage in the post-industrial economy."[37] This new model rests on a changed social script: one that replaces women's dependence on their husbands with spousal inter-dependence.[38] "The new script assumes commensurate contributions, but it does not distinguish between financial and domestic ones."[39] "Perhaps most critically, though, it assumes joint responsibility—for the family's finances and [if babies arrive] for any resulting children."[40] In this new world, many families depend on two incomes and few jobs are secure; both spouses must therefore be prepared to contribute financially and domestically.[41] Moreover, two incomes do not just cushion the impact of layoffs. They also create the flexibility necessary to retool if new opportunities require new degrees or children's needs require cycling in and out of the workplace.[42] In this script, women have finally become fully autonomous adults, and both men and women believe it is only worth marrying if they find a true partner who can make the new marital script work.[43]

Starnes is more willing than we are to find coherence in the history of alimony and ties the disappearance of that coherence to the complicated role of fault in determining awards. She suggests that the real problem for alimony comes with the "appearance of absolute divorce and the supposed end of coverture [which] meant the end of caregivers' lifetime support ticket and also the end of a clear rationale for alimony."[44] That is, she ties the initial rationale for alimony to specific performance of the husband's duty of support during a period of separation in which the marriage nonetheless

37. CARBONE & CAHN, *supra* note 15, at 93.

38. *Id.* at 110.

39. *Id.*

40. *Id.* at 111.

41. *Id.* at 95–97.

42. *See generally* HANNA ROSIN, THE END OF MEN AND THE RISE OF WOMEN 47–77 (2012) (explaining that couples' roles have become increasingly fluid and interchangeable and that division of earnings may "flip-flop," allowing each partner a chance to be the primary provider).

43. *See* KATHLEEN GERSON, THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA 11–12, 126–28 (2010) (noting that young adults express wariness about partners who expect to be supported).

44. STARNES, *supra* note 3, at 34.

continued and questions its role once the states authorized true divorce.[45] By the end of the nineteenth century, many of the American states permitted judicial divorce actions and adopted the Married Women's Property Acts, which allowed women to retain control of their separate property during the marriage and ownership at divorce.[46] The women thus regained control of the property they owned and the husband's duty of support presumably ended with dissolution of the marriage. Still, the mothers of young children did not typically work outside the home if their husbands could support them, and even with return of their separate property, they risked impoverishment at divorce. Starnes argues that the principal justification for alimony in this era became fault; that is, "a husband who committed adultery, for example, would be required to pay alimony to an injured caregiver" as damages for breach of the marital contract.[47] With adoption of no-fault divorce, the fault justification disappeared, leaving no apparent basis for the continuation of support.[48]

In fact, no state treated alimony as a true system of damages, attempting to measure the "innocent" spouse's loss with precision,[49] and by the time no-fault reforms were adopted, the insistence on a showing of fault by one, and only one, party had become a farce. As Starnes acknowledges, many couples colluded to establish that fault existed.[50] The result for these couples more closely approximated a system of divorce though mutual consent. Moreover, with erosion of the barriers to divorce, relatively few states banned alimony altogether on the basis of a dependent spouse's transgressions,[51] and those

45. She can conclude that alimony during this period was "coherent," however, only by overlooking the tensions between its role in distributing the estate versus providing basic maintenance.

46. Carbone, *supra* note 23, at 49; *see also* STARNES, *supra* note 3, at 34 (noting that by the end of the nineteenth century, every state had at least allowed for some form of absolute divorce).

47. STARNES, *supra* note 3, at 35. In fact, the role of fault in divorce is more complex. Fault, as grounds for divorce, never served the same purpose as breach of contract, which has traditionally allowed parties to renege on contractual obligations so long as they compensated the other parties for their expectation losses. Instead, it reinforced the permanence of marriage. Neither party, nor both parties jointly, had the power to end a marriage without a showing of fault. Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 861 (1988); *see also* Carbone, *supra* note 21, at 1474–75 (emphasizing that expectation damages that allow one spouse to enjoy a certain standard of living at the other's expense makes no sense when there is no obligation to stay married and no way to determine fault). Within this system, fault served to free an innocent spouse from the bonds of a union that could be shown to no longer exist due to the adultery, desertion, or extreme cruelty of the other party. Brinig & Carbone, *supra*, at 861. It thus justified not just a legal separation but the end of the union, which was necessary to permit the innocent spouse to remarry. *Id.* at 862.

48. STARNES, *supra* note 3, at 36.

49. *See, e.g.*, Lyon v. Lyon, 21 Conn. 185, 196–97 (Conn. 1851) (rejecting the characterization of alimony as damages).

50. STARNES, *supra* note 3, at 34.

51. Carbone, *supra* note 23, at 53.

states (Starnes mentions North and South Carolina)[52] tended to be concentrated in the more conservative parts of the country. Other states allowed consideration of fault in determining the amount of an award but still seemed reluctant to adopt an absolute rule that might leave a dependent spouse penniless and dependent on the public fisc.[53]

Even when the woman claiming alimony was the innocent spouse, the courts continued the debate in *Burr v. Burr* and disagreed as to whether it made more sense to characterize alimony as a distribution of the marital estate that remained titled primarily in the husband's name or as a continuation of support justified by the combination of the husband's fault and the wife's need.[54] This debate had two consequences. First, it affected the issue of whether an alimony award ended upon remarriage. If it were a distribution of the estate, it would not; if it constituted continuation of the marital duty of support, it would.[55] Second, courts expressed concern about the effect on the divorce rate. A Massachusetts court in 1835 observed, for example, that "the doctrine, which no one will doubt, that a wife is not to be encouraged to leave her husband in violation of the marriage contract, by the expectation of enjoying a separate maintenance, and that in such cases a court of equity may interfere."[56] If alimony were in fact a distribution (or buyout) of the jointly owned marital estate, either party, as Starnes argues later, ought to be able to end the union with his or her share of the marital estate intact.[57] Few courts were willing to grant women that much independence.[58]

The adoption of no-fault divorce did nothing to resolve the debate over the nature of alimony, though it did contribute to a changing understanding of the nature of marriage. Implementation of divorce reform over the course of the seventies and eighties coincided with the large-scale entry of women, including the married mothers of young children, into the labor market; skyrocketing divorce rates that reflected in part the changing nature of women's roles; and changing legal treatment of marriage, which became

52. STARNES, *supra* note 3, at 35.

53. *See* Carbone, *supra* note 23, at 52–53 (explaining that courts did not often exercise their discretion against guilty wives).

54. *Id.* at 52–54 (summarizing nineteenth-century cases).

55. Indeed, even if the awards were viewed as damages, remarriage might be characterized as mitigation of damages, but then, of course, a true contract award would be reduced to a liquidated sum that took the likelihood of mitigation into account.

56. Ayer v. Ayer, 33 Mass. (16 Pick.) 327, 333–34 (Mass. 1835).

57. June Carbone has argued elsewhere that the problem with this approach is not necessarily the principle of ownership but the failure to recognize the offsetting interests. A wronged husband, for example, also has a loss from the end of a marriage. The larger the share of marital assets he retains, the better his prospects for remarriage in an era that places a premium on male income. *See* Carbone, *supra* note 23, at 64–65 (describing how alimony obligations take away from a man's ability to support a new family).

58. For a discussion of the practical effect of such restrictions, see Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. ECON. 267, 269–70 (2006).

effectively terminable at will.[59] Marital property reform, which often accompanied adoption of no-fault divorce, changed what had been title systems to marital property or equitable distribution regimes. In accordance with these systems, the courts acquired the power to divide the marital estate to recognize homemaker contributions and to address the need of a lower earning spouse following divorce.[60] Divorce awards tended overwhelmingly to become fifty-fifty divisions, but scholars disagreed as to whether these awards reflected women's contributions to accumulation of the marital estate (and thus recognition of their ownership claims to property accumulated during the marriage) or allocation of a larger portion of the "husband's property" to address the wife's need (and thus use of the marital estate to provide support or compensation for caretaking).[61] Precisely because divorce courts do not need to justify the basis for their awards with precision, the basis for the fifty-fifty awards has never been definitely resolved.[62]

The core of Starnes's critique is focused here. No-fault divorce ended the insistence, however unconvincing it had become by the seventies and eighties, that marriage was a life-long relationship. All states now recognize no-fault grounds for divorce, either allowing an immediate divorce if one party alleges irreconcilable differences or similar grounds, or if the parties live apart for a period of time.[63] In a large number of jurisdictions, divorce reforms precluded any consideration of fault, and in other states the subsequent judicial decisions moved away from fault (in the breach of contract sense) as a major factor in divorce awards.[64] Women were no longer dependent solely as a result of their gender or even necessarily because of caretaking responsibilities. And with greater economic and legal

59. CARBONE & CAHN, *supra* note 15, at 112–13. For discussion of the changes associated with no-fault divorce, see generally Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 149–51 (2006) and Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, J. ECON. PERSP., Spring 2007, at 27, 46. The economists maintain generally that the parties bargain around the legal changes. Mechoulan, for example, shows a change in divorce patterns following adoption of pure no-fault statutes, with the rates peaking in the years immediately after adoption but then leveling off as the parties adjust their expectations. Mechoulan, *supra*, at 165. In particular, Mechoulan shows that traditional couples experienced the greatest increase in divorce following adoption of no-fault reforms but that the rates level off for couples married later. *Id.*

60. STARNES, *supra* note 3, at 68–73.

61. *Compare* Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 849–52 (1988) (finding that most equitable division statutes result in approximately equal property division and concluding that property division is therefore not being used to address need), *with* Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 273–75 (1989) (arguing that award of 50% of the property may in fact be intended to redress need if the court remains unconvinced that the wife's contribution to the marital estate equals the husband's).

62. *See* Baker, *supra* note 12, at 329–31, 333–35, on the courts' increased preference for mechanical rules of division rather than normative standards or discretion.

63. STARNES, *supra* note 3, at 36; Stevenson & Wolfers, *supra* note 58, at 273.

64. STARNES, *supra* note 3, at 73–74.

independence, women came to initiate two-thirds of marital dissolutions.[65] The Uniform Marriage and Divorce Act dealt with these changes by advocating a "clean break."[66]

Starnes argues that these reforms shortchange homemakers—and they do. She correctly observes that the assaults on alimony often rest on inaccurate assumptions that understate the impact of caretaking on both the caretaker's income and family well-being, overstate the degree of gender equality in either the workplace or the assumption of family responsibilities, and fail to recognize the societal stake in children and those who care for them.[67] The move away from fault-based divorce and the equal division of marital property eliminated the two principal historic justifications for alimony. Moreover, most couples have few assets outside of the family home,[68] and as Starnes documents, legislatures and courts are increasingly concluding that case-by-case judgments create too much uncertainty and potential for political backlash.[69] The result is a move away from discretion towards guidelines[70] that, as Starnes also suggests, are designed to limit the length and duration of alimony.[71]

This disproportionately affects long-term homemakers, who typically married in an earlier era, whose employment skills have long since atrophied, who will reach retirement age before the investment necessary to begin a new career begins to pay off, and who enjoy relatively fewer opportunities to remarry than younger women or men of the same age. Indeed, as Starnes acknowledges, many states cut back on clean break provisions to ensure more support precisely because of the plight of long-term homemakers,[72] and even

65. Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 128 tbl.1 (2000) (stating that two-thirds of those filing for divorce are women).

66. STARNES, *supra* note 3, at 36.

67. *Id.* at 26–31.

68. *Id.* at 69. Of course, this is true in part because most couples divorce relatively early in the marriage and, even in longer marriages, those with fewer assets are more likely to divorce. *See* ALISON AUGHINBAUGH ET AL., U.S. BUREAU OF LABOR STATISTICS, MARRIAGE AND DIVORCE: PATTERNS BY GENDER, RACE, AND EDUCATIONAL ATTAINMENT 17 (2013), *available at* http://www.bls.gov/opub/mlr/2013/article/pdf/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.pdf, *archived at* http://perma.cc/GE6T-SH68 (stating that as marriages age the possibility of divorce decreases); Jeffrey Dew et al., *Examining the Relationship Between Financial Issues and Divorce*, 61 FAM. REL. 615, 624–26 (2012) (indicating that financial conflict acted as a predictor of divorce among an older data set).

69. STARNES, *supra* note 3, at 76, 88–90.

70. As an example, consider MASS. GEN. LAWS ANN. ch. 208, § 53 (West Supp. 2014).

71. STARNES, *supra* note 3, at 76.

72. *See id.* at 50–51 (explaining that Minnesota enacted legislation to protect awards of permanent alimony and that other state courts also intervened to protect long-term alimony awards in the face of hostile statutes).

the new more restrictive divorce legislation currently in vogue typically leaves open the possibility of support after longer term marriages.[73]

She nonetheless stacks the deck by starting the book with "Casey's story." Casey had been a full-time homemaker through years of marriage.[74] After the children were grown, her husband, a professor at a major university, came home and announced that he had fallen in love with someone else and wanted a divorce.[75] Casey, in her fifties, was left with almost nothing—no employment history, no skills, no significant property settlement, no child support and no alimony.[76] She "ran away" to another city, a small apartment and a minimum wage job at Starnes's law firm.[77] Starnes reports that "[o]ne day Casey didn't show up for work. . . . She had traveled back to her hometown, to her old house, to her old garage, where she sat in a car and took her life."[78]

While Starnes is right that women like Casey still exist, Casey herself was the product of a different era.[79] Starnes met Casey while she was a paralegal,[80] presumably before Starnes graduated from law school. If Casey had fully grown children, she had probably married twenty to thirty years earlier, in the fifties or early sixties. If she is characteristic of the women of that era, she would have married at a younger age than the comparable group of women today and done so before completing a college degree or shortly after graduation. And not only would she have had a difficult time staying employed during her marriage, her husband might have forbidden it. When her husband came home and told her he was leaving her for someone else, he was ending a marriage that reflected the rules of another era.[81]

Alongside Casey's story, however, is another tale from the same time period that raises the same issues: Doonesbury's Joanie Caucus.[82] In the seventies, Joanie felt trapped in the homemaker's role. In a manner that shocked some and resonated with others, she walked out on her husband and

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73. *See id.* at 79 (noting that the restrictive alimony statutes in Maine and Texas still allow alimony payments for long-term marriages).

74. *Id.* at 2.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. For reflections from popular culture of women's role in that era, see Sara Boboltz, *Awful '50s Marriage Advice Shows What Our Mothers and Grandmothers Were up Against*, HUFFINGTON POST (Sept. 26, 2014, 2:30 AM), http://www.huffintonpost.com/2014/09/26/can-this-marriage-be-saved-advice_n_5829870.html, *archived at* http://perma.cc/Y35H-DYX5.

80. STARNES, *supra* note 3, at 2.

81. Mechoulan, *supra* note 59, at 147, documents the increase in divorce rates that followed adoption of no-fault divorce and suggests that the increase disproportionately affected marriages such as Casey's. In contrast, he shows the leveling off of divorce rates with adjustment to the new regime as couples recognized the lack of protection for long-term homemakers. *Id.* at 165.

82. *Joanie Caucus*, WASH. POST, http://doonesbury.washingtonpost.com/strip/cast/member/13, *archived at* http://perma.cc/U9HE-2WKE.

young daughter.[83] She too ran away, in her case to escape a traditional marriage and ultimately to recreate her life, which she did, becoming a lawyer, working as a legislative aide, and then moving into private practice.[84] Should she have been able to walk out and still be entitled to a buyout of her share of her distraught husband's income? And, today, if Rick Redfern, Joanie's blogger husband who lost his job with the Washington Post,[85] walked out on her, would he be entitled to alimony on the basis of Joanie's presumably higher earning capacity as a lawyer? To answer these questions requires asking how we understand marriage, gender, and homemaking today.

II. Can Alimony Be Justified?

The strongest part of the book is Starnes's effort to revitalize alimony for the modern era. After surveying other theories that seek to justify alimony, Starnes offers her own: "[A]n enriched partnership model that analogizes alimony to a buyout."[86] The concept of a partnership, Starnes argues, recognizes the equality of each spouse's contributions to the marriage. As she notes, marriage, like partnerships, typically begins with trust and without a written agreement that sets out precise expectations.[87] In the absence of an express agreement, the law supplies default terms that govern partnerships.[88] Starnes, however, is elusive on the question of whether the parties can contract around these terms,[89] and indeed, suggests that her proposed partnership terms come from the state rather than the presumed intent of the parties. As in business partnerships, "the state determines the economic price of exit," and in marriage, "it is important that the state fix this price, for if the marriage promise matters, it must have consequences."[90]

To establish such consequences, Starnes revisits the marital exchange of promises and defines them as "a mutual commitment to pool labor, time, and talent in the expectation that these contributions will generate shared value in the form of income and a family home."[91] Once the marriage is

83. *See id.* (describing her liberation "from a disasterous marriage").

84. *Id.*

85. *Id.*

86. STARNES, *supra* note 3, at 147.

87. *Id.* at 150.

88. UNIF. P'SHIP ACT § 103(a), 6 U.L.A. 73 (1997).

89. For example, she describes her proposals as "default rules" which implies that the parties can contract around them, STARNES, *supra* note 3, at 160, and she notes that the terms apply "[a]bsent an agreement otherwise" but says nothing in either place about the extent of the parties' ability to negate her proposed terms. *Id.* at 155. She does say, however, that couples who want an "every man for himself" relationship can opt into one. *Id.* at 161. For a discussion of such terms, see, for example, UNIF. PREMARITAL & MARITAL AGREEMENTS ACT, 9C U.L.A. 15 (2012).

90. STARNES, *supra* note 3, at 155.

91. *Id.* at 156.

underway, particularly in marriages with children,[92] the parties seek to optimize the family combination of income and services, and couples often choose to trade off labor-market participation and homemaking. These decisions often "generate a higher income stream and enhanced human capital for the spouse who invests more extensively in paid employment."[93] A divorce may terminate the relationship, but in a marriage like Casey's,[94] the earnings stream made possible by the couple's joint contributions continues, with her husband reaping all of the benefits they would have shared had the marriage continued. Starnes argues that this is not a partnership dissolution.[95] Instead, it is the equivalent of one partner deciding to terminate the involvement of the other in what had been their joint enterprise.[96] To be able to do so, the partner who reaps the benefit of the continuing earning stream should have to "buy out" the other.[97] Over the last part of the book, Starnes develops a detailed proposal for doing so.[98]

Starnes's partnership rationale captures the sense of modern relationships as relatively egalitarian commitments premised on sharing.[99] Both the law and popular culture portray marriage as an unconditional commitment in which the parties form an interdependent relationship in which they pool income, assets, efforts, and children;[100] describing it as "a mutual commitment to pool labor, time, and talent"[101] therefore makes sense. The more difficult challenge is to give content to the terms in a way that justifies Starnes's buyout proposals, which presume that this pooling enterprise lasts after the marriage ends. This requires unpacking a number of underlying concepts.

Starnes eliminates the need to discuss ownership of human capital by positing a partnership ideal that includes a commitment to pool resources over the course of the marriage. A partnership is a specialized form of

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92. Starnes does discuss the applicability of a buyout to marriages without children, drawing on a Canadian alimony guideline project. *Id.* at 159.

93. *Id.* at 156.

94. *Id.* at 2.

95. *See id.* at 155 ("A spouse's decision to leave the partnership does not necessarily trigger a winding up of any shared marital enterprise.").

96. *Id.* at 154–55, 160.

97. *Id.* at 160.

98. *Id.* at 149–68.

99. *See id.* at 149 (describing the partnership model of marriage as espousing "egalitarian principles" that also "infuse family norms if not all family realities").

100. Indeed, poorer women often describe their failure to marry in exactly such terms; they take the commitment to marriage very seriously and are therefore reluctant to commit unless they feel that their partner merits such commitment. *See generally* Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 MARRIAGE & CHILD WELLBEING, Fall 2005, at 117 (examining a number of barriers to marriage among disadvantaged Americans, including perceived expectations about marital relationships, aversions to divorce, and economic barriers).

101. STARNES, *supra* note 3, at 160.

contract that includes default terms that apply in the absence of an agreement to the contrary.[102] These default terms can come from two sources. Most typically, they reflect terms that can be assumed to be those to which the parties might agree if they were to write an explicit contract.[103] Such terms presumably reflect either common assumptions about how to conduct such a relationship or basic principles of fairness.[104] Alternatively, the terms may reflect provisions imposed by law or public policy. The parties are ordinarily free to contract around the former, but not the latter. In a prenuptial agreement, for example, the parties may ordinarily specify that particular pieces of property will remain separately owned by one of the spouses, but they may not use a prenuptial agreement to eliminate a child's right to support or to leave either spouse entirely dependent on the public fisc.[105]

The cornerstone of Starnes's proposal is the view that each party's respective income is the product of investment during the course of the marriage.[106] She thus proposes that marriage be seen as a partnership that rests on the agreement to pool investments.[107] At divorce, parents continue to share children,[108] and they should similarly be required to share income. That agreement is premised on a contractual perspective of what a fair exchange should look like.

Yet, Starnes does not fully work through either the assumptions that might underlie a mutual consent theory or the alternative public policy justification. She would presume that each spouse contributed equally, and although she would build in the length of the marriage as a factor, she would make no provision for tallying individual contributions, for taking into account the circumstances that led to the break-up, or to the accumulation of

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102. *See supra* note 88 and accompanying text.

103. One way to justify default terms, however, is to pick the terms that favor the party with less bargaining power. The other party is more likely, in any event, to initiate a premarital agreement, and premarital agreements more commonly seek to eliminate responsibility for spousal support than to augment it. *See* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 89–90 (2011) (describing the "stereotypic" premarital agreement scenario as a situation where the wealthier party "instructs his or her lawyer to draft an agreement and limits the claims of the other party . . . if the parties divorce").

104. Fairness typically involves notions of reciprocity. Standard contract measures such as expectation and restitution depend on measures of reciprocal exchange, which in turn come from the nature of the exchange of marital promises (expectation) or the relationship of a benefit conferred on one party that corresponds to a loss suffered by the other party (restitution). *See* Brinig & Carbone, *supra* note 47, at 870–72 (discussing the nature of the reliance and expectation interest in marriage).

105. *See, e.g.*, UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 10, 9C U.L.A. 27 (2012).

106. *See* STARNES, *supra* note 3, at 140 ("As an equal stakeholder in the marriage, the primary caregiver is entitled to an equal share of the financial fruits of marriage.").

107. *Id.* at 160.

108. *See id.* at 169–70 (stating that contemporary norms emphasize coparenting after divorce).

capital in a particular spouse's earning capacity.[109] While we agree that in cases like Casey's alimony is justified,[110] we doubt that the proposals fit the myriad of modern cases likely to arise.

First, Starnes needs to say more about whether couples would in fact agree that the lower earning spouse can decide to end the marriage and take a substantial share of the other spouse's income. Most scholars, like Starnes, reject fault principles as a basis for divorce allocations in part because there is no agreement on what fault entails, and we agree with that conclusion.[111] Yet, it is important to acknowledge the tradeoffs: there may simply be some interests that cannot be protected in the absence of fault, and the lack of confidence in the permanence of marriage necessarily changes the parties' expectations about the nature of marriage itself.[112] Starnes states that "it is important that the state fix [the buyout] price, for if the marriage promise matters, it must have consequences"[113] without discussing the most important marital promise, the one to stay married. Indeed, the gendered division of labor that lies at the core of the Starnes partnership model makes little sense in the absence of a conviction that the marriage will last. The poster child for Starnes's defense of alimony—full-time homemaker Terry Hekker whose husband left her for another woman after forty years of marriage—admits that she is a relic from a different era.[114] Hekker states that if she had to do it over again, she would still have married the same man and had the same

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109. *See id.* at 140 (noting that gain theory is "generally not interested in relative spousal contributions").

110. Of course, one of the reasons Casey's case is so compelling is that her husband left her for someone else. So he gets the benefits of his higher earnings and the ability to remain married to what he views as a better wife, while Casey gets neither a share in the income the marriage made possible nor similar opportunities to remarry. If she had left him for a higher earning spouse, however, the fairness of Starnes's proposals would seem quite different. Although the data is sparse, there is some indication that while women initiate the majority of divorces, they are less likely to do so in precisely these circumstances: that is, after a long-term marriage with a traditional division of labor where the husband earns substantially more than the dependent wife. Casey's case is more typical than that of a long-term homemaker seeking to end a marriage for a new partner. *See* Carbone, *supra* note 23, at 73, 75 (describing a case where a husband divorces his wife after thirty-five years so he can marry his mistress as "typical").

111. The difficulty with fault in the breach of contract sense lies with the absence of agreement on what constitutes justification for the decision to leave. Starnes's example of the brief affair with the tennis pro is a good example. STARNES, *supra* note 3, at 73. Infidelity has long been associated with a double standard for men and women, but without that, there is no agreement on when infidelity creates irreconcilable differences and when it should be forgiven. For a more complete discussion of this issue, see Carbone, *supra* note 23, at 64–65 (discussing the role of gender in allocating fault in the context of marriage and divorce).

112. *See* Carbone, *supra* note 21, at 1472–76 (discussing the need for fault in order to award expectation damages, thereby protecting incentives to avoid inefficient marital breaches and encouraging beneficial specialization within marriages).

113. STARNES, *supra* note 3, at 155.

114. Terry Martin Hekker, *Paradise Lost (Domestic Division)*, N.Y. TIMES, Jan. 1, 2006, http://www.nytimes.com/2006/01/01/fashion/sundaystyles/01LOVE.html?pagewanted=all, *archived at* http://perma.cc/G7HA-DRMM.

number of children.[115] But she would not have permanently given up a career. She quotes with approval her niece's determination to stay in the workforce so that she doesn't "end up like Aunt Terry."[116]

Second, Starnes's pooling principle looks at the parties' combined post-divorce income,[117] yet Starnes also insists that the policies that justify sharing gains are not identical to those that require sharing losses.[118] The argument she makes for sharing gains rests on the assumption that post-divorce income reflects marital contributions that increase over the course of the marriage,[119] though she also acknowledges that a commitment to pooling resources that combines gains and losses better addresses an era of stagnating incomes.[120] Do losses rest on the same principle? If a full-time homemaker has suffered a loss in earning capacity as a result of contributions to the marital enterprise, it does.[121] Losses, however, may also reflect layoffs or economic downturns; the illness or personal limitations of the individual (with economic downturns often compounding factors such as substance abuse);[122] or continuing discrimination in the workplace.[123] Greg, in the example at the beginning of this Review, has become a full-time homemaker because he lost his job and could not easily find another. In these circumstances, the disparity in spousal incomes does not necessarily reflect either his lost income (which may be practically zero if he cannot find another job at the height of a financial recession) or his contributions to his wife's income, which may reflect her willingness to work longer hours because of the family's dependence on her

115. *Id.*

116. *Id.*

117. STARNES, *supra* note 3, at 164–65.

118. *Id.* at 145.

119. *Id.* at 156–57.

120. *Id.* at 157.

121. *Id.* at 157, 160. It does in part because the value of the homemaker's contribution to the marital enterprise can be presumed to be at least as great as their opportunity cost—the value of the foregone earnings.

122. *See* Clifford L. Broman et al., *The Impact of Unemployment on Families*, 2 MICH. FAM. REV. 83, 88–99 (1996) (surveying workers at a closing industrial plant and finding that plant closings led to increased financial hardship, increased tension and conflict among family members, and deteriorating family relationships overall); Tony Dokoupil, *Lifestyle: Laid-Off Men Don't Do Dishes*, NEWSWEEK, Feb. 20, 2009, http://www.newsweek.com/lifestyle-laid-men-dont-do-dishes-82201, *archived at* http://perma.cc/PF7J-MT42 (describing the effects of economic downturns and increases in unemployment on men, including potentially contributing to increases in domestic violence or alcohol abuse).

123. *See, e.g.*, JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK 299 (2014) (identifying gender bias against women in the workplace and describing its negative effects); Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 202–03 (2014) (discussing the "Maternal Wall," in which mothers' career commitments are questioned by their employers, both benevolently and with hostility, after giving birth or adopting a child).

income.[124] The implied agreement to pool resources seems to resurrect the "for better or for worse" aspect of marriage vows without a corresponding agreement either to stay together or on what constitutes shirking of partnership responsibilities.

Finally, the partnership analogy itself may be flawed. One problem is that a partnership typically has a clear goal: as the Uniform Partnership Act proclaims, a "partnership" involves "an association of two or more persons to carry on as co-owners a business for profit."[125] Starnes does not spell out precisely how she conceives of the remade marital enterprise. The buyout remedy she proposes means that "the higher-income spouse should buy out the other spouse's interest in the financial arm of the marital partnership."[126] This meets her goal of compensating a spouse who has assumed caregiving responsibilities and is, consequently, not a full participant in the workforce. It leaves out, however, spouses who have assumed a role as primary caregiver and breadwinner, or even marriages where, say, one spouse works full-time for the government and has a limited wage scale, while the caregiving spouse works in the legal or financial world, albeit part-time, but with a higher salary. When Kathy Edin and Tim Nelson describe the break-up of fragile relationships, they often describe men who, pressed to contribute financially, take up drug dealing while the mothers of their children engage in less remunerative, but more stable, employment.[127] Are either of these activities—the drug dealing or the support of the drug dealer on parole—part of the marital partnership? And if they are, do the obligations to share profits really continue after divorce?

Moreover, Starnes's proposal rests on the proposition that any time a marriage ends, the higher earning spouse, by continuing to earn money in the same way he or she did during the marriage, is continuing a portion of the partnership enterprise. Buyouts are only appropriate, of course, when the partnership continues; ending a partnership involves winding it up.[128] Consider how the partnership principle might work for George Clooney and

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124. Indeed, individuals may vary widely as to whether they view longer work hours, necessitated by the other spouse's loss of income, as a net advantage in achieving career goals or as a burden they would prefer to forego. PAUL AMATO ET AL., ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING 123–24 (2007).

125. UNIF. P'SHIP ACT § 101(6), 6 U.L.A. 61 (1997).

126. STARNES, *supra* note 3, at 156.

127. KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN 74–76 (2013).

128. *See* Baker, *supra* note 12, at 338 ("[W]hen partnerships dissolve, the partners do not have any ongoing obligation to each other . . . ."). Indeed, Starnes repeatedly emphasizes that the buyout she is proposing is not a partnership dissolution. She states that "[a] spouse's decision to leave the partnership does not necessarily trigger a winding up of any shared marital enterprise." STARNES, *supra* note 3, at 155.

Amal Alamuddin, who were married in September 2014.[129] If they divorce six years later, with no children born to the marriage and no change in their work activities, then Starnes would consider Clooney's acting income for a period after the divorce as a continuation of the partnership enterprise, and he must buy out his wife's share, even though his earning capacity was established before the marriage and continued unchanged through the marriage and subsequent divorce. Starnes softens the conclusion that the partnership enterprise continues by limiting the duration of the buyout payments,[130] but the principle remains: all personal income is treated as jointly owned irrespective of the source of the investment that produced it, and therefore simply continuing to earn money in the same job one had before the marriage becomes continuation of the partnership enterprise. Of course, in George Clooney's case, this might simply trigger a much more complex premarital agreement, but for others we suspect it would come as quite a surprise.

III. Can Alimony Really Be Saved?

Alimony, whether serving as liquidation of a marital estate that remained in the husband's control, compensation for the fault that ended the marriage, or Starnes's proposal to pool human capital, has always been about the status of women.[131] The most fundamental challenge for its continuation therefore rests on reconciling alimony with an era in which the majority of women, including 71% of mothers with children under eighteen, are in the labor market.[132]

This requires reconsideration of the nature of marriage, not just as a partnership ideal, which arguably it has long been, or as a relationship between equals, which has emerged more recently, but as an integrated part of a new economic model. We have argued at length elsewhere that the dismantling of the traditional family took place in two stages tied to the development of today's capitalist economy. The first involved the

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129. Bob Woletz, *Celebrity Weddings 2014: Costly and Captivating*, N.Y. TIMES, Dec. 12, 2014, http://www.nytimes.com/2014/12/14/fashion/weddings/celebrity-weddings-2014-costly-and-captivating.html, *archived at* http://perma.cc/7CVR-FW7W.

130. STARNES, *supra* note 3, at 164–66.

131. It wasn't until 1979 that the Supreme Court struck down the gendered basis of alimony. Orr v. Orr, 440 U.S. 268, 283–84 (1979). Even today, a very small percentage of alimony recipients are men. *See* STARNES, *supra* note 3, at 27 (noting that the majority of alimony recipients are female).

132. EILEEN PATTEN & KIM PARKER, PEW RESEARCH CTR., A GENDER REVERSAL ON CAREER ASPIRATIONS: YOUNG WOMEN NOW TOP YOUNG MEN IN VALUING A HIGH-PAYING CAREER 6 fig. (2012), *available at* http://www.pewsocialtrends.org/files/2012/04/Women-in-the-Workplace.pdf, *archived at* http://perma.cc/GMU7-3XYZ; *see also* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families—2013, at 2 (2013), *available at* http://www.bls.gov/news.release/pdf/famee.pdf, *archived at* http://perma.cc/43N9-8A6A (showing that approximately 65% of married mothers worked outside the home in 2013).

transformation of an agricultural economy into an industrial one. In this era, husbands, who had previously overseen the farm or the shop next door to the family home, entered the paid labor force while wives took over supervision of a remade domestic realm shorn of productive activities such as clothes making or bean picking.[133] While economist Gary Becker described this as specialization between husbands and wives,[134] in fact, it is more accurately described as increased specialization among men, with reorganization of the middle-class household to funnel greater investment in children, education, and the delayed marriages that became the hallmark of the new industrial-age professional and managerial classes.[135] With time, these families set the standard for working-class households that, with a "family wage" for working-class men, became able to afford a similarly gendered division of family labor.

The industrial era is over and the information economy has dissolved the sharp separation between workplace and family, men and women. This new system involves greater demand for women's paid labor and opportunities for greater specialization among women, as the most successful women hire other women—and buy fast food and wrinkle-free fabrics—to help meet the families' domestic needs.[136] Investment in children, education, and later marriage pay off even more than in the industrial age. Moreover, over the last quarter century, the high-paying union jobs that paid a family wage to blue-collar men have largely disappeared.[137] As a result, the full-time homemaker role has become perilous, not just because the higher earner spouse may choose to end the relationship, but because family well-being increasingly depends on two incomes, both to stay afloat in an era of wage stagnation and to cushion the impact of layoffs, downturns, and underemployment.[138] Any remade theory of marriage and alimony therefore

133. *See* CARBONE, *supra* note 25, at 63 (noting how, with industrialization, a woman "withdrew from family economic production" and focused instead on raising children); NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 34–36 (2010) (sketching the implications of industrialization for the family).

134. GARY S. BECKER, A TREATISE ON THE FAMILY 21–25 (1981).

135. *See* CARBONE, *supra* note 25, at 60–61, 110, 114 (examining Western tendency to delay marriage until surprisingly late in life, comparing the advantages of male specialization and female specialization in marriage, and pointing out increased investment in childrearing and education by the middle class when compared to the working poor).

136. CAHN & CARBONE, *supra* note 133, at 36–37.

137. *See, e.g.*, ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S, at 103–04, 193 (2011) (documenting the loss of stable, higher paying blue-collar jobs).

138. *See* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960–2010, at 175–78 (2012) (documenting changes in working patterns, particularly in white working-class communities); ROSIN, *supra* note 42, at 87–88 (describing women who have been taking over the wage-earner roles in the face of layoffs and lower male earnings).

must address the issue: is the full-time homemaking role something that any spouse should perform or more critically, one that society should encourage?

A. Norms about Marriage, Norms about Caretaking

The new model of marriage implicitly rests on the new social script that replaces specialized marital roles, including women's dependence on their husbands, with spousal interdependence. Marriage takes place, within this model, between relative equals who enter their unions with established earnings and high measures of the trust and flexibility to manage changing financial fortunes.[139] Starnes's partnership model is at the core of this new script, but the "marital ideal is [one of] *interdependence*—marriage has become an institution that encourages the parties to commingle their assets, share responsibility and decision-making, and create intertwined lives."[140] Within this structure, spouses assume joint responsibility—for the family's finances and for any resulting children. To vindicate the balancing act at the cores of these marriages, however, the new model "expects both spouses to retain their capacity for financial independence" in order to meet family exigencies and to prepare themselves for a possible split.[141] After all, within the new regime, both men and women are deemed capable of workforce participation, and with the average family now below the replacement level of two children per family,[142] child care no longer occupies an entire adult lifetime.

Within this model, of course, caretaking still occurs and is still difficult to reconcile with the workplace demands of the "ideal worker" employers prefer.[143] Yet, the patterns that describe modern caretaking do not necessarily strengthen the justification for alimony.

First, the circumstances that best fit the Starnesian model are those of the elite. Yet, the elite are least likely to support assumption of the homemaking role as a matter of principle. For example, Charles Murray reported that the General Social Survey asked whether "'it is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family'" and that in 1980, the vast majority (approximately 70 percent) of low-income whites agreed.[144] By 2010, however, their support for the traditional model had fallen in half, with around 35 percent still responding in the affirmative.[145] In contrast, only

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139. CARBONE & CAHN, *supra* note 15, at 90–91.

140. *Id.* at 113–14.

141. *Id.*

142. *As U.S. Birth Rate Drops, Concern for the Future Mounts*, USA TODAY, Feb. 13, 2013, http://www.usatoday.com/story/news/nation/2013/02/12/us-births-decline/1880231/, *archived at* http://perma.cc/NUZ9-58RT.

143. *See supra* note 9 and accompanying text.

144. MURRAY, *supra* note 138, at 150, 151 & fig.8.1

145. *Id.* at 151 fig.8.1.

about half of higher income whites agreed with the statement in 1980, and by 2010, their support for the statement had fallen to less than 20 percent.[146] African-Americans are even less likely than whites to support such a traditional division of family labor.[147] This leads to a dilemma: the group where men are most likely to out earn women and where divorce is most likely to involve a primary earner with sufficient income to support a primary caretaker is also the group least likely to approve such a division of labor in principle.

Second, even if there were more popular support for the traditional caretaking role, it's not clear that it should receive support as a matter of public policy. The long-term economic changes suggest that investment in men and women's labor-force participation has become increasingly important, and the full-time homemaker role can no longer be justified.[148]

Among elite workers, however, women are still more likely than men to assume that role because of the particular nature of elite competition. The top executive and financial-sector jobs have shown the greatest income growth since 1990, fueling income inequality.[149] These positions in turn have placed greater emphasis on hours worked, routinely exceeding forty hours a week, than have other highly skilled occupations.[150] The result is not just that women have lost ground financially in this top group, though that has happened.[151] It also has made it very hard for two professionals in high-

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146. *Id.*at 151 & fig.8.1.

147. STARNES, *supra* note 3, at 28.

148. Moreover, the caretakers themselves have reservations. Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES, Aug. 7, 2013, http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?pagewanted=all, *archived at* http://perma.cc/PAR3-WSWZ. As Judith Warner summarizes:

> Many of the women I spoke with were troubled by the gender-role traditionalism that crept into their marriages once they gave up work, transforming them from being their husbands' intellectual equals into the one member of their partnership uniquely endowed with gifts for laundry or cooking and cleaning; a junior member of the household, who sometimes had to "negotiate" with her husband to get money for child care.

Id.

149. LAWRENCE MISHEL & NATALIE SABADISH, ECON. POLICY INST., CEO PAY AND THE TOP 1%: HOW EXECUTIVE COMPENSATION AND FINANCIAL-SECTOR PAY HAVE FUELED INCOME INEQUALITY 1–2 (2012), *available at* http://s4.epi.org/files/2012/ib331-ceo-pay-top-1-percent.pdf, *archived at* http://perma.cc/4B5L-TD9N.

150. *See* Claudia Goldin & Lawrence F. Katz, *The Cost of Workplace Flexibility for High-Powered Professionals*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 45, 56–57 (2011) (noting business occupations penalize employees for deviating from normal work arrangements to a further extent than other high-paid positions).

151. Indeed, for college graduates as a group, the gendered wage gap has grown during this period in large part because of this phenomenon. *See* THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2014-015, DIGEST OF EDUCATION STATISTICS 2012, at 633 tbl.438 (2012), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2014015, *archived at* http://perma.cc/7KW7-XLNT (showing an increasing gap in median annual earnings between college-educated men and women from 1990 to 2011). *See*

powered jobs, with both facing pressure to work long hours, to stay in the labor market on a full-time basis after the birth of children. This leads to a reinforcing cycle: the most lucrative positions are male dominated and place the greatest emphasis on long hours; the emphasis on hours discourages many women from seeking such careers, reinforcing male domination, and the fact that men are more likely than their wives to be in such positions justifies a gendered division of family responsibilities.[152] These patterns have resurrected neotraditional marriages for a subgroup of the most elite families, even as such arrangements have been disappearing from other parts of the economy, including the majority of college-graduate marriages.[153]

These families—the highest earners with a neotraditional division of family responsibilities—present the best case for Starnes-style alimony. Where there is a significant difference in income between the two spouses, the higher earner can afford to pay spousal support and still afford another household, the higher earners' income is likely to reflect the ability to be an ideal worker at least in part because of the other spouse's contributions,[154]

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generally Francine D. Blau & Lawrence M. Kahn, *The US Gender Pay Gap in the 1990s: Slowing Convergence* (Princeton Univ. Indus. Relations Section, Working Paper No. 508, 2006), *available at* http://www.irs.princeton.edu/pubs/pdfs/508.pdf, *archived at* http://perma.cc/9ZPY-25YG (studying "the slowdown in the convergence of female and male wages in the 1990s compared to the 1980s").

152. Goldin & Katz, *supra* note 150, at 57–58.

153. Indeed, college-educated women generally enjoy more family-friendly workplaces than other women and are less likely to cut back on their hours after the birth of children than lower earning women. *See* LYNDA LAUGHLIN, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008, at 16 (2011), *available at* http://www.census.gov/prod/2011pubs/p70-128.pdf, *archived at* http://perma.cc/FS65-UUCS (noting that women with bachelor's degrees were more likely to return to working full-time after the birth of their child than women with positions requiring less education); Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses' Earnings*, 115 AM. J. SOC. 1524, 1526 (2010) (stating that high-earning women have become more likely to stay in the labor market). As the text notes, when the price of high income is long hours and little family flexibility, however, the women are more likely than the men to cut back on work-force participation. *See* Goldin & Katz, *supra* note 150, at 57–58 (describing how career interruptions negatively affect gender gap in earnings). Indeed, it turns out that women who graduated from elite universities are more likely than other women to opt out. Joni Hersh, *Opting Out Among Women with Elite Education* 4–5 (Vanderbilt Univ. Law Sch. Law and Econ., Research Paper No. 13-05, 2013), *available at* http://ssrn.com/abstract=2221482, *archived at* http://perma.cc/E2RR-X2UZ. Upper middle class couples therefore are both more likely to be in successful dual-earner arrangements and to display neotraditional family patterns. *See* PAUL R. AMATO ET AL., *supra* note 124, at 137–38 (suggesting that middle-class couples where both parties are career-oriented and earn relatively high incomes are insulated from job-related stress and economic insecurity and positing that evasion of economic problems arising from the wife's employment benefits the marriage).

154. Ironically, however, really high earners are likely to have had similar opportunities without spousal contributions. What they could not have, however, are children (or at least not children raised the same way) and the same jobs.

and the lower earning spouse is likely to have made substantial sacrifices in income capacity because of the marriage.[155]

These arrangements, however, also tend to reflect the parts of the economy with the least family flexibility and the greatest discrimination against women. While we agree that alimony is appropriate in these cases, we have considerable reservations about treating these atypical cases as prominent ones either for establishing marital norms or for setting standards that would apply to other families.

B. Alimony and Class

The world that idealizes homemakers is a world that needs alimony. Yet, the vast majority of households need two incomes, and even if one spouse temporarily scales back, the complete dependence of the full-time homemaker role is a luxury few families can afford. Instead, men and women cycle in and out of the labor market because of increasing employment instability, the inflexibility of many non-elite workplaces, and the high cost of child care.[156] These arrangements do not rest on the same foundation as elite marriages. There is often no gain to the higher earner, the lower earner's low income is less likely to be a product of decisions made during the marriage, and the family's child-care arrangements are more likely to reflect an absence of choices rather than conscious sharing decisions made over the course of the marriage.

In 1970, 40% of all mothers with children under the age of 18 were stay-at-home mothers with working husbands; in 2012, that number had fallen by half, and among lower earners, gender does not play the same role in the distribution of family income.[157] In a growing number of households, men and women are equal earners—or women earn more. Almost 70% of women in the bottom quintile of earnings (family earnings up to $28,894/year)[158]

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155. Carbone, *supra* note 23, at 77 ("The majority of marriages produce children, and childcare almost always entails some sacrifice of career opportunities that extends beyond the end of the marriage.").

156. *See supra* notes 34–36 and accompanying text. *See generally* JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE (2010), *available at* http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf, *archived at* http://perma.cc/73F9-58NR (cataloguing the myriad challenges faced by parents in non-professional positions).

157. D'VERA COHN ET AL., PEW RESEARCH CTR., AFTER DECADES OF DECLINE, A RISE IN STAY-AT-HOME MOTHERS 8 fig. (2014), *available at* http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home_04-08-2014.pdf, *archived at* http://perma.cc/EX7R-3HB6.

158. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, TABLE F-1. INCOME LIMITS FOR EACH FIFTH AND TOP 5 PERCENT OF FAMILIES (ALL RACES): 1947 TO 2012, http://www.census.gov/hhes/www/income/data/historical/families/2013/f01AR.xls, *archived at* http://perma.cc/8Y5E-82AW.

have the same income, or a higher one, than their husbands.[159] In the top quintile, that is true of approximately one-third of women, albeit a number that has almost tripled since 1967.[160]

Indeed, when we look at women who drop out of the workforce, this is most likely to happen at the bottom of family incomes. These women, who are much less likely to be married in any event, are much less likely to do so in ways that contribute to a partner's earning capacity. Instead, their choices reflect the difficulties they experience combining employment and child-care responsibilities.[161] Almost half of stay-at-home mothers have no education beyond high school (in contrast with women with a bachelor's degree, who are more likely to be working than any other group of women).[162]

Increasingly, the story of divorce, which has fallen for the top group and risen for everyone else, is a story of adjustment to an increasingly unstable employment market. Paul Amato and his colleagues show that among the elite, the marriage quality of dual earners has increased while their divorce proneness has fallen.[163] For those who don't graduate from college, however, wives' workforce participation tends to reflect their husbands' lack of income and greater marital tensions.[164] Hanna Rosin in *The End of Men* presents a portrait of women who, in the face of plant closings and economic downturns, step up to the plate. They take on jobs, invest in careers, receive promotions at work—and still assume the primary responsibility for the house and the children.[165] These women, who are much more likely than the elite to divorce, would in a Starnesian world also face increasing claims for alimony

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159. SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THE NEW BREADWINNERS: 2010 UPDATE, 3 fig. 2 (2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf, *archived at* http://perma.cc/4WLX-92DM.

160. *Id.* On an aggregate level, women are the primary breadwinners in almost one quarter of all marriages. Philip N. Cohen, *For Married Mothers, Breadsharing Is Far More Common than Breadwinning*, FAM. INEQUALITY (June 3, 2013, 2:29 PM), http://familyinequality.wordpress.com/2013/06/03/breadsharer-breadwinner/, *archived at* http://perma.cc/5S9H-GGHJ. Cohen notes that women in these families earn smaller shares of the overall household earnings than do men who are the primary earners in their households, so the number is somewhat distorting. *Id.* Nonetheless, even when a woman earns only $1 more, it indicates the movement towards equality in partners' earnings.

161. *See* WILLIAMS & DEMPSEY, *supra* note 123, at 130–31 (noting that in at least one study, most of the women involved in the study attempted to adjust their work responsibilities to accommodate their family responsibilities prior to leaving the labor force).

162. COHN ET AL., *supra* note 157, at 7, 19.

163. *See* AMATO ET AL., *supra* note 124, at 137–38 (suggesting that middle-class couples where both parties are career oriented and earn relatively high incomes are insulated from job-related stress and economic insecurity and positing that evasion of economic problems arising from the wife's employment benefits the marriage).

164. *Id.* at 123–24.

165. *See generally* ROSIN, *supra* note 42, at 79–112 (explaining the rise of women in the "New American Matriarchy," in which women increasingly outperform men as the primary provider, earner, and caregiver in the face of rising male unemployment and erosion of patriarchal family structures).

from the slacker dudes whom they are leaving behind. While there is not enough income in most of these families to produce much in the way of alimony payments, the principle—that the higher earning spouse who trained for a new job, won promotions, cleaned out the refrigerator, and supervised the children's homework is responsible for the spouse playing video games—does not sit terribly well in a new egalitarian era. The predictable result, already well underway, is even less marriage.

What Starnes's concept of alimony fails to acknowledge or shape is the implicit terms of the new lower and working-class relationships—unless Starnes is ready to conclude that such couples should not marry at all and that the class-based division in marriage rates is an appropriate one.

Conclusion

Family has long been tied to dependency—the reliance of women on their husbands' income and the importance of marriage in providing for children and their caretakers.[166] The rise of more autonomous women, who *can* thrive on their own earnings, and the decline of marriage—both as the institution for organizing sex and as the exclusive way to provide for children—have rocked family law to its core. In an era in which pundits proclaim "The End of Men"[167] or "The Richer Sex"[168] and others believe that all able-bodied adults should be in the labor market,[169] no agreement exists on a justification for alimony, and many call for its abolition.[170] Starnes has made a compelling attempt to provide just such a justification for alimony. Accepting her argument, however, means agreeing that marriage is an enduring commitment that is not ended by divorce and accepting that one spouse will take primary responsibility for caretaking while the other invests in developing a more stable income stream. At the end of the day, the question is not whether alimony can be justified on the basis of partnership principles because the idea of the interdependent union at the core of marriage is a compelling one. Instead, the questions concern the future of caretaking and the role of marriage in an increasingly class-based society.

The book, reduced to its essentials, still works for the new patriarchy—the group where the men have a higher income potential, where his earnings are greater than hers for gendered reasons, and she stays home for similarly

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166. For a discussion of the relationship between autonomy and vulnerability, see generally Martha Albertson Fineman, Essay, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

167. ROSIN, *supra* note 42.

168. LIZA MUNDY, THE RICHER SEX (2012).

169. Indeed, a major shift is that both men and women have become wary of potential partners who wish to be supported. CARBONE & CAHN, *supra* note 15, at 119.

170. Keli Goff, *Is Alimony Anti-Feminist?*, DAILY BEAST (Aug. 25, 2014), http://www.thedailybeast.com/articles/2014/08/25/is-alimony-anti-feminist.html, *archived at* http://perma.cc/582-NEHQ.

gendered ones. The problem is those assumptions are no longer universal, and a theory of alimony must tease out when this makes sense and when it doesn't. While the case can be made that the Caseys of the world, together with the spouses of CEOs and investment bankers, should receive alimony at divorce, we do not wish to cede to these atypical couples the power to define the terms of marriage for everyone else.

My Body, My Bank

BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA. By Kara W. Swanson. Cambridge, Massachusetts: Harvard University Press, 2014. 352 Pages. $35.00.

Reviewed by I. Glenn Cohen*

All this has happened before, and all of it will happen again.
–Leoben, *Battlestar Galactica*[1]

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
–T.S. Eliot, *Little Gidding*[2]

I. Introduction

Kara Swanson's first book, *Banking on the Body: The Market in Blood, Milk, and Sperm in Modern America*, is a meticulously researched history of the banking industries in milk, blood, and sperm in America from 1908 till into our century.[3] It is an extremely useful read for anyone working in the field of bioethics, commodification, and property. It is exhaustive (perhaps occasionally too much so) when it tackles blood and milk banking—the latter a banking system that much less has been written on. It is less good on sperm banking. It deserves much praise and a little critique. I try to give both in this Review.

This Review is divided into two parts. The first tries to capture in short form the story Swanson aims to tell. She focuses on the blood-banking industry, giving it four of the six substantive chapters, with a chapter and a third for milk and a short chapter for sperm. In my Review I follow a similar path. I also specifically highlight a few of the important

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1. *Battlestar Galactica: Flesh & Bone* (Syfy television broadcast Feb 25, 2005).

2. T.S. Eliot, *Little Gidding*, *in* THE COMPLETE POEMS AND PLAYS 1909–1950, at 138, 145 (1971).

3. KARA W. SWANSON, BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA (2014).

contributions of the book, especially in the relationship of product liability law with the development of conceptions of bio-property, something she does deftly that strikes me as quite a new story to tell.

The second Part of this Review focuses on critique, layered from milder to deeper, though many of these are disguised praise (in that I see things in Swanson's account that she may not see!). My critique centers on four elements: (1) she could do more to clarify the role (or lack thereof) for law in the story; (2) the central notion of "the bank" and the idea of a metaphor taken from finance is a bit undertheorized in the work; (3) the book could use more dialogue with the commodification discourse more generally, especially its more nuanced articulations (this is the ubiquitous *here is how I would have written your book* section of the Review); and (4) the book's take on the role of gender and body banking is underdeveloped. None of these critiques, though, mar what is itself an excellent book.

II. The Story

A. The Frame

For Swanson, the twentieth century is the story of the transformation of the human body and its parts into mass-produced commodities. In particular, it is the story of the rise of a particular kind of organization of this commerce that she seeks to show bridged the sale of blood, milk, and semen: the bank. Swanson traces the adoption of the "bank" and "banking" metaphor to Dr. Bernard Fantus in 1937, who while "working at Cook County Hospital in Chicago, borrowed the term *bank* from the world of finance to describe the organization of stored blood in his hospital, which he sought to manage like money in the bank."[4] The introduction has the longest discussion of the notion of the role the bank plays in her story and what it means, so it is worth quoting slightly more from the book on this topic:

> The thread that links this century of history is the banking metaphor itself. . . . The banking metaphor has encouraged us to think of body products in terms of money and markets. This association was Fantus's original intention. . . .
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> . . . .
>
> Taking the banking metaphor seriously led the medical profession and, later, policymakers to lose sight of Fantus's original goal of harnessing the market to serve communal ends. Instead we have allowed ourselves to become trapped in a dichotomy that is neither

4. *Id.* at 5.

> accurate nor useful. It is an inaccurate description of the experience of body product exchange to separate "gifts" from "commodities" as distinct and opposite.[5]

Swanson then draws on the work of sociologist Viviana Zelizer that she claims "has shown that the idealized division of the world into market and nonmarket spheres does not exist in lived experience."[6] Part of her aim is to uncover the lost history of body products as property, to be sure, but a form of *civic* property. She also thinks this history will have something important to tell us about the commodification debate (a point I highlight because I return to this issue in Part II):

> By adopting the metaphor of the bank, a free market institution of capitalism, the doctors who established and promulgated these institutions created links between money, bodies, and markets. These links led to current divisions between sales and gifts and the current problematic legal landscape in the United States for supplying and allocating body products. By retracing the history of body banks, we gain tools for moving beyond the gift/commodity debate to a more expansive view of body products focused on ends rather than means, a view that has ramifications not only in American law and medicine but in all countries where body product exchanges are taking place.[7]

B. Blood and the Rise (and Fall) of the Bank

1. Origins.—Swanson's historical account begins in the early twentieth century, when the blood business faced significant technical and scientific barriers. As transfusion technology caught up and blood typing became mainstream, the first people in line to donate typically were friends and relatives. But the match criteria were too numerous and the pool of friends and relatives too small for a reliable match to result consistently. There then came an interim period that "targeted poor men living in low- or no-cost men's boardinghouses" that one source characterized as "'rovers of the unskilled type.'"[8]

Two problems emerged with this interim solution. The first was somewhat comical: donors often collected their money and got very drunk (ill-advised after bleeding), and the banks became worried about injury to them and bad publicity should things go awry on the way home, such that

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5. *Id.* at 6, 9.

6. *Id.* at 9.

7. *Id.* at 14.

8. *Id.* at 40 (quoting BERTRAND M. BERNHEIM, ADVENTURE IN BLOOD TRANSFUSION 86 (1942)).

doctors had to personally accompany donors home.[9] Second and more importantly, these "rovers" came and went, necessitating the time and expense of blood typing and testing for syphilis of new waves of donors.[10]

Doctors began to envision instead a regular blood supply, provided by repeat professional donors, who are the central characters in Chapter 1 of the book. These professional donors were "available by phone or otherwise on short notice, free from syphilis, of known blood type, needful of extra income, reliable and compliant—and, usually, male."[11] Whenever a patient needed a transfusion, doctors would thumb through a central repository of professional donors and contact a match. The donor's fee would be added to the patient's medical bill. The professional donor was a striver, an up-and-comer:

> Through blood selling, even an uneducated laborer could earn good money while serving others. In 1924 an Ohio newspaper devoted a half-page of its [science] feature . . . to an illustrated article, "Earning a Living by Letting Blood." The article lauded men such as John Broady, a "plucky Kansan," earning his way through college by selling his blood. Frank Welch, a factory worker, was acclaimed in 1929 for selling twenty-three and a half gallons of blood over five years for a total of $5,000.[12]

Although framed in gendered terms for each trade, in fact there were many parallels between the male sellers of blood and the female sellers of breast milk (the focus of another chapter of the book) in this regard: "[L]ike the money earned by married women who sold their milk to augment household incomes during the lean years of the Great Depression, husbands could help provide for their families as 'professionals,' demonstrating their robust health, business savvy, and masculinity."[13]

Three different kinds of organizations made use of professional donors: commercial agencies, hospital registries, and, for lack of a better term, "civic organizations"—most notably the Blood Transfusion Betterment Association that created a Blood Donors Bureau to supply multiple different hospitals in New York City with professional donors.[14] The Bureau standardized the screening and employment of donors and pressed for regulations that governed not only itself but also other kinds of

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9. *Id.* at 40–41.

10. *Id.* at 41.

11. *Id.*

12. *Id.* at 42–43 (footnote omitted). It is in little vignettes like these that Swanson's ability to tell a story really hits its stride, giving a vivid picture of the professional donor as businessman and entrepreneur in the midst of massive unemployment.

13. *Id.* at 44.

14. *Id.* at 45.

organizations in the business.[15] "By municipal regulation, the new creature, the professional blood donor, was defined at law as a 'blood donor who offers or gives his blood for transfusion purposes for a fee.'"[16] The law required donors to register with the city, to carry a booklet containing the donor's physical description, photograph, blood type, and signature and to present this booklet with each donation to be marked.[17] The goal was to prevent sellers from selling so often it compromised their health.[18] There was, Swanson notes, however, anecdotal evidence that these booklets were forged, shared, and sold to circumvent the regulation at least in some cases.[19] Nevertheless Chapter 1 ends with the rise of the professional donor and institutional systems to organize his donations.

Chapter 2 is the story of the decline of this system. This model began to break down during the Great Depression, when public hospitals were finding it impossible to meet the demand for blood transfusions using professional donors alone.[20] Because the professional-donor model relied on donor-to-recipient transactions in each sale of blood, many in need could not cough up the asking price and were left untreated. Nor was a sliding-scale approach, where hospitals bought at the market price and then sold at higher rates to wealthier patients to cross subsidize the poorer ones (a strategy that had worked in milk banks) feasible: there were no wealthier patients to buy at high enough prices in some municipalities.[21]

To deal with these changing circumstances, Dr. Bernard Fantus of Cook County Hospital in Chicago fathered an alternative, the "bank" model: blood should be available for "withdrawal" to those who "deposit" blood, not only to those who pay.[22] The new donor would be "motivated neither by love [friends and relatives] nor by money [professional donors], but by indebtedness."[23] Crucially, because it required in-kind payment (blood for blood) of debts, it enabled cash strapped hospitals to maintain ready supplies without payments. For Fantus, this bank was more than a metaphor, as he put it "[j]ust as one cannot draw money from a bank unless one has deposited some, so the blood preservation department cannot supply blood unless as much comes in as goes out."[24] This, as Swanson

15. *Id.* at 46.

16. *Id.* (quoting E.H. Lewinski Corwin, *Blood Transfusions and Donors*, 4 BULL. AM. HOSP. ASS'N 16, 118 (1930)).

17. *Id.*

18. *Id.* at 46–47.

19. *Id.* at 47.

20. *Id.* at 49.

21. *Id.* at 50.

22. *Id.* at 50–51.

23. *Id.* at 57 (internal quotation marks omitted).

24. *Id.* at 57.

emphasizes, also had the effect of depersonalizing blood exchange and making it a product that was more interchangeable, the creation of a fungible unit that created a credit instead of donation (for altruistic or commercial reasons) to a *particular* patient.[25] The book even contains an illustration of a 1938 blood-bank account ledger looking very much like every other bank-account document in the financial world at the time.[26]

It took Fantus four years of experimentation to get the model right, but his blood bank opened its doors in 1937 at Chicago's Cook County Hospital to resounding success.[27] Within one year of the bank's opening, the number of blood transfusions doubled; by the ten-year mark, the figure had increased twelve-fold.[28] Although some were understandably loath to employ a commercial term to describe a scientific organization,[29] media and medicine generally embraced the blood-bank concept with enthusiasm, lauding the balancing of deposits and withdrawals as an innovative solution to the blood needs of indigents.[30] The new system was not costless—Cook County Hospital paid an estimated 89 cents per transfusion in the early 1940s, but that was much cheaper (by a factor of fifty to one according to Swanson) than the large sums it had had to pay to the professional donor.[31] The professional donor never completely dropped out of the picture in that in order to meet demand Cook County and others using this model still had to buy some blood, but they could do so at a much lower rate—ten dollars per 500 cubic centimeters—than in the prior period.[32] While some criticized Fantus for using the commercial term of bank to describe a scientific organization, for the most part, the medical community eagerly supported and adopted his approach.

One of the most fascinating elements of this story was the question of integration versus segregation of blood banks by race. Fantus's innovation was to treat blood as widget, interchangeable, but that ran up against deep-seated prejudices about mixing the blood of the races. In the era of familial donor or the professional donor, recipient and donor would have met each other face-to-face in the operating room such that race would have been obvious and inescapable. The bank's disintermediation of that relationship, by contrast like the rise of milk banking, made "unwitting cross-racial body product exchange possible by separating donor and recipient;" that is the

25. *Id.* at 57.
26. *Compare id.* at 58, *with* 89 HISTORY OF BANKING § 6, at 11 (1907).
27. SWANSON, *supra* note 3, at 50–51.
28. *Id.* at 59.
29. *Id.*
30. *Id.* at 60.
31. *Id.* at 59.
32. *Id.* at 48, 59.

new system "required doctors and patients to decide in a new context how much of the individual characteristics of the supplier traveled with each bottle of blood."[33]

Banks of this era split on how to handle this situation. At Fantus's bank, doctors labeled blood with the date of collection, the results of the donor's physical examination, the donor's medical history, and the donor's race.[34] Other early banks, such as the one at Johns Hopkins, not only recorded information about race but placed "white" and "colored" blood in entirely separate facilities.[35] The bank justified its decision by deeming it "best to avoid the [race] issue," despite acknowledging that there was "no valid objection on biologic or physiologic grounds to the transfusion of patients of one race with blood from donors of another."[36] The banks in Baltimore created essentially two separate banks with their own ledgers, and others such as those in San Francisco put into place a unified system.[37] I emphasize this piece here just to show (a point I return to in Part II) the way in which Swanson's account could be used to more deeply engage the typical commodification discourse. There the claim typically is that buying and selling body parts facilitates, rather than reduces, the amount of racial intolerance and the salience of race for decision makers; for example, in the case of sperm donation, some have attacked the way in which banks facilitate (and some would say even encourage) racial preferences.[38]

Fantus's blood-donation experimentation spread slowly until a crisis of an even greater scale: war. On the eve of the United States's entrance into World War II, blood centers launched across the nation in preparation for a massive wartime blood-donation program.[39]

This program, though, put pressures on the existing blood-banking models. Both the professional-donor model and Fantus's balance-sheet model were unworkable in war. Instead, organizations like the Red Cross relied on unpaid donations by valorizing the role of the blood donor. As some public appeals went: "[P]eople should realize that when they give blood they are . . . saving lives just as effectively as the doctors at the

33. *Id.* at 66.

34. *Id.* at 64.

35. *Id.*

36. *Id.* at 65 (quoting Mark M. Ravitch, *The Blood Bank of the Johns Hopkins Hospital*, 115 JAMA 171, 171 (1940)) (internal quotation marks omitted).

37. *Id.*

38. *See, e.g.*, Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1852–53 (2009) ("[California Cryobank's] . . . donor catalog is prominently organized according to race . . . . A message appears in bold font at the top of each catalog page identifying the racial identity of the donors listed on that page.").

39. SWANSON, *supra* note 3, at 68.

front!"[40] Through "the giant blood bank," what many called the national wartime donation movement, blood became "a public collective resource," belying the "bank" connotations Fantus originally intended.[41] Also interesting was the deployment of gender as a tool for recruiting. Most Americans had never stepped foot in a hospital unless they needed a surgery or faced illness and needed some gentle encouragement. Enter the "Gray Ladies," a core of Red Cross volunteers who acted like hostesses for the men who would donate and add a "feminine touch."[42]

More generally, these programs allowed the medico-industrial establishment to mediate between two conflicting goals—making individual donors feel special and worthy of every consideration while implementing the assembly line method and its efficiency to blood retrieval and banking.[43] Some of the methods proved fascinating, like inviting donors to inscribe their own name on the carton of dried plasma that would be sent to the recipient and being allowed to name a particular soldier or sailor they intended to memorialize with the gift.[44] In this the goal was to give the "reconstituted body fluid an individualized identity and strengthened the link of generosity and gratitude between donor and recipient threatened by the more commercial terms of the banking metaphor."[45]

Postwar, doctors fought to maintain a steady blood supply. The Red Cross kept its unpaid-donor model alive by adapting its wartime message to peacetime. It urged in a pamphlet that "blood [is], or should be, a pillar of national health" and that donating provided "a personal share in fighting death and disease."[46] By 1963, the Red Cross collected roughly half of the nation's blood supply.[47]

2. Blood Banks and Capitalism.—Chapter 3 of the book examines the way postwar euphoria gave way to Cold War fear, causing the unpaid-donor model to falter. As the ideological struggle between capitalism and communism escalated, blood became a part of American war strategy all over again, only its role this time around was metaphorical rather than physical. If Fantus was the protagonist of the pre-War period, now the hero (or villain) was Mrs. Bernice Hemphill, Navy wife and initially laboratory

40. *Id.* at 75 (quoting Edwin Jordan & Arno Holm, *The Red Cross Blood Donor Service*, 21 HYGEIA 108, 109, 156 (1943)) (internal quotation marks omitted).

41. *Id.* at 82.

42. *Id.* at 78.

43. *Id.*

44. *Id.* at 80.

45. *Id.*

46. *Id.* at 91 (quoting ALTON L. BLAKESLEE, BLOOD'S MAGIC FOR ALL 24, 31 (Maxwell S. Stewart ed., 1948)) (internal quotation marks omitted).

47. *Id.* at 93.

bioanalyst. She began by taking over a blood bank in Honolulu, Hawaii, but over the course of a forty-year career she would become known as the mother of blood banking or just "Mrs. Blood."[48]

In the blood-giving context, the larger ideological debate translated into disagreement as to the appropriate underlying donor model. For instance, the newly formed American Association of Blood Banks (AABB), a professional organization connecting and loosely overseeing the nation's various community blood banks, vigorously opposed the Red Cross's "harmful socialist approach."[49] Focusing on "the difference between blood *banks* and blood *centers*,"[50] the AABB castigated the national Red Cross *centers* and "used the *bank* to link local control . . . to capitalism as a cornerstone of democracy."[51]

And so Fantus's bank, originally conceived as a response to the harsh consequences of a market-system-based professional-donor model, came to stand for capitalism itself. The "Red Cross advocated for free blood to all who needed it, without obligation, while" the blood-banking industry and its medical professionals "insisted that blood was a 'personal resource' that had to be paid for, just like any other aspect of medical care."[52] Swanson treats this as a proxy war for those who wanted to move American medicine towards universal health care and those who rigidly opposed it. Indeed, at one point even the American Medical Association itself put itself on record by resolution that "any free medical service or supply offered to all without regard to ability to pay violated the principle that it is the responsibility of an individual to assume the obligations of the medical expense just as he does for other living expense[s],"[53] a line that has fascinating echoes of our recent debates about the individual mandate in the Affordable Care Act.[54]

Perhaps in this chapter Swanson indulges in a little too much detail—the other chapters feel more readable—but it does have some fascinating details. My favorite points to the way we see an insurance market arise in blood with two innovations, the replacement fee and replacement donor. The replacement fee was the "dollar value placed on the blood withdrawn, which could be paid in cash or in kind."[55] The blood banker's goal "was to

48. *Id.* at 84–85.

49. *Id.*

50. *Id.* at 95.

51. *Id.* (emphasis added).

52. *Id.* at 87.

53. *Id.* at 100 (quoting *Red Cross Blood Banks*, 45 J. MED. SOC'Y N.J. 416, 417 (1948)) (internal quotation marks omitted).

54. Affordable Care Act, 26 U.S.C. § 5000A (2012).

55. SWANSON, *supra* note 3, at 108.

keep the replacement fee high enough that patients chose to become indebted donors":[56]

> Anyone who had not yet accumulated a blood debt could donate a pint and thereby earn a credit of one unit of blood. For one year the donor or anyone in his or her immediate family could receive a pint of blood without any replacement charge, a form of in-kind medical insurance. What became known as the "replacement donor" donated blood in order to repay either a present or future debt.[57]

One blood bank in Stockton took it even one step further, allowing local residents to "buy into a blood assurance plan with blood or money"—it collected $1 per person or $4 per family in 1957 to buy blood as needed when supplies ran low.[58]

Then Mrs. Blood herself took matters still one step further—having learned from the Federal Reserve Bank about how banks transferred credits and getting sample documents, she established the first blood clearing-house, allowing participating banks to trade blood between them and rack up debts and credits.[59] In some ways this extended the fungibility of blood from *within* the bank (I do not get my own blood bank but an equivalent pint of blood) to *between* banks. The more banks joined the network, the more pressing became the need for national standards on quality and methods, which the AABB itself ended up drafting in the 1950s.[60] But those standards were silent on the source of the blood (paid professional donors vs. unpaid replacement donors vs. true altruists).[61]

3. Products Liability, Immunity, and the Contingency of Tort Law Developments.—Swanson depicts this era of blood banking as a kind of high point for the market, titling the next and last chapter on blood markets "Market Backlash."[62] In fact, though, I think this framing does a disservice to what is a more complex story Swanson wants to tell here—not so much the *fall* of blood markets, but the unintended consequences of market terms given the historical contingency of the rise of products liability theories in tort law and the decline of charitable immunity. As someone who is a pretty intensive reader of the commodification/taboo trades market literature, this is the place where I think Swanson actually makes the biggest novel contribution in the book and where the book shines as *legal*

56. *Id.*
57. *Id.* at 109.
58. *Id.* at 111.
59. *Id.* at 111–12.
60. *Id.* at 112.
61. *Id.*
62. *Id.* at 120.

history rather than medical or market history, and perhaps she does too little to spotlight that.

Pre-World War II, the liability for "bad blood" was understood primarily in terms of medical malpractice liability. Swanson uncovers some early cases in this line, including a 1922 California case where a woman who gave blood to a dying neighbor sued when her arm did not heal properly; a Georgia case from 1925 where a woman sued the doctor based on the method of transfusion when her wound did not heal after providing her blood to her husband; and a case brought by the widow and mother of a University of California crew team professional donor who died of septicemia in 1933 after selling his blood.[63] Swanson appropriately notes that these scattered opinions may not accurately reflect the universe of actual injuries or cases and also mentions a 1937 survey of hospitals that found that 40 out of 350 hospitals reported transfusion "accidents," resulting in 60 incidents, including 16 patient deaths and 1 donor death.[64]

These were scattered opinions and scattered incidents, but when in 1953 the level of transfusion had risen to an estimated 3.5 million blood transfusions a year, the procedure began receiving more legal scrutiny.[65] To be sure the death rate was still unremarkable, 1 in every 1,000 to 3,000 transfusions (roughly the same chance of dying from treatment for appendicitis or from anesthesia), but the risk of disease transmission was more serious with an estimate of 1 in 200 transfusions transmitting hepatitis in the 1950s.[66] What mattered was that the legal barrier to suit that hospitals enjoyed, the charitable immunity doctrine, began to crumble in the same era as hospitals were being held liable for the torts of their doctors. In *Necolayff v. Genesee Hospital*,[67] a case from 1946, a New York appellate court upheld a jury award of $6,500 against a hospital when a woman suffered a transfusion reaction from being transfused with blood intended for another patient.[68] Courts in the District of Columbia, Mississippi, and elsewhere reached similar conclusions, and these cases were written up in the Journal of the American Medical Association, which told its readers that by 1957 "only about half the states continued to recognize charitable immunity doctrine."[69]

The second important tort development central to Swanson's story was the rise of products liability law. As she puts it: "Product liability law

63. *Id.* at 123.
64. *Id.*
65. *Id.* at 124.
66. *Id.*
67. 61 N.Y.S.2d 832 (App. Div. 1946).
68. *Id.* at 833–35, 837.
69. SWANSON, *supra* note 3, at 125.

provided a way for patients injured by blood transfusions to sidestep the traditional rules of medical malpractice regarding standard of care, the need to show negligence, and, in states where it was still in force, the doctrine of charitable immunity that protected hospitals."[70]

The key question legally was whether blood was a good to be "bought" and "sold"; what distinguished it from other goods that could give rise to product liability? New York once again served as a trailblazer: in 1953, a New York state trial court found a breach of implied warranty of fitness, or a warranty that "goods sold are reasonably fit for the purpose for which the buyer requires them," in a "sale" of blood that had resulted in the recipient's contraction of hepatitis.[71] The court reasoned that was the kind of transaction for which the doctrine was appropriate; in Swanson's words "[t]he hospital-seller understood the purpose for which the blood was purchased, and the patient-buyer relied on the skill and judgment of the seller in providing safe, matched blood."[72]

The state's highest court ultimately disagreed, holding that "[c]oncepts of purchase and sale cannot separately be attached to the healing materials such as medicines, drugs, or, indeed, blood supplied by the hospital for a price as part of the medical services it offers" and that the fact that the "property or title" to something like blood was "transferred" to the patient as part of the medical procedure was not enough to make "each such transaction a sale."[73] Subtly then the issue was not whether blood was "property" (it was) but whether it was a "sale." The concern that motivated the majority was that holding this was a sale and subjecting it to products liability doctrine "would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of 'bad' blood."[74]

While the industry had narrowly avoided this form of liability in New York, the possibility of the product liability argument growing legs elsewhere put organized medicine's support of blood banking in something of a quandary. It "wanted blood to be treated as a market commodity by patients but as a special sort of 'therapeutic merchandise' by the courts."[75] There was a conflicting narrative of uniqueness: blood was *not* unique from

70. *Id.* at 126.

71. *Id.* (quoting Perlmutter v. Beth David Hosp., 128 N.Y.S.2d 176, 177 (Sup. Ct. 1953)) (internal quotation marks omitted).

72. *Id.*

73. *Id.* at 127 (quoting Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 794 (N.Y. 1954)) (internal quotation marks omitted).

74. *Id.* (quoting *Perlmutter*, 123 N.E.2d at 795) (internal quotation marks omitted).

75. *Id.* at 128.

other health care goods and services (it should be sold not given freely) but *was* supposed to be unique in terms of the way in which tort law regulated its transfusion.

Blood banks, hospitals, and other groups wanting the industry to thrive tried to head off more tort liability through legislation: in 1955, California passed a law declaring that providing "banked blood for transfusion was a service and not a sale."[76] They also tried some self-help remedies—some of which felt like getting the blood lady to protest too much (the AMA recommended that instead of charging for the blood itself, making an equivalent charge for the use of the facility (i.e., relabeling the charge))—and getting patients to sign consent forms stating that the blood was "incidental to the provision of services" and there was no warranty attached.[77]

The legal debate simmered for years as other jurisdictions confronted these questions and one by one agreed with New York that blood did not fall under the purview of product liability.[78] In the 1960s, the debate roared to life again when the Federal Trade Commission (FTC) began to assert jurisdiction over blood banks on the grounds that they were engaged in the "blood trade."[79] This stemmed from attempts by some hospitals to boycott blood purchase from for-profit banks in favor of community nonprofit banks, which led the for-profit banks to complain to the FTC, among other institutions.[80] The FTC ultimately concluded that both for-profit and not-for-profit blood banks "were parts of a 'business' rather than parts of the practice of medicine" and thus that it had authority over them, including antitrust authority.[81] Blood bankers balked at the suggestion that they engaged in any such "commerce." Indeed, the same bankers who just years prior had been adamant that blood banks were a hallmark of free trade now insisted that they "provided a service rather than a *product* and therefore that there was no trade in blood."[82] A federal appellate court ultimately rejected the FTC's argument that it had jurisdiction over nonprofit blood banks, but the court did not explicitly reject the argument that blood banks dealt in the blood trade.[83] For-profit organizations remained at risk, prompting a strong push for states to enact blood shield laws "designed to

76. *Id.* at 129.

77. *Id.* (quoting *Medicine and the Law: Blood Transfusions—Mediolegal Responsibilities*, 163 JAMA 283, 286 (1957)) (internal quotation marks omitted).

78. *Id.* at 129.

79. *Id.* at 130.

80. *Id.* at 131–32.

81. *Id.* at 133 (quoting *In re* Cmty Blood Bank of the Kansas City Area, 70 F.T.C. 728, 900 (1966)) (internal quotation marks omitted).

82. *Id.* at 134.

83. *Id.* at 133.

remove banked blood from the laws regulating sales of goods."[84] By 1973, all but six states had enacted such laws.[85]

4. Fear of the "Other" and the End of the Blood Bank?—At this point Swanson takes her story in a very interesting direction. She connects the 1960s and 1970s litigation and Richard Titmuss's work, comparing the U.S. and U.K. blood supply in 1971 as "the critical perspective on blood." Swanson writes:

> [Both were] simply a reformulation of long-existing sociocultural anxieties about body product exchange that the body bank had sought to dispel but had never completely eliminated. The adoption of the banking metaphor, with its assumption that all blood was equivalent, had never been strong enough to resolve the deep-rooted cultural anxieties that all blood was *not* the same, that the transfer of blood would also transfer qualities from perceived inferiors into a vulnerable patient. . . . During this period, continuing suspicions of blood from the 'other' were reformulated into fear of 'bad blood' from those who sold it rather than those who gave it.[86]

Swanson uses this as a pivot point to discuss a theme that comes up earlier in the history of blood banking: racial segregation. As I discussed above, the blood-banking industry struggled with how to deal with blood from those of different races.[87] The degree of the racial separation in early blood banks varied by region, resulting in an uneven standard across the country that called into question "the fundamental assumption of the blood bank that all blood was equal."[88] Wartime exigencies helped equalize "white" and "colored" blood but only quite slowly. At the start of World War II, the Red Cross refused to accept blood donated by African-Americans.[89] When it later accepted blood from African-Americans, it provided that blood only to African-American soldiers, a policy that remained in place even when President Harry Truman desegregated the armed forces in 1948.[90] Not until the start of the Korean War in 1950 did the Red Cross drop its separation policy.[91] Meanwhile, labeling persisted in many local blood banks.[92]

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84. *Id.* at 138.
85. *Id.*
86. *Id.* at 140.
87. *See supra* notes 33–38 and accompanying text.
88. SWANSON *supra* note 3, at 66.
89. *Id.* at 141.
90. *Id.*
91. *Id.*
92. *Id.* at 142.

During the Civil Rights Movement of the 1960s, "blood segregation became a political statement."[93] To "signal state opposition to the national push for racial integration," states in the South passed laws *requiring* the racial segregation of blood.[94] The federal government responded with the Civil Rights Act of 1964, which (among other things) made federal Medicare and Medicaid funds contingent upon eliminating blood segregation, though not all hospitals complied; Louisiana still segregated blood as late as 1969.[95]

But as blood became less segregated along racial lines, it became increasingly scrutinized along socioeconomic lines. In 1957, about one-sixth of all blood "donors" were being paid nationwide according to a Joint Blood Council survey.[96] In the 1960s, some blood banks "unabashedly" paid their donors, while nearly all others (save the Red Cross centers) occasionally paid suppliers to keep inventories from running low.[97] In the 1960s the perception was (my slogan not theirs) that bought blood = bad blood, the kind that carried disease.[98] The perception (that continues even in the halls of academia today) was that buying blood meant recruiting a population of financially needy individuals, desperate for cash, and willing to lie in order to make their money. Swanson does not hammer the point home as much as I might like, but her history shows that this is an oversimplification, perhaps a gross one. Among those "suspect sellers," for example, was the Greenleafton Reformed Church of Preston, Minnesota, whose members sold blood and raised $27,000 to rebuild its church[99]—hardly the typical poster boys and girls for the commodification attack on selling body parts.

A nationwide hepatitis scare exacerbated the fear. "Only in 1971 did it become possible for blood banks to screen" for hepatitis in blood, and even then sensitivity of the screen was poor, catching infection only 60% of the time.[100] Paid blood was the easy scapegoat. As Swanson puts it:

> [D]uring the 1950s and 1960s and into the 1970s Americans were forced to rely upon stereotypes and assumptions rather than science or medicine to avoid this invisible killer. The association of disease with filth, squalor, and poverty had been reinforced again and again

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 143.
97. *Id.*
98. *Id.* at 144.
99. *Id.*
100. *Id.* at 146.

> in American history. It seemed only logical that paid blood suppliers from the wrong side of the tracks were the problem.[101]

Except they weren't. Studies came out claiming that paid donors provided the most reliable blood supply because they were often repeat donors.[102] As Swanson points out: "The best way to know if an asymptomatic supplier would transmit hepatitis was whether his or her blood had transmitted it before. Professional donors, as repeat suppliers, could therefore be considered 'clean' donors, tested in the most reliable way possible—after their first donation . . . ."[103] The professional donor thus acquired a kind of double identity; in the medical literature he was heralded as the source of the safest blood, in the public's imagination as the source of "contaminated blood."[104]

Nevertheless public reporting on what contamination did occur in the U.S. blood supply focused on the for-profit banks, and that is where the political and civic action focused as well. In 1967, "New York legislators proposed state and federal legislation to eliminate commercial blood banks" in New York, which the blood-banking community successfully resisted.[105] Around the same time, an Illinois commission proposed a licensing scheme for blood banks that would have forbidden most advertising for blood donors, also aimed at dampening the for-profit blood-bank model.[106] Other states also considered such measures. But ultimately "[w]ithout waiting for legislative action, Americans took matters into their own hands, opting out of the general blood supply and joining co-ops" where friends stored blood for each other or individuals stored their own blood for future potential use (autologous transfusion).[107]

Onto this turning tide sailed British Sociologist Richard Titmuss's book *The Gift Relationship*, which Swanson characterizes as telling

> Americans that their fears were true: reliance on paid blood suppliers in the United States was causing insufficient supplies, waste, and increased risk of hepatitis. His argument was made by comparison with the British health system, which relied entirely on unpaid donors and had, he argued, much less transfusion-transmitted hepatitis and blood wastage.[108]

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101. *Id.* at 146.

102. *Id.*

103. *Id.*

104. *Id.* at 147.

105. *Id.* at 149. Here and elsewhere, Swanson is sometimes unclear about whether she is talking about the corporate form of the blood bank itself (for profit or not for profit) or whether the blood donors were paid or not.

106. *Id.*

107. *Id.* at 150.

108. *Id.* at 151.

At this point one might expect Swanson, who is as expert as anyone on the status of the American blood supply at the time of Titmuss's writing, to give a detailed hard look at Titmuss's claim and the evidence supporting it. One gets a sense from the surrounding materials in the book that on the safety issue Swanson is skeptical or at least thinks Titmuss overstated his case. But surprisingly she does not directly evaluate the claims from what was known at the time; instead, she uses this to pivot back to the theme of projection of stigma on the "other":

> With Titmuss's assumptions about the correlation between dangerous paid donors and African American donors left unquestioned and unremarked, his book helped obscure the racial subtext of American fear of the professional donor by tying it to the earlier politics of the blood bank battles of the 1950s.[109]

For Swanson, the contemporaneous debate over Titmuss's work was really as much, perhaps, about his critique of capitalism for which the blood bank was only the stand-in. As she characterizes Titmuss's critique, it was not just about efficiency, but the blood-banking system of the United States was "immoral and proof of a national failing. The failure of Americans to make the civic-minded wartime volunteer who had given blood as a personal gift into the basis of a postwar blood system . . . ."[110]

Titmuss's critique ignited governmental interest in the blood system: President Richard Nixon called for the development of a federal blood policy and "Congress introduced about forty bills addressing the blood supply between 1970 and 1972."[111] But Swanson concludes that this "federal attention" did not generate more "federal control of the blood supply" because "[b]etter capitalism, not socialism, was the American answer to Titmuss."[112] The AABB argued in its response that "the failures of the American blood supply were not due to reliance on market forces by its membership but were the result of the inability of medical societies, the Red Cross, and non-profit hospitals to establish and maintain blood banks as well-run business organizations."[113] Nevertheless, the AABB saw eliminating the "paid donor" as a target of opportunity that would help it deflect some of the pressure Titmuss's work and the governmental scrutiny

109. *Id.* at 151–52.

110. *Id.* at 152.

111. *Id.* at 153. In what is otherwise a quite exhaustive account of the history of blood banking in the United States, this is one place where Swanson could helpfully have added more detail—what was the content of these bills? How many succeeded? What were the coalitions that supported and opposed them?

112. *Id.*

113. *Id.*

was bringing to bear, and "in 1972 it set 1975 as the target date for eliminating the use of paid donors."[114]

If one has read the chapter up to this point and especially the data Swanson brings up suggesting the paid donors were *not* the source of infection risk, one gets the impression that they merely were targets of opportunity and an institution like the AABB decided to eliminate them fully knowing that fact. It is slightly frustrating that Swanson is unwilling to come out and say whether that is right or wrong (or even unclear), even though she strongly implies this was all kabuki theater.

In any event the AABB succeeded in phasing out the paid donor. By 1976, less than three percent of whole blood came from paid sellers and then primarily for rare blood types, and this was the result largely of self-regulation by the industry (the Food and Drug Administration's requirement that blood be labeled as "paid" or "volunteer" came later).[115] Insurance finished the job and obscured the difference between the Red Cross model and the blood-bank model. With the introduction of Medicare and Medicaid and the coverage in private insurance plans, there was no longer an incentive for many of the old models because "[o]nce blood transfusion charges were covered by insurance plans, insured patients had no financial incentive to repay their blood 'loans' in kind, and the currently healthy lost the incentive to give against future need."[116]

Swanson's story of blood essentially ends here, with only a page and a half devoted to later events, such as the impact of this history on laws about buying and selling organs in the United States.[117] It feels a wee bit abrupt, but the book is already quite long and she wants to save some space for two other markets: milk and sperm.

B. Milk and the Banking of Feminine Kindness.—Milk and sperm banking get a chapter each. The heart of this book is in blood, and so is my exegesis of it, but I will more briefly discuss what Swanson has to say about these other banks.

1. Standardizing Wet Nursing.—Swanson has made the (I think) unhelpful editorial choice to split her discussion of milk markets into two parts of the book roughly 100 pages apart.

In the first chapter of the book, we are introduced to Dr. Fritz Talbot, recent Harvard Medical School grad, who is crisscrossing Boston looking for a wet nurse for a newborn baby boy in his care who is not getting

114. *Id.* at 154.
115. *Id.*
116. *Id.* at 155.
117. *Id.* at 157–58.

enough milk from his mother.[118] Finding a wet nurse had always posed difficulties since one had to track down a lactating woman willing to provide services in the geographic area. By contrast, the demand was high, in that even for their own babies "[w]omen of all socioeconomic strata sought the ability to move freely outside their homes, unhampered by breast-feeding duties, out of either the necessity to earn wages or the desire to participate in social and civic life."[119] The dairy industry promoted "artificial feeding" regimes, many of which were using "cow's milk-based concoctions," but many (though not all) pediatricians were suspicious of these products as substitutes for breast-feeding and believed they played a role in infant sickness and mortality.[120]

Not that wet nurses were an easy sell either:

> As Talbot knew from firsthand experience, the wet nurse was often a highly unsatisfactory source of nutrition, what another doctor later called "that necessary but often slatternly female." She was most often an unwed mother or an otherwise desperate, impoverished immigrant women and, in Boston, frequently Irish Catholic. As both an immigrant and unwed mother, she entered a middle-class household with two strikes against her: perceived as lacking in morals and in the sociocultural assumptions of her Anglo-Saxon, native-born, Protestant employers. Employers and doctors not only worried about the nutritional content of her milk but also feared the transmission of disease, such as syphilis, as well as undesirable ethnic traits, individual moral failings, or personality flaws.[121]

Nevertheless the demand was there, and Talbot's innovation was to implement the "Directory for Wet Nurses," a simple registry of women looking for employment.[122] But Talbot discovered that many of the wet nurses could not sustain themselves while looking for parents to employ them (a prerequisite for the scheme to work), so he established a house where up to eight women could live with their infants, funding it out of his own income when the Directory's income could not support it.[123] The housing and the Directory more generally regulated these women's behaviors—such as by forbidding alcohol, monitoring them for tuberculosis and syphilis, and teaching them to clean and care for babies—such that parents who employed women off Talbot's Directory could be assured a

118. *Id.* at 15.
119. *Id.* at 18.
120. *Id.* at 18–19.
121. *Id.* at 21 (footnotes omitted).
122. *Id.* at 22.
123. *Id.*

quality product (service?).[124] Talbot introduced a screening process whereby every woman he selected was screened for infectious disease and physical defect, as well as being subjected to a "probation" period where he evaluated their suitability for the job.[125] "Troublesome" women were dismissed, but most of the others stayed for six to eight months.[126] Their diet, schedule, eating times, rest times, and feeding times were all standardized by Talbot and similar operations, turning the process into a kind of factory farm for human milk.[127]

But even this standardized and regimented form of wet nursing faced a problem: doctors could not detect the quantity or quality of milk the babies received in the process.[128] The solution was to get the women to express their milk first, allow medical staff to examine it, and only then give it to the baby.[129] The transformation to manufacture was now complete: "The wet nurse's job thus became to produce like a dairy cow rather than to suckle an infant, and her production was measured not in cries quieted but in ounces per minute."[130]

2. From Wet Nursing to Banking.—By 1915, the woman producing the milk and the baby receiving it could be separated in space and time. In that year Talbot's Directory not only provided nurses for hire but bottled milk from them as well.[131] Parents liked disintermediating the living,

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124. *Id.*

125. *Id.* at 23.

126. *Id.*

127. *Id.* at 22. All this has fascinating echoes in today's world with international surrogacy, where surrogates in Anand, India, live communally while carrying the babies of Western genetic parents. As I wrote in my last book, the Ankansha Fertility Clinic

> employs only women who have been married and have had at least one child. In 2008, there were forty-five surrogates on the payroll who lived away from their families in a compound, which one author described as a "classroom-size space . . . dominated by a maze of iron cots that spills out into a hallway." Surrogates receive $50 a month, plus $500 at the end of each trimester, and the balance upon delivery. A successful Akanksha surrogate makes between US $5,000 and $6,000 (slightly more if she bears twins), an amount that exceeds a typical salary for several years of ordinary labor in India. If a woman miscarries, she keeps what she has been paid up to that point. If she chooses to abort—an option the contract allows—she must reimburse the clinic and the client for all expenses. . . .
>
> . . . .
>
> . . . The surrogates' husbands and children may visit during the day, and some take classes such as English or computer skills.

I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 373–74 (2015).

128. SWANSON, *supra* note 3, at 23.

129. *Id.*

130. *Id.* at 24.

131. *Id.* at 32.

breathing wet nurse from their life and doctors liked selling by the ounce, so by 1927 the Directory was renamed "The Directory for Mother's Milk" and now offered only bottled milk and not wet nursing.[132] This approach spread beyond its origins in Boston, and elsewhere in the country these facilities were called "milk stations" or "milk bureaus."[133] Some of these, such as in Detroit, allowed women who were "reliable" providers to express milk at home and send it to the operators who pasteurized it, while other women continued to express milk on site that was left unpasteurized and labeled "certified milk," borrowing a term from the dairy industry.[134]

The language changed with the process. No longer wet nurses, they were now "healthy mothers" engaged in a "legitimate trade" in mother's milk.[135] To be sure, both before and after this shift the lactating women were paid, and the parents buying the milk paid.[136] What was different was the socioeconomic status of the women. Wet nurses were from the "bottom rungs of society—women without husbands to support them or their babies," and it was envisioned that the scheme to some extent helped these women lift themselves out of poverty and provide for others who needed their milk.[137] But these women also represented to the buying populace images of illness and contamination.

The move to bottled milk was in part a response to this perception, but it also targeted very different lactating women. They were married women looking to make some extra money on the side to afford things just beyond their socioeconomic grasp. A Detroit woman reportedly earned $3,500 during fourteen months of lactating she used to purchase a home; at another bureau a mother of three made more than $1,700 during four years of lactation.[138] This was a lot of money! At the time the average annual earning of all employees (male or female) was $1,420 for nonfarm workers and a measly $714 per year for domestic service.[139] The bureaus made enough money from their trade to become financially self-sustaining but did not raise prices beyond that. "Bottled human milk could have been sold at a profit for whatever price the market would bear, as was true for formulas from . . . certified milk," but the medicalized milk bureaus chose not to charge those profit-making prices.[140]

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132. *Id.*
133. *Id.* at 32–33.
134. *Id.* at 33.
135. *Id.* at 34.
136. *Id.*
137. *Id.* at 36–37.
138. *Id.* at 37.
139. *Id.*
140. *Id.* at 38.

The milk story then gets picked up in Chapter 5 of the book, which Swanson calls "Feminine Banks and the Milk of Human Kindness."[141] While blood banking took off in post-World War II America, milk banking seems to have seen a decline during the same period—from 24 banks in 1944 to only 7 in 1955—likely due to the success of canned infant formula and increased acceptance of this method of feeding by doctors accompanying a more general medicalization and hospitalization of birth.[142] In part, because of this medical indifference and drop in demand, starting in 1955 the dominant model was instead what Swanson characterizes as "a feminized, lay-led institution that emphasized peer-to-peer maternal gifting, taking the blood bank as a model but adapting it in new ways."[143]

Why did the trajectory of milk "banking" go so differently than blood? While some milk bureaus adopted the title of "bank," as Swanson notes the "metaphor fit only loosely" for a number of reasons.[144]

For one thing, Fantus's initial blood model of in-kind accounting was just impossible for milk because there could be no repayment in kind; those who needed milk from the bank were unlikely to be able to give milk themselves in the future, in part because of the timing of lactation's connection to the timing of child birth.[145] Moreover, babies did not drink milk in standardized amounts and women did not express it in standardized predictable amounts, making the standardized unit-by-unit treatment that blood was given unsuitable.[146] What we had was instead something much more akin to a "manufacturing facility that bought its raw materials [milk from lactating women] and sold its final product at a mark-up."[147]

Second, milk banks never faced product-liability concerns: there were only a handful of milk banks in operation; milk raised no immune-compatibility issues between donor and recipient; and milk banks never adopted the language of transfers, sales, deposits, and withdrawals.[148] The term "bank" had crossed over in some instances but not the bank's underlying balancing concept, making it easier for courts to reject the notion of milk banking as a commercial exchange.[149] Still, despite this favorable legal regime many insurers became worried, and in the case of the

141. *Id.* at 159.
142. *Id.* at 160–61.
143. *Id.* at 161.
144. *Id.* at 166.
145. *Id.* at 163.
146. *Id.*
147. *Id.* at 166.
148. *Id.* at 166–67.
149. *Id.* at 167.

San Francisco Mother's Milk Bank the insurer threatened to raise their charge 700%, causing the bank to close in 1978.[150]

Another key difference was that there was no controversy about paying for breast milk. If anything, the wet-nursing tradition, which was always about paying for milk, strengthened the conviction of the medical establishment that of course they had to pay for the milk.[151] Nevertheless, perhaps because of the gendered nature of the narrative and the supplier, the payment coexisted with a public perception of altruism—yes "milk was . . . bought and sold to the mutual benefit of buyer and seller, but it was also the 'milk of human kindness'" and fell within a gift narrative.[152] Again, one can see a contemporary echo of this in the way in which women's reproductive sales are characterized—while for men sperm "donation" is portrayed as employment or shift work, for women narratives of altruism and helping other women start a family are a major part of the way in which egg donors are recruited and retained.[153]

Furthermore, as time passed higher socioeconomic status (SES) women were often recruited to provide milk as well. In the 1920s and 1930s the women were often married and certainly financially better off than the wet nurses that preceded them.[154] By the 1940s and 1950s, hospitals were recruiting even wealthier postpartum mothers, not only those who saw "selling milk as a way to avoid the necessity of leaving their baby for paid employment outside the home but also women who could afford to be full-time mothers and housewives."[155] Indeed, startlingly some of the women who contributed were actually high society women, and in San Francisco they threw gala balls and fashion shows that ended up in the society pages to raise money for the banks.[156]

As time went on, increasing numbers of women of all social classes disavowed payment.[157] Initially, in the postwar era, the medical profession refused free milk and paid even the women who wanted to give it for free, but some banks, such as the one in Evanston, began transforming their activities into philanthropy; indeed, the Evanston bank became the first to not pay any suppliers at all.[158] Not only the running of the bank itself but

150. *Id.*

151. *Id.* at 164.

152. *Id.* at 168.

153. *See* RENE ALMELING, SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM 87 (2011) ("[E]gg donation is organized as gift exchange, while sperm donation is likened to paid employment.").

154. SWANSON, *supra* note 3, at 169.

155. *Id.*

156. *Id.* at 170.

157. *Id.* at 171–72.

158. *Id.* at 171–73.

the actual donating of milk, both the activities of society women, was seen within this philanthropic lens, and Swanson argues that they saw themselves as "altruistic volunteers, caring for their community and other women's children as an extension of their primary role as mothers and homemakers"; that is, they "were mothers, not professional donors or wet nurses looking for a 'profitable business.'"[159] Still, Evanston remained an anomaly, and most banks relied at least in part on paid-for milk.

What threatened to kill the milk banks was not supply but demand—the demand for "natural milk" dwindled in the face of increasingly popular "commercial milk."[160] Although the post-World War II ideal of female domesticity espoused natural milk, pediatricians began in the 1960s to grow skeptical of the notion that breast milk had any real advantage over commercial formulas.[161] By the late 1960s, few milk banks remained.[162] For a while, mothers in need of natural milk would have to turn to ad hoc, informal systems of milk distribution or even direct mother-to-mother exchanges.[163]

The extinction of the milk bank was saved unexpectedly by the gaining of steam of the Women's Liberation Movement in the 1960s. Women reconceptualized the milk bank as an "anticapitalist institution of women's power in which an intimate act was extended to strangers to save them from reliance on the cold, impersonal world of the market represented by artificial feeding choices."[164] Within this new institution, "the natural was superior to the commercial."[165] Naturally, the Women's Liberation Movement also changed the formerly structured manner in which milk banks operated. The milk-giving model was recast as a part of the women's health movement: a way for women to overthrow the patriarchal control of the medical industry, with male doctors tending to female patients.[166] Women started "kitchen milk banks," collecting milk in their own homes and dispersing to other women's babies on request without any medical intervention or legal oversight.[167] With the resurgence of interest in natural milk, the number of milk banks nationwide increased from four to twenty-seven—nearly seven fold—between 1973 and 1982.[168]

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159. *Id.* at 175.
160. *Id.* at 176–77.
161. *Id.* at 176.
162. *Id.* at 177.
163. *Id.* at 180–81.
164. *Id.* at 187.
165. *Id.*
166. *Id.* at 185–86.
167. *Id.* at 187.
168. *Id.* at 184.

It is fascinating to see milk banking go so communitarian or socialist when blood banking staunchly moved in the other direction. It is hard to pin down the explanation—was it the lack of legal threat from products liability? The gendered nature of the service and the ability to recognize (or perhaps exploit) gender narratives? Was it the lack of health risks like hepatitis or syphilis being transmitted? The fact that women could only provide breast milk for specific periods tied to pregnancy as opposed to throughout the lifetime? Was it the fact that milk banking was kept more on the periphery of the medical establishment while that establishment "owned" (figuratively and literally) blood banking? Or was it the fact that demand was, even at its peak, never very high, and the service one that medicine never insured? In Swanson's discussion one can see all these threads, but she does not put emphasis on any one of them in particular, which is perhaps wise given what the historical record can and cannot show. It would be fascinating to go comparative in this analysis and examine how milk banking developed in other countries in the same time period, but that is not something Swanson attempts in this work (perhaps her next book).

In any event, this return of the milk bank was short-lived. In the 1980s and 1990s, concern grew over informal, unregulated methods of distributing natural milk.[169] If "bad blood" came from the commercial donor in the public perception of the time, for milk the concern was that contamination came from donated milk.[170] Organized medicine formed the Human Milk Banking Association of North America (HMBANA), which "develop[ed] standard milk-bank procedures to ensure the quality and safety" of natural milk.[171] The HIV crisis and the first case of transmission of the virus via breast milk in 1985 made the need for this kind of regulation apparent.[172] Milk bankers largely adhered to HMBANA's guidelines in the hopes that doing so would move natural milk "back into the medical mainstream," "stabilize demand[,] and help with cash-flow problems."[173]

At the end of the twentieth century and into our century, milk banking has seen something of a resurgence. Swanson reports that "[b]y 2013 there were thirteen HMBANA-accredited banks in the United States and four more planned."[174] She also notes that their successors ("Big Milk" if you will), especially Prolacta Bioscience, are "for-profit business[es] that take[] advantage of the gift/commodity dichotomy and the public acceptance of

169. *Id.* at 188.
170. *Id.* at 189.
171. *Id.* at 191.
172. *Id.* at 193.
173. *Id.* at 191.
174. *Id.* at 194.

body banks to maximize shareholder profits."[175] These businesses manipulate stereotypes about paying for milk to get women to donate for free and then make profits themselves. Swanson quotes the executive director of the milk-banking association in 1996, for example, suggesting that "[p]urchasing milk could have harmful consequences" in that "infants whose mothers would sell their milk might be deprived of their own birthright to that milk," the women "might be tempted to adulterate milk with either cow's milk or water to increase the volume and thus the amount earned," and the adulterated milk might also hurt downstream recipients.[176] Swanson may not completely connect the dots, but it is quite clear that this is a kind of scaremongering history (given the history that shows it was donated milk that was more likely to be a health risk) playing on gendered narratives (that mothers who would sell must be selfish and bad mothers depriving their own children of their "birthright," ignoring that some of the funding would itself go towards their families).

The chapter closes by showing how companies like Prolacta that make infant formula have now gotten into the same game. They have a network of milk banks with names like "Helping Hands and Milkin' Mamas" that seek free milk donations to "help save the lives of the most fragile infants," where the woman donating milk is rewarded to know that her donation is "nurturing other children as she nurtures her own"; in fact, Prolacta takes that milk, processes it into a human milk-based infant formula, and sells it to hospitals like infant formula, all of this as a for-profit company.[177] The milk of human kindness feeds the profits of corporate America.

D. Banking Sperm

The book's last chapter before a brief conclusion is entitled "Buying Dad from the Sperm Bank."[178] It is very short, 35 pages, and does not make nearly the contribution that the other chapters do as against the existing literature.[179] One imagines this chapter's addition might have been the result of the push from an editor at the press to "say something current, how

175. *Id.*

176. *Id.* at 193–94 (quoting Lois D.W. Arnold & Laraine Lockhart Borman, *What Are the Characteristics of the Ideal Human Milk Donor?*, 12 J. HUM. LACTATION 143, 144 (1996)).

177. *Id.* at 195.

178. *Id.* at 198.

179. For some excellent books on the history, legal treatment, and current status of sperm banking, see, for example, ALMELING, *supra* note 153; NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL RECOGNITION (2009); JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW (2d ed. 2013); and DAVID PLOTZ, THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK (2005).

about sperm banks?" Whatever its genesis, it does not blotch an otherwise excellent book.

As Swanson depicts it, in the United States, sperm banking and sperm "donation" have always been a business proposition without the patina of a nonmarket existence.[180]

Before sperm could give rise to a viable business, however, medicine needed to perfect artificial insemination, and the public needed to overcome a deep-seated moral opposition to what some religions perceived as a form of adultery.[181] Here Swanson notes that some early legal encounters with artificial insemination were *also* about adultery, such as the 1921 Canadian court opinion suggesting that artificial insemination might be grounds for divorce, although she claims there were no U.S. legal opinions published on the subject before 1945.[182] Public opinion to the practice warmed up in the 1920s, when the possibility of eugenics seemed like a solution to the "race suicide" (Theodore Roosevelt's words apparently) threatening to result from the decreased fertility of white elites.[183] But "by the late 1940s[,] eugenics had fallen from favor in American public discourse, tainted by the Nazi atrocities performed in the name of racial purity."[184] Unlike with blood or milk, doctors refrained from creating banks themselves, though in 1947 New York they urged the city of New York to pass regulations requiring the testing of semen from donors that medical involvement would be required.[185]

Secrecy was always at the heart of the early American experience—doctors did not want to be associated with the practice because of the opposition to eugenics and instructed their patients not to reveal the practice to their donor-conceived child or even other family members.[186] This reason for secrecy was likely reinforced by and also reinforcing of the legal uncertainty over the practice of artificial insemination, which persisted for a long time. Swanson examines some proposed bills either endorsing or repudiating the legality of artificial insemination from the 1940s and 1950s but then notes that they failed to pass.[187] Instead, the task of determining the legal status of artificial insemination was left to the courts, primarily

180. *See* Swanson, *supra* note 3, at 199 (differentiating sperm banks from milk stations and blood banks in that sperm banking was developed outside the medical community and was for profit from the start).

181. *Id.* at 200, 202.

182. *Id.* at 209–10.

183. *Id.* at 203.

184. *Id.* at 209.

185. *Id.* at 208.

186. *Id.* at 209.

187. *Id.* at 216.

through custody disputes of children conceived through the method.[188] In one of the most divisive cases to capture the public's attention, an Illinois state court held in 1954 that "donor insemination, even with husband consent, was 'contrary to public policy and good morals,' and therefore [the child at issue] was an illegitimate child and [the father] was not liable for child support."[189] Controversy ensued. The state expressed concern for the thousands of now potentially illegitimate children who might "end up dependent on the public purse."[190]

Despite the legal controversy over the practice, negative public reporting, and medical refusal to sanction or run sperm banks, demand persisted and led to a commercially viable model for banking.[191] The first sperm banks, for profit, opened in 1971 and targeted a discrete, narrow population: men at risk of infertility.[192] The number of vasectomies was on the steady rise, and sperm bankers hoped that soon-to-be-infertile males would see banking as "fertility insurance."[193] The term "bank" was thus even more of a misnomer in the sperm context than in the milk context. The first sperm banks did not sell sperm or give it away. Instead, they merely offered storage services.[194] Indeed, unlike their colleagues in banking blood and milk, Swanson notes that the sperm bank operators never wanted property rights in what was provided—to own the sperm itself—instead they wanted to be one's sperm safety deposit box.[195]

Despite dire predictions of the "sterilization of the American male," the "safety deposit" business model never took off.[196] Not only was there an exceedingly limited pool of men planning sterilization who had the means to buy fertility insurance, but cryopreservation of sperm also had its limits.[197]

Not until the end of the twentieth century did sperm banks devise a workable business model. The key was changing the target clientele. Sperm banks "reinvented their business as marketers of goods to women rather than providers of services to men."[198] Several factors contributed to the success of the model. First, sperm bankers realized that people might be willing to pay extra for preferred characteristics, so they focused on creating

188. *Id.*
189. *Id.* (quoting Doornbos v. Doornbos, 23 U.S.L.W. 2308, 2308 (Ill. Super. Ct. 1954).
190. *Id.* at 216–17.
191. *Id.* at 216–19.
192. *Id.* at 219.
193. *Id.* at 220.
194. *Id.* at 219.
195. *Id.* at 219–21.
196. *Id.* at 223.
197. *Id.*
198. *Id.* at 225.

more detailed catalogues from which recipients would select, much as they would a "fine wine or artisanal cheese," rather than the product being like "carrots or silver teaspoons."[199] Second, states finally passed laws on artificial insemination, such as versions of the Uniform Parentage Act of 1973, and they often enshrined physician involvement.[200] Doctors' legally recognized stamps of approval "did the cultural work of transforming what some considered a variation of adultery into a treatment for infertility, that is, 'sin into therapy.'"[201] Third, the AIDS crisis actually turned cryo-preservation from a drawback into a boon. Frozen sperm generally had a lower success rate of conception, but it also was less likely to transmit AIDS, and thus AIDS transformed semen "into a body product that *required* a bank for a safe exchange."[202] Fourth, social movements empowered women without male partners to have children. The Women's Liberation Movement encouraged single women to "take charge of their reproduction," while the gay rights movement encouraged lesbian women to "embrace motherhood" and form families with their partners.[203]

By the 1980s what I called "Big Milk" was joined by what I might call "Big Sperm." The use of frozen sperm plus the ability to purchase from donors now allows the banks to offer breadth and depth of inventory for potential purchasers that compete not only on their inventory but also on how much information they are willing to provide to purchasers.[204] This development has raised a host of issues facing the industry today that Swanson has not left herself enough room to really discuss: the fostering of eugenic impulses of those buying sperm through the cataloguing system and the recruitment process; racial segregation of sperm bank catalogues; medical tourism for U.S. sperm to circumvent domestic prohibitions in Europe and elsewhere; open-identification programs versus sperm donor anonymity and the complaints of donor-conceived children that the United States is one of the few Western countries that still permits entirely anonymous sperm donation; attempts to use Craigslist for free sperm donation and the child-support consequences; lack of limitation on the number of donations per donor, leading to large numbers of half siblings

199. *Id.*

200. *Id.* at 226; *see also* UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 408 (2001). *See generally* I. Glenn Cohen & Travis G. Coan, *Can You Buy Sperm Donor Anonymity Identification? An Experiment*, 10 J. EMPIRICAL LEGAL STUD. 715, 724 n.29 (2013) (discussing the history of revisions to the act).

201. SWANSON, *supra* note 3, at 225.

202. *Id.* at 226–27.

203. *Id.*

204. *Id.* at 230.

who may conceive of themselves as "donor families"; and many more issues.[205]

The end result is the most market like of the body banks she discusses. The "product" unlike blood or milk is highly individuated; almost always, if not always, sold to the bank by the donor; highly regulated in its storage and "quality"; and always sold by the banks (rather than having some charitable distribution alongside the sale regime).

Swanson leaves herself a mere four-and-a-half pages to discuss the markets in human eggs, which is not nearly enough room to make a contribution to this literature. Relying on Rene Almeling's excellent sociological work on the way in which sperm and egg sale is marketed differently to parties involved by the companies that manage the relationships (focusing more on altruism for eggs), Swanson suggests that this

> owes less to fear of the other and the association of taint and disease with cash that helped drive paid donation out of other types of body product exchange, and more to the long history of gendering the professional donor. No matter how the payments are structured and how direct the relationship between donor and recipient, when the donor body is male, he has been a "professional," and when the donor body is female, she has been a nurturing mother or potential mother.[206]

This is a provocative claim, and in some measures I think accurate, but it is not a claim Swanson has left herself space to develop or really support in the book. Indeed, I will suggest in the next Part that one big thing missing from the book is a focused discussion of gender in the other markets, and actually I find Swanson's own account of some of these markets to make the role of gender more complex than the more typical narrative she offers here.

III. Critique

The genre of the book review demands not just that we praise but also that we bury, at least a little. Who am I to fight the genre? I offer a few criticisms of the book, listed from least to most serious. They are: the role of law in the story, confusion over what constitutes a bank and the use of

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205. For additional information on analysis of these issues, see generally NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES (2013); COHEN, *supra* note 127; I. Glenn Cohen, Response, *Rethinking Sperm Donor Anonymity: Of Changed Selves, Non-Identity, and One Night Stands*, 100 GEO. L.J. 431 (2012); Cohen & Coan, *supra* note 200; I. Glenn Cohen, *What (if Anything) Is Wrong with Human Enhancement? What (if Anything) Is Right with It?*, 49 TULSA L. REV. 645 (2014); and Fox, *supra* note 38.

206. SWANSON, *supra* note 3, at 234.

the metaphor, the level of interaction with commodification literature, and finally the failure to adequately discuss the role of gender in the narrative.

A. The Role of Law

Surprisingly, though, there is not that much law in this book and it often reads more like medical or sociological history than legal history. This is not a critique so much as an observation. In some ways, some of the most interesting and novel elements of the book *are* the legal portions discussed above relating to the rise of products-liability law, the decline of charitable immunity, the role of antitrust enforcement and the good–service distinction, and the role of insurers in the progress of blood banking. To be sure, there are other legal tangents here and there (the case law on adultery for using donor sperm, for example), but overall one gets the impression at the end of the book that law had relatively little role to play in the story or at most the threat of legal regulation of industries by Congress or state legislatures was more important in fostering self-regulation than were actual legal decisions or legislation.

This is perhaps not what Swanson intended for a reader to come away with at the end of his or her reading. In some cases this impression may be a function of her emphasis and length of treatment on certain topics. In other instances it may be a function of her tendency to close the narrative at a particular point in time or slightly rush the more recent developments. For example, in the blood story, had she extended the history a little later in time, she could have looked at things like the FDA's forbidding men who have had sex with men from donating blood and nascent legal challenges to that policy.[207] It is also instead possible that Swanson really wants the reader to walk away with the message "this is *not really* about the law," which would perhaps make her account fit more with "order without law" kinds of narratives—or at least narratives of private ordering in the shadow of the law—but she does not really push an argument in that direction. What the reader might have hoped for was more of a reckoning at the end of the book about law's role, its successes, and its failures to shape the

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207. *See generally* I. Glenn Cohen, Jeremy Feigenbaum & Eli Y. Adashi, *Reconsideration of the Lifetime Ban on Blood Donation by Men Who Have Sex with Men*, 312 JAMA 337 (2014) (exploring the shortcomings of the current FDA policy and proposing that a policy focused on individual risk assessment be used instead); Brody Levesque, *Teen Activist Files Lawsuit Challenging FDA Ban on Gay Blood Donors*, LGBTQ NATION (Oct. 12, 2014), http://www.lgbtqnation.com/2014/10/teen-activist-files-lawsuit-challenging-fda-ban-on-gay-blood-donors/, *archived at* http://perma.cc/YH5W-AKYK (reporting on a lawsuit alleging that the FDA ban is discriminatory and unconstitutional). This policy is on the verge of changing. Sabrina Tavernise, *F.D.A. Easing Ban on Gays, to Let Some Give Blood*, N.Y. TIMES, Dec. 23, 2014, http://www.nytimes.com/2014/12/24/health/fda-lifting-ban-on-gay-blood-donors.html?_r=0, *archived at* http://perma.cc/4FL4-2XCT.

development of these banks. I think that would have made the book even more useful for legal academics and connected it more to the law and social movements and law and society literatures.

B. What Is a Bank? And the Role of Metaphor

For a book that uses "bank" in its title and for which almost no page goes by where that word is not used, it is strange to finish the book somewhat confused about what Swanson means by the word. She frequently speaks of the use of the bank metaphor and its importation from the financial world,[208] which may be part of the problem; to understand the evolution of body banking in twentieth-century America and to compare narratives across the three banks she uses, we need a much stronger definition or typology of banks than she offers.

The more minor portion of the critique has to do with the role of metaphor in the book. Swanson repeatedly discusses the adoption of the banking metaphor, but it is not always clear what that means or what work the metaphor is doing in each of the three types of body. There is a vast literature on the role that metaphor plays in shaping legal thinking[209] that it might have been useful for her to engage more with. As Justice Benjamin Cardozo put the admonition: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[210] There is also a vast cognitive science and history and philosophy of science literature on the way metaphors are constructed and deployed. Because metaphor is so central to the story Swanson seems to want to tell—at some junctures it feels as though the book could have been subtitled "the story of a financial metaphor run amok"—it would have been nice to see her engage a little more critically with the role of metaphor in the story.

The more important point, though, has to do with lack of clarity on her part as to what is constitutive of the kind of "bank" this book is about.

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208. *E.g.*, SWANSON, *supra* note 3, at 5–9, 14, 140, 166, 240.

209. For some representative entries, see Jonathan H. Blavin & I. Glenn Cohen, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265 (2002); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545 (2011); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989); Eileen A. Scallen, *Metaphor and Reason in Judicial Opinions*, 10 CONST. COMMENT. 480 (1993) (book review). For in-depth treatment of the use of analogical reasoning, which often shades into metaphor, see generally Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1010 (1996).

210. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926). For others concerned about the effects of the unreflective use of metaphors in law, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) and Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745, 764 (1992) (book review).

Swanson never gives us a straight-out definition, but the task of struggling through how to define it might have been helpful in sharpening the scope of the book and its contribution.

Dictionaries are always a useful starting point, and therein one might find this (or another similar) definition for "bank":

> 1 a : an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds
>
> b *obs.* : the table, counter, or place of business of a money changer
>
> 2 : a person conducting a gambling house or game; *specif.* : DEALER
>
> 3 : a supply of something held in reserve: as
>
> a : the fund of supplies (as money, chips, or pieces) held by the banker or dealer for use in a game
>
> b : a fund of pieces belonging to a game (as dominoes) from which the players draw
>
> 4: a place where something is held available <memory ~s>; *esp* : a depot for the collection and storage of a biological product <a blood ~>.[211]

Intriguingly, the dictionary itself lists blood banks as one of its own examples of usage yet groups it not with financial banks but with a distinctly nonfinancial analogue—the memory bank of a computer. Swanson would of course note that this grouping is ahistorical, that the body banks she reviews borrowed the metaphor from the financial bank and not the memory bank (which was not in wide use when her story begins), but it remains salient to me as a reminder that one need not think of banking as at all financial.

Dictionaries can be helpful, but in the area of body banking it is useful to try to be more conceptual and demarcate a few separate elements (this is not an exhaustive list by any means) and press on which, if any, are necessary or sufficient conditions for something being usefully described as a bank, or at least the kind of bank Swanson has in mind. Here are three:

1. Storage and Temporal Discontinuity vs. Contemporaneous Provision.—A bank takes something from you, stores it, and makes it available at a later time. If this is a necessary condition for body banks, then it would exclude contemporaneous exchanges. If, as in the early days of blood history, someone provides the good contemporaneously on

211. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 96 (11th ed. 2006).

demand rather than with storage, then it is not a blood bank. At most, perhaps you have a bank of eligible individuals (though in the milk world they called that a "Directory," which seems more linguistically apt), but even if it is offered at a price, that is not a bank of the body any more than dating websites are body banks.

From her treatment of blood and milk I take it (though she is not completely clear on the point) that Swanson thinks of this as a necessary condition for something to be a body bank, in that it appears for her that there was a moment when *banking* rather than blood transfusion or wet nursing became possible, and the era before that was *not* an era of body banks.

If this is right, one point follows that is important for the next subpart: it seems like two of her major bêtes noires she sees in body banking, the anti-commodificationist critique and the fear of the other in this discourse, are in a deep way *unconnected* to banking. That is, the elements of those critiques would apply equally well to contemporaneous exchange of the goods as to the banking thereof.

If one were to try to come up with a list of concerns or issues specific to the banking (rather than the sale or exchange) element, they would look quite different than the list of things Swanson is considering in her book. To give just a few examples: how to resolve disputes about disposition of banked goods when there are fights about ownership or control (as in the case of pre-embryo disposition disputes for banked pre-embryos[212])? Is there liability when a banked good is destroyed or released without proper authorization or refused release?[213] When storage itself damages the good in a way that creates liability for the end user, who is liable? Does product liability attach to the storage facility?[214] What are the responsibilities and legal disposition of a bank when it goes bankrupt or ceases operating with respect to its existing holdings?[215]

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212. *E.g.*, I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1136–37 (2008) (discussing courts' resolution of these disputes); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1117–18 (2008) (same).

213. *See, e.g.*, York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989) (recognizing that a prezygote cryopreservation agreement created a bailment relationship, which imposed a duty to account for the prezygote).

214. Surprisingly, Swanson spends considerable time on this in the chapter on blood but almost no time on this in the chapter on sperm, despite important and ongoing debates on when sperm banks can be liable for poor screening activities in donor selection wrapped up in questions of wrongful birth and wrongful life liability. For some discussion of this liability regime, see generally I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 442–45 (2011).

215. *See, e.g.*, I. Glenn Cohen & Eli Y. Adashi, *Made-to-Order Embryos for Sale—A Brave New World?*, 368 NEW ENG. J. MED. 2517, 2519 (2013) (acknowledging that what "happen[s] to made-to-order embryos if the relevant clinic goes bankrupt" remains an "unanswered legal

These seem to me the pertinent questions for work on the *banking* of body parts (understood as stored and temporally discontinuous exchange) rather than their contemporaneous selling.

2. Non-Autologous v. Autologous (and Non-Directed v. Directed).— Autologous body banking is storing materials for one's own future use, as opposed to providing biological material to a bank for someone else's use.[216] To be sure, the line between these two kinds of banking is not always so easy to draw—in the reproductive area couples often freeze additional pre-embryos when they undergo in vitro fertilization (IVF) for their own future use, but at a later time they might decide to donate them to another couple, turning what started as autologous into banking for the sake of others.[217]

Every so often the book mentions autologous storage—for example, the initial marketing of sperm banking as a form of safety deposit or fertility insurance[218]—but for the most part I think it is fair to say that Swanson intends to largely exclude autologous banking from the focus of her book. Of course, autologous banking raises a host of its own interesting legal issues, as well as some of the concerns about demonization of the other that does seem to be Swanson's focus (here the other is excluded entirely by instead resorting to one's own body material). One can see the importance of autologous banking most recently in the push of women towards egg freezing for their own fertility and the attendant legal and ethical issues that surround it.[219] Ironically, the very model Swanson found failed for sperm may in our century take off for eggs,[220] and it would be interesting to examine the reasons why that is the case.

Swanson also more implicitly seeks to exclude what I might call "directed" banking. Autologous banking is banking for anticipated future

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question[]"); Mark A. Rothstein, *Expanding the Ethical Analysis of Biobanks*, 33 J.L. MED. & ETHICS 89, 99 (2005) (discussing the treatment of biobanks in bankruptcy).

216. SWANSON, *supra* note 3, at 26.

217. *E.g.*, Cohen & Adashi, *supra* note 215, at 2517; Polina M. Dostalik, *Embryo "Adoption"? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 872–75 (2010–2011). In some of the post-divorce disposition disputes, one party to the marriage has wanted to donate the pre-embryos to an infertile person or couple as well. *E.g*, J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

218. SWANSON, *supra* note 3, at 223.

219. For discussion of some of these issues, see generally John Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, 1 J.L. & BIOSCIENCES 113 (2014).

220. *See* Joanna Weiss, *Egg Freezing Message: Lean in, and Save the Kids for Later*, BOS. GLOBE, Oct. 16, 2014, http://www.bostonglobe.com/opinion/2014/10/16/egg-freezing-message-lean-and-save-kids-for-later/dKGaoRtjrszo8OozNbj45K/story.html, *archived at* http://perma.cc/W59Y-ZSRM (detailing how some employers now offer autologous egg storage for their female employees).

use by oneself, but one could instead intend to bank for a specific other person. A good current example is the practice of umbilical cord blood banking by parents with the hope that stem cells derived from that blood may be useful for their child if needed in the future.[221] The banking that Swanson has in mind, as she reminds us often in the book, is instead one that deindividuates the relationship of donor and recipient and breaks whatever dyadic or intentional relationship the two might have. That is a specific kind of banking but not the only one.

3. Clinical vs. Research.—All the banking of the body that Swanson focuses on is banking where the end use is a clinical encounter and not a research use. All those who "withdraw" seek to use for their own health needs or the health needs of someone in their care (a blood transfusion, reproducing, or milk for their infant). In fact, one of the most important modern forms of body banking is *not* for clinical use at all but for research use, what we call in the literature "biobanks," wherein tissue samples are stored for specific research projects, potential future research uses, or both.[222] One scientifically quite important example of that kind of biobanking is the He-La cells that Rebecca Skloot traced back to the poor, African-American woman Henrietta Lacks;[223] this story has recently received significant public attention and raised issues about consent and ownership of the cells and science derived therefrom.

Swanson's account ignores this entire industry and the legal and bioethical issues attendant to it, even though this is in some ways the most interesting and pressing form of body banking today. It would be interesting to see how a historian might interpose the rise of *this* kind of banking and the legal and ethical issues it raises with the clinical body banking that is Swanson's focus. Again, her book is long enough and omitting this kind of banking is not something for which she deserves fault, but it would be useful to understand how this history interweaves with the

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221. Seema Mohapatra, *Cutting the Cord to Private Cord Blood Banking: Encouraging Compensation for Public Cord Blood Donations After* Flynn v. Holder, 84 U. COLO. L. REV. 933, 939–40 (2013). Mohaptra's article also discusses the possibility of creating public cord banks available for access by unrelated individuals in need that would resemble more closely the types of banks Swanson focuses on. *Id.* at 940.

222. *See generally* Wash. Univ. v. Catalona, 490 F.3d 667, 673 (8th Cir. 2007) (holding that donors do not retain an ownership interest in biobanked prostates they donated); Greenberg v. Miami Children's Hosp. Research Inst., Inc., 264 F. Supp. 2d 1064, 1074 (S.D. Fla. 2003) (holding a donor to a research institution does not retain any property interest in the body tissue and genetic material); Brett A. Wiliams & Leslie E. Wolf, *Biobanking, Consent, and Certificates of Confidentiality: Does the ANPRM Muddy the Water?*, *in* HUMAN SUBJECTS RESEARCH REGULATION: PERSPECTIVES ON THE FUTURE 207, 207–19 (I. Glenn Cohen & Holly Fernandez Lynch eds., 2014) (discussing biobanks and their legal and ethical issues in great depth).

223. REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2010).

one she tells and also to get a better sense of whether the theoretical underpinnings for debates about this kind of biobanking do and do not map on to the ones she has presented.

Thus far the critique merely shows that Swanson needs to be more precise about the contours of her project. She is interested in one specific form of body banking—temporally discontinuous, nonautologous, non-directed, stored biological materials for clinical and not research purposes. We could ask questions about why, when the potential alternative ambits are properly understood, it is useful to restrict the inquiry to this kind of bank and not the other kinds of body banking. Of course it is unrealistic to expect Swanson to look at everything, and she should not be faulted for failing to do so. All I want to point out is that these choices are ones she (1) has deliberately made; (2) needs to recognize shape the narrative in important ways by exclusion; and (3) perhaps should give an account as to why, as well as be more specific as to the kind of banking she has in mind.

But the research biobank exclusion is perhaps most important in the way it puts further pressure on the central metaphor she wants to draw on: the idea that the banks that are the relevant comparators to the ones she talks about are financial institutions. If what she had in mind is a purely historical account of term-borrowing, semantic contagion, I think she succeeds in spades in showing that the three industries borrowed the term from each other, initially borrowed it from financial institutions, or both. But arguably the research biobanks are much closer to financial banks than the banks she has in mind. In financial banking one deposits one's money and perhaps eventually withdraws it, and at least in the interim period the bank (hopefully) profitably uses what one has deposited to further its own ends. This is what happens in at least some research biobanks, though perhaps not the withdrawal part since most commit their tissue to the bank forever or at least until they exercise a right to destroy samples if permitted.

The main profit in financial banking comes from the ability to use the deposited money for investment that has a higher return than one pays as interest; it does not come from connecting buyers and sellers. The business model of all the banks Swanson discusses (or at least the for-profit version) is quite different: it is to pay one price (or nothing at all) for blood, milk, or sperm to the sellers of the good, then store it and resell it to a buyer at a higher price, counting the difference as profit. We could call what they do a bank, but it is not the storage and redeployment for investment that is doing the work in the model. Instead, the model is much more akin to resellers or retailers than to the financial banks that make profits on their temporary holding of a good.

When one recognizes this distinction, it makes somewhat mysterious the book's constant hand wringing over the way each of the body banks she writes about adopts the term of "bank" but then begins to depart from that

model in subtle ways. What is mysterious is that the book does not acknowledge that the very design of these banks and the way they are intended to profit are very *unlike* financial banks, such that the focus on the subtle details seems to miss the large difference. What is needed is some kind of an error theorem account—if these banks are so unlike financial banks, why were many of the writers and designers at the time so enamored with that comparison? What would be really interesting here would be to go into the history of financial banking and the public's attitude towards it, and see if the adoption or rejecting of the lingo of the bank rose and fell with the public's love or hatred for financial banks. Ponder, for the moment, whether someone offering a similar service in the Occupy Wall Street moment would be as quick to draw a comparison to financial institutions in order to inspire trust and the belief that the institution is there working hard to protect your interests.

By inquiring as to what Swanson means by "bank," I do not mean to be merely pedantic or to fight about nomenclature. Rather it seems quite important in understanding what this book is about. Is this a book about the buying and selling of body parts or the banking of body parts (of which buying and selling may be parts or not) and the legal, ethical, and medical struggles with these concepts? Sometimes the book feels like one and other times like the other.

C. *Understanding This Book's Relationship to Commodification/Taboo Trades Debates*

There is a vast literature in law and ethics on the buying and selling of body parts and other "sacred" goods that sometimes goes under the name "commodification debate" or "taboo trades."[224] Swanson's book has what I would call a "doubly ambivalent" relationship with this debate.

One ambivalence has to do with the way to frame this particular debate. The second ambivalence is as to whether this is actually the central debate that the book (and those participating in the historical events) is interested in or not.

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224. The topic is vast and includes sex, organs, blood, military service, vaccines, noble prizes, etc. For just the tip of the intellectual iceberg, see generally CÉCILE FABRE, WHOSE BODY IS IT ANYWAYS?: JUSTICE AND THE INTEGRITY OF THE PERSON (2006); MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS (2006); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); MICHAEL SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF THE MARKET (2010); Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 3 UTAH L. REV. 683, 689–95 (1995); Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, PUB. INT., Spring 1992, at 65; Julia D. Mahoney, *Altruism, Markets, and Organ Procurement*, LAW & CONTEMP. PROBS., Summer 2009, at 17; Note, *The Price of Everything, The Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003).

On the one hand, the book often reads as though this is the key debate that Swanson is interested in—for example, when she writes in the introduction that the post-World War II embrace of property markets conflicted with

> deeply held lay notions that property sourced from human bodies should be treated in special ways. The result has been polarization of the controversy around the flashpoint of markets and sales: Should body products be nonmarket gifts of love or market commodities subject to sale? The characterization of gifts and sales as opposite and mutually exclusive exchanges is often summed up by the shorthand phrase the *gift/commodity dichotomy*.[225]

Although on the same page, relying on Viviana Zelizer's work, Swanson wants to point out that the two poles are really more conjunctive than disjunctive (not love or money, but love and money) in that "[u]pon close inspection, the categories of gift and commodity throughout the history of body products have been neither distinct nor opposite."[226] At other times, as a reader of this book well-steeped in the commodification/taboo trades literature, I read into the book (it is hard to know if this was her intention or not) the following imagined monologue:

> You clever bioethics and philosophy types! You are so anachronistic. You project on to the history of body banking in America your contemporaneous debates when in fact most of the developments have nothing to do with this debate. It is things like the loss of hospital immunity, the development of products liability, the developing case law on goods versus services in antitrust, the prevailing attitudes towards and against breast milk, the HIV crisis, etc., which are doing the work that is driving this debate. Where you see fancy theories I see a series of contingencies.

The book's framing and this double ambivalence leaves me doubly puzzled. First, is my imagined monologue really what Swanson is after and what she intends for me to derive from this book? More often it feels as though she wants to engage with the taboo trades literature and add to it rather than to show that it is not the force behind the subjects she is interested in as a historian.

The second puzzle is exactly what she thinks that literature is about. And this may speak as much about me as a reader (although not atypical of many of the law readers who will be interested in the book) as it does about her as a writer: I think of this literature as much more complex than the mere questions about how to characterize goods like blood or sperm as gifts

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225. SWANSON, *supra* note 3, at 9.

226. *Id.*

or commodities. Instead, as I will describe in a moment, my own take on the debate is that it has many more moving parts.

The bad news is, I think the book suffers from an undertheorization of what this debate is all about that makes it harder to read this book as making a substantial contribution to the debate. In particular, I think Swanson often equivocates between the corporate form of the bank as for profit or nonprofit and the question of whether donors will or will not be paid. Those are two quite different questions, but much of the historical back and forth that is the subject of this book pertains to the first more than (or at least as much as) the second. One could imagine a book, perhaps framed as less interesting but more "pure" than this one, that focused on just that question—whether body banking should be a for-profit business or a nonprofit calling. Such a book would very nicely tie into what Swanson has to say about the ties of the swinging of the pendulum on banking to capitalism and communism. But one could have a not-for-profit bank that pays and a for-profit bank that does not (Swanson's discussion of Prolacta at the end of the milk-banking materials, for example[227]). This kind of book would go more into the history of the not-for-profit form, tax structures, and the gradual change of medicine from a public calling to its current state,[228] all of which are not subjects that Swanson spends much (or in some cases any) time engaging with.

The good news is that when the debate is understood in its full glory, this book has very important things to say about it. I will set out my own understanding of the terms of the debate in brief below and show how one can reconceptualize the materials Swanson has provided as speaking to the debate more fully.[229] To be fair, in the book's conclusion Swanson does begin to indirectly address some of these issues, but at 14 pages and covering a myriad of other topics (including some forms of body products that have not been the subject of her book, like organ sale) it feels like too little too late.

1. What Is the Commodification/Taboo Trades Debate Really About?—Swanson's account of the commodification/taboo trades literature

227. *See supra* notes 174–76 and accompanying text.

228. For a good recent summary on this last point, see Nicholas Bagley, *Medicine as a Public Calling*, 114 MICH. L. REV. (forthcoming 2015).

229. I have done so in greater depth in I. Glenn Cohen, *Regulating The Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS., no. 3, at 71 [hereinafter Cohen, *Organ Market*]. To be sure, for those uninterested in these debates the call for more theory might seem a bit like Christopher Walken's call for "more cowbell" from the band Blue Oyster Cult in the iconic Saturday Night Live skit. *Saturday Night Live* (NBC television broadcast Apr. 8, 2000). But I think it is called for in this case given that those interested in these debates are some of the most likely readers of this book.

seems a bit dated and a bit procrustean. My own work and that of many others writing in this literature suggests many more moving parts than the simple "Is it a gift? A commodity? Something in between?" framing that Swanson gives the debate early on. Instead, I think it is useful to break the debate down into constituent families of normative concerns. Here I borrow from work I have done elsewhere characterizing the various concerns in the context of selling organs, but the framework I have introduced is applicable to really all taboo trades discourse. There are four basic argument types, each of which has its own subargument types.[230]

> *a. Corruption.—*
>
> The basic idea behind what I have elsewhere called the "corruption" argument is that allowing the practice to go forward will do violence to or denigrate our views of how goods are properly valued. This argument is sometimes also labeled the "commodification" argument, but because that term is also used in a way that encompasses some of the other arguments I discuss below, I prefer the more specific label of "corruption."[231]

Sometimes the frame, for example as to selling organs, is that this would "dehumanize society by viewing human beings and their parts as mere commodities."[232]

> We can distinguish two subcategories of this objection, which I have elsewhere called "consequentialist corruption" and "intrinsic" corruption. "Consequentialist corruption" justifies intervention to prevent changes to our attitudes or sensibilities that will occur if the practice is allowed—for example, that we will "regard each other as objects with prices rather than as persons."[233] This concern is contingent and to be successful must rely on empirical evidence, in that it depends on whether attitudes *actually* change. By contrast, "intrinsic corruption" is an objection that focuses on the "inherent incompatibility between an object and a mode of valuation." The wrongfulness of the action is completed at the moment of purchase irrespective of what follows; the intrinsic version of the objection

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230. Much of this is freely borrowed (with permission) from Cohen, *Organ Market*, *supra* note 229, but I have omitted nearly all of the citations for brevity's sake and shortened the account where possible. Those who want the longer version and the citations may consult that prior work.

231. *Id.* at 73 (footnote omitted).

232. Council on Ethical and Judicial Affairs of the Am. Med. Ass'n, *Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors*, 155 ARCHIVES INTERNAL MED. 581, 581 (1995).

233. Cohen, *Organ Market*, *supra* note 229, at 74 (quoting Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 296 (1991)).

> obtains even if the act remains secret or has zero effect on anyone's attitudes.[234]

This is probably one of the most common critiques of selling body products one encounters in the literature. What is shocking about Swanson's account (in a good way) is how seldom this is the concern that is marshaled by opponents of the body banks in the history she presents. There are many things policy makers worry might be wrong with body banking, but at least in the story according to Swanson, this is not something they particularly wrestled with.

This suggests at least two possibilities: (1) the commodification/taboo trades literature is anachronistic in its emphasis on this concern and (2) the corruption objection entered the debate much later, or in the minds of theoreticians but not the actual decision makers or discourse as it unfolded. The second possibility is that the corruption concern is not transubstantive to various forms of body banking and, in part, its absence from Swanson's story is a result of the kinds of body banks she has in mind. It is worth emphasizing that blood, milk, and sperm are all renewable bodily resources in a way that solid organs are not. At least the first two may also be easier to view as severable and divorced from one's personhood in a way that, for example, solid organs and surrogacy are not. My own guess is that the second possibility seems more plausible, but Swanson's account and this dog that failed to bark therein raises the possibility that deeper engagement with the historical literature might be useful for commodification/taboo trades theorists.

One more observation on the corruption objection and Swanson's story: it is possible that some moments in the evolution of body banking had a form of exchange that was *less* problematic on the corruption objection. The early blood banks envisioned by Fantus and put into practice required in-kind payment (blood for blood) of debts, for as he put it, "[j]ust as one cannot draw money from a bank unless one has deposited some, so the blood preservation department cannot supply blood unless as much comes in as goes out."[235] It appears that the motivation for this version of the practice was not high-minded objections of corruption but the practical reality that it enabled cash-strapped hospitals to maintain ready supplies without payments.[236] Still, as I have argued elsewhere, on some

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234. *Id.* at 744 (footnotes omitted).

235. SWANSON, *supra* note 3, at 57 (internal quotation marks omitted).

236. *Id.* In a similar vein Swanson mentions the practice of one New Orleans bank in the post-War era that conceptualized itself as making "blood loans" that required to be paid in kind but could instead be repaid by a steep "replacement fee" if the borrower preferred. Was this just double talk to avoid thinking of oneself as selling blood, or is this in fact a meaningful distinction from the perspective of the corruption concern?

versions of the corruption objection it may be relevant whether trades are occurring within or without spheres of valuation (or if you prefer how wide to define the relevant sphere of valuation for the good) such that a my-blood-for-your-blood exchange may register as less corrupting than a my-blood-for-your-money exchange.[237]

b. Crowding Out.—

This claim has its roots in behavioral economic work on motivational crowding out, suggesting that, contrary to the classical economic model, allowing payment for goods may change its social meaning in a way that discourages altruistic giving. The crowding-out objection posits that permitting the sale of organs will decrease the supply of organs in some way. There are actually four somewhat distinct variants of the argument. One focuses on crowding out of donat[ion] [of the good] and claims that the number of [the good (sperm, milk, blood, organs)] donated *altruistically* will decrease if compensation . . . is permitted. A stronger claim is that sale will lead to "crowding out of overall [supply of the good]," such that the *total* [amount of the good], whether procured through altruistic donation or compensated donation, will go down—that is, the decrease in altruistic donations due to permitting a market will not be outweighed by an increase in [sale of the good]. Third . . . is the crowding out of quality [goods], when even if supply remains constant or increases, the [sold versions of the good] that become available will be of inferior quality, that is, diseased or unusable, as compared to those that are available in a [system] where compensation is prohibited. This objection might also hinge on the claim that methods of detecting poorer quality [versions of the good] are unavailable [(such as blood before the hepatitis test)], or if available are not feasible for financial or other reasons.[238] Such an

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237. Elsewhere I have argued:

> Limiting the form that compensation might take to, for example, MoreMarrowDonors.org-type scholarship funding, or organs received from the in-kind organ trading of organs that occurs in NEAD chains or simultaneous paired kidney exchanges discussed above, seem most likely to blunt the effect of consequentialist corruption. If one is convinced that these alternative benefits are part of the same or a closely allied "sphere" or "modes" of valuation as organs, these kinds of exchanges may have fewer attitude-altering effects than do exchanges for money.

Cohen, *Organ Market*, *supra* note 229, at 84 (footnote omitted).

238.

> As [Michele] Goodwin makes clear, Titmuss's claim about the blood supply was premised on a lack of technology to appropriately determine whether blood provided by individuals was diseased or not, but we now have the requisite technology for blood and certainly for organs. Further, Titmuss seemed to assume that it was

> argument might also point to the crowding out of one source of [the good] for another less good source, for example, crowding out living organ donation in favor of deceased organ donations. A final variant of the argument is less concerned with the effects on supply as such, but more about a kind of coarsening of sensibilities or "crowding out of opportunities for altruism or altruistic [f]eelings" more generally. Of course, this depends on a prior view that we care about motivation independent of its effects on supply, and also that that "altruistic" motivation is one we want to valorize.[239]

Here it is worth emphasizing two ways in which Swanson's account can interface with this more subtle understanding of what is considered problematic in the sale of body parts. First, there is hardly any concern expressed by the major players in her story as to the first two variants of the crowding-out objection, the crowding out of donated versions of the good or overall supply of the good. Again, for someone steeped in the theoretical rather than the historical literature on commodification/taboo trades, this is surprising, as one would expect this to be one of the major themes of opposition to the commercial banks for blood, milk, and sperm.

In part, the absence of this objection as a major part of the historical opposition may stem from what I think of as the way Swanson's account problematizes what I will call the "paradise lost" leitmotif in the commodification/taboo trades debate. The fable goes something like this:

> Once upon a time people were good, altruistic, and loved their neighbors. Exchanges were done out of a motivation of altruism, not for profit. Somewhere along the line we fell into sin, and we began selling that which "money can't buy." Sometimes we received our biblical retribution (the spread of hepatitis in the blood supply in the U.S., which worshipped filthy lucre unlike the U.K.!). More often the contamination was to our moral beings. Still there is hope. With the right regulation we can return to the halcyon days when exchanges were altruistic.

Am I having a bit of fun in characterizing the fable? Absolutely. No one really speaks in quite this way. But at the same time there is very much a romanticization and nostalgia that suffuses this literature about return to an earlier era. What Swanson's book does so nicely is show that body banks were very much "born in sin." For blood, most of the first providers for transfusion sold their blood instead of giving it away. Milk banking has

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> commercially supplied blood but not altruistically donated blood that provided the contamination risk; in fact, as Goodwin suggests, a good deal of the blood contamination of the 1980s was due to altruistic donation by gay men in an era before the HIV virus was widely known to be transmitted through blood transfusion.

Id. 75 n.14 (citation omitted).

239. Cohen, *Organ Market*, *supra* note 229, at 74–75 (footnotes omitted).

its origin in the wet nurse, who was invariably paid. Sperm banking has known almost nothing other than compensation for provision in the United States. The history is thus a more complicated one that zigs and zags between permitting and discouraging sale rather than a straight slouching towards Gomorrah.

Once this is understood, the baseline against which crowding out is measured becomes more tendentious. In some of the markets it appears as though sale is necessary to augment supply rather than the traditional story in which sale reduces supply. The story of the professional donor in blood that Swanson tells in Chapter 2 is that banks began to move off his having a major role because they could not keep up with demand but that professional donors were often still involved on the margins of the new model when supply was low. In the story of milk the tendency to sell versus altruistically donate milk and the organization of milk supply organizations seems to *follow* largely exogenous shocks in demand (movements towards or away from canned infant formula as a substitute for milk from lactating mothers).

By contrast to the first two crowding-out variants, the crowding out of quality instances of the good in favor of inferior ones *does* seem to be a predominant concern in the histories Swanson recalls. But from Swanson's account one can make two observations that, I think, upset the traditional story to some extent.

First, it is frequently the altruistically donated versions of the good that are the ones that carry the risks of disease or are otherwise low quality, not the sold versions. Swanson's review of the literature of the 1960s and 1970s shows that paid donors provided the most reliable blood supply, because they were often repeat donors and because the "best way to know if an asymptomatic supplier would transmit hepatitis was whether his or her blood had transmitted it before. Professional donors, as repeat suppliers, could therefore be considered 'clean' donors, tested in the most reliable way possible—after their first donation."[240] For sperm, the banking industry and its buying and selling of sperm enabled a robust disease-screening program and made it less likely to transmit HIV, which transformed semen "into a body product that *required* a bank for a safe exchange."[241] For milk, much of the contamination concern of the 1970s was from *donated* milk, as Swanson's research uncovers.[242]

Second, it seems as though Big Milk manipulated the narrative to suggest the very opposite—that, in the words of the executive director of

240. SWANSON, *supra* note 3, at 146.
241. *Id.* at 227.
242. *Id.* at 189.

the milk-banking association: women who sold milk "might be tempted to adulterate milk with either cow's milk or water to increase the volume and thus the amount earned" as a way of pushing against milk sale in favor of donation, as well as playing on gendered narratives of the woman who sold her milk as a bad mother who sold her own child's birthright.[243] Thus, far from being the real concern motivating public policy against sale for these substances, one can read Swanson's narrative as (at least in part) a story of rhetorical manipulation of the *seller* as the other—dirty, greedy, ill—with the *donor* being virtuous, selfless, clean; all this despite the fact that much of the contemporaneous science pointed in the other direction.

c. Coercion, Exploitation, Undue Inducement, and Justified Paternalism.—The third family of commodification/taboo trades arguments focuses on the harming or wronging of the seller. While there is some loose family resemblance between these four types of concerns, as I have argued elsewhere, they are often improperly run together and are quite distinct.[244]

> "Coercion" is the claim that poor sellers are improperly forced into selling [the good] by brokers or recipients who have no right to propose this, because the seller has no reasonable economic alternative. . . . In what is probably the leading bioethical account of the idea, Alan Wertheimer suggests that (to use a stylized framing) we imagine *A* proposing to *B*,
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> 1. If you do *X*, I will bring about or allow to happen *S*.
>
> 2. If you do not do *X*, I will bring about or allow to happen another state of affairs, *T*.
>
> Has *A* then coerced *B*? Wertheimer provides a two-pronged test for whether a proposal constitutes a coercive threat. The first part, which Wertheimer names the "choice prong," determines whether "*A*'s proposal creates a choice situation for *B* such that *B* has no reasonable alternative but to do *X*." Importantly, this prong does not ask whether *B* has *some* alternative to doing *X*, but rather whether the alternatives available to *B* are *acceptable* ones. Indeed, even in the mugger's demand "your money or your life" the victim has *some* choice, he can choose to surrender the money. Instead, the problem is that surrendering one's life is not an acceptable alternative to turning over one's money; it is too costly an alternative to complying with *A*'s demand. Rather than calling for an empirical determination that *B* has "no choice" but to do what *A* proposes, the choice prong

243. *Id.* at 193–94 (quoting Arnold & Borman, *supra* note 176, at 144).

244. COHEN, *supra* note 127, at 287; *see also* I. Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J.L. MED. & ETHICS 269, 273–79 (2013) [hereinafter Cohen, *Transplant Tourism*] (distinguishing these four types of concerns).

> requires a judgment as to whether the costs to *B* of not doing what *A* proposes are too high. What qualifies as an acceptable choice is an inherently normative determination. . . .
>
> [More importantly,] [f]inding that the person receiving the proposal has no acceptable choice is a *necessary* but not *sufficient* condition for finding coercion. Wertheimer gives the example of a surgeon who refuses to amputate a patient's leg for a fair price, but although the patient had no acceptable choice, we do not think the act morally problematic nor would we allow him to renege on the contractual obligation. This points us to the need for a second prong to find coercion, what Wertheimer calls the "proposal prong," which asks whether the proposal is one that A has or does not have a right to make. . . .
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> . . . .
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> Of course, what kind of proposals one does or does not have the right to make is itself an inherently normative inquiry. Wertheimer would incorporate a "moral" test to distinguish the two types of proposals, whereas legal scholars have suggested the existing law could also define what we do and do not have the right to propose.
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> . . . [I]n determining whether the proposal prong is met one must "distinguish between B's rights against other *individuals* and B's rights against the *society* or the state."[245]

Moreover, as Wertheimer notes, his approach leaves open the possibility of distinguishing "between B's background conditions for which A is not responsible and rights-violating threats to B's welfare which are specifically attributable to A."[246] This tracks, for example, the difference between demanding a "rescue fee" of a drowning person you stumble upon versus one you yourself pushed in the water.[247]

> Someone can be exploited if not coerced and coerced if not exploited. The concept of "exploitation" comes in several varieties, but the most prominent philosophical account distinguishes harmful from mutually advantageous exploitation—a distinction that turns on whether "both parties (the alleged exploiter and the alleged exploitee) reasonably expect to gain from the transaction as contrasted with the pretransaction status quo"—and consensual versus nonconsensual exploitation.

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245. Cohen, *Organ Market*, *supra* note 229, at 75–77 (quoting ALAN WERTHEIMER, COERCION 172, 218 (1987)) (footnotes omitted).

246. WERTHEIMER, *supra* note 245, at 219.

247. *See, e.g.*, I. Glenn Cohen, *Conscientious Objection, Coercion, the Affordable Care Act, and US States*, 20 ETHICAL PERSP. 163, 176 (2013) (discussing the importance of distinguishing cases of "taking advantage of someone's existing condition versus putting a person in a condition which you then exploit" (emphasis omitted)).

> To determine that *A* has wrongfully exploited *B*, philosophers usually stipulate that two requirements must be met: (1) *A* benefits from the transaction, (2) the outcome of the transaction is harmful (harmful exploitation) or at least unfair (mutually advantageous exploitation) to *B*, and *A* is able to induce *B* to agree to the transaction by taking advantage of a feature of *B* or his situation without which *B* would not ordinarily be willing to agree. Those opposing the [selling of body parts on this ground] will often suggest that even if consensual, [a sale] can wrongfully exploit the seller either because (1) the seller is ultimately harmed (harmful exploitation) by the transaction as compared to the pretransaction baseline, or more commonly (2) because the buyer induced the seller to sell at a given price by taking unfair advantage of the seller's poverty or other need, without which the seller would not have sold the organ.
>
> Although often labeled "exploitation," "undue inducement" is in fact a separate and in some respects, opposite concern about the sale. In the case of exploitation, the claim is that the seller is getting offered too little, a "raw deal," whereas undue inducement is the claim that they are being paid *too much*, the "offer too good to refuse," such that their autonomy is in some sense overwhelmed by the price offered and the decision is (again in some sense) less than voluntary.
>
> All three of these concerns are to be contrasted with opposition to . . . sale as a form of "justified paternalism." Such arguments seek to protect [the] seller[s] from making the "wrong" decision. Typically, these arguments look to see whether purported consent to sell . . . is really consensual in a more robust sense of the term. That is, they think whatever formal consent the seller gives, be it contractual or otherwise, falls short because it is involuntary, uninformed, or otherwise invalid because the seller lacks competence or capacity . . . . These arguments would forbid what appears to be a voluntary transaction by pointing to at least one of these defects in the consent process and by the presence of anticipated harm to the seller.[248]

In this Review I am not seeking to evaluate these arguments—work I have done elsewhere. Instead I want to ask: what role do these four argument types play in the historical story Swanson tells? Again, the answer is that they play a surprisingly small role. It is surprising since these concerns—all related to the welfare and autonomy of the provider of the

248. Cohen, *Organ Market*, *supra* note 229, at 78.

good or service (blood, milk, sperm)—are a predominant fixture of the commodification/taboo trades literature.

Again, one possibility is that the kinds of risks that worry theorists in this debate—be they the physical risks of organ transplantation[249] or the risks of emotional labor and self-repressing in the case of surrogate mothers[250]—are simply not present in the markets that Swanson is discussing. That may be true for blood and milk (replaceable unlike organs), but the case of sperm seems to at least be tempting as a target for these kinds of emotional risks: one might think that as with surrogacy there is a real worry that the sperm donor is called on to minimize or repress the significance and emotional attachment to his genetic contribution and ordinary fatherhood relationship as kind of a dehumanization of someone who has merely masturbated into a cup on a fixed weekly schedule. Now it may be that the gendered narrative—mothers are to be attached to their children, fathers only sperm suppliers—historically overcame the impulse towards this kind of critique. That is a possibility, but one for which there is not enough evidence in this book to make a real judgment. In any event, here would be a place where one wishes Swanson had really developed the history of egg provision as a comparison group to sperm, since there you have both the emotional risks and some of the physical risks (such as ovarian hyperstimulation syndrome).[251] This would help us to better understand why this argument does or does not manifest in her narrative on sperm.

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249. For summaries of these four concerns as directed to organ sale, see Cohen, *Transplant Tourism*, *supra* note 244, at 274–78.

250. *See, e.g.*, Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 81 (1990) ("[T]he surrogate industry . . . requir[es] the mother to engage in a form of emotional labor. . . . [S]he agrees not to form or to attempt to form a parent-child relationship with her offspring." (footnote omitted)).

251. Scholars argue:

> It is wrong to leave people vulnerable to the harms of unregulated trade in human eggs (whether intra or transnational)—these harms . . . include: the commercialization and commodification of reproduction and the exploitation of children, women, and men (hence, the prohibition on the sale of eggs and restrictions on reimbursements); violations of autonomy (hence, the consent requirements); and risks to human health and safety including the risk of transmission of disease (hence, the controls on distribution, use, and importation).

Jocelyn Downie & Françoise Baylis, *Transnational Trade in Human Eggs: Law, Policy, and (In)Action in Canada*, 41 J.L. MED. & ETHICS 224, 232 (2013) (footnotes omitted). For discussion of the risks to women who provide eggs, see AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 15–18 (2011), *available at* https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf, *archived at* http://perma.cc/QAE6-SWVF.

What's more, although she does not entirely tie it together in this way,[252] one might argue that not only are these kinds of arguments dogs that did not bark in the true history of the buying and selling of these substances in the United States, but in fact there is evidence in the historical record to suggest that many of these concerns were actually checked by the real facts about the populations doing the selling.

The professional donor of the 1920s was often a family man trying to make some extra income on the side during the Depression rather than a desperate person going from blood sale to blood sale (though some of the stories Swanson tells of poor men donating and then drinking after payment in the era *before* this one may cut the other way). Far from being paid too little, some of the 1920s blood sellers Swanson writes about were making thousands of dollars for selling their blood[253]—suggesting no exploitation but perhaps increasing concern about undue inducement, if that was a form of taboo trades concern that one thought was persuasive. In the 1950s, the blood sellers were not (or it would appear from Swanson's account not predominantly) poor homeless men seeking to do what they could to afford shelter or a hot meal but included, for example, the Greenleafton Reformed Church of Preston, Minnesota, whose members sold blood and raised $27,000 to rebuild its church.[254]

The story of milk banking is even more interesting in this regard in that it is a story of sellers of progressive social mobility. The wet nurse much more resembled the figure of this element of the commodification/taboo trade concern, "an unwed mother or an otherwise desperate, impoverished immigrant woman and, in Boston, frequently Irish Catholic."[255] But the xenophobic tendencies of the wealthier women who employed them and the desire to keep them out of their households ultimately propelled the development of milk banking, which in turn

252. She does briefly address exploitation in one paragraph in the conclusion, noting that "[w]hile offering money for blood at midcentury did attract the economically marginal and for-profit middle men who may have taken advantage of some donors, it also attracted carloads of rural Minnesotans, who chose to sell their blood to buy a new church organ . . . . For some, blood selling was seen as preferable and more protective of a sense of dignity and self-worth than panhandling for survival." SWANSON, *supra* note 3, at 246. What the reader interested in these debates really wants to know is not that there were many kinds of sellers, but which kinds predominated—i.e., were most sellers poor men whose other choice was panhandling or not?

253. *Id.* at 42–43.

254. *See supra* note 99 and accompanying text. My own view is that the notion that we are paying individuals too much is the weakest critique of selling body parts. I would much rather pay them too much and let them reap a windfall that they can use to self-insure against future psychological and health consequences than pay them nothing, as is often the case in the soft forms of "coercion" or "exploitation" that occur based on the demands of family members. This latter form leaves the donor to bear all the risk themselves. For more of my thoughts on this, see generally Cohen, *Organ Market*, *supra* note 229, at 88–91.

255. SWANSON, *supra* note 3, at 21.

resulted in a seller of much higher SES. Instead of poor immigrants as wet nurses, the history shows sellers of milk to the banks were married women living relatively comfortably and using the sale of their milk as a way to get extra side money for niceties just beyond their financial grasp. Again, if there is a concern it appears to be undue inducement and not exploitation—recall the Detroit woman who reportedly earned $3,500 during fourteen months of lactating and used it to purchase a home,[256] well above the average annual earning of all employees (male or female) at the time.[257] The 1950s milk-banking period far from demonized the women who demanded payment or considered them victims of exploitation; rather, the milk-banking industry refused to allow women to go without payment and paid even those who "disavowed a monetary motivation," noting that "rather than spending their milk payments on necessities, these mothers were investing their earnings in savings bonds for their children."[258] It is only starting in the 1990s that the concern for undue inducement or justified paternalism really appears in force: the view being that we ought not to pay women for their milk, for fear that "infants whose mothers would sell their milk might be deprived of their own birthright to that milk."[259] In the hands of commercial players in the market like Prolacta, this appears to be a relatively strategic deployment of the argument: far from the paying for milk being exploitative of women, the industry is exploiting gendered narratives of female altruism to get women to donate their milk, on which it then makes profit.

Swanson has less to say about the SES of sperm donors at the dawn of sperm banking or during its development. What I know from other work is that the eugenic impulses of those who want to buy sperm often push against recruiting sperm donors from the dregs of society; instead, for much of the history of the practice, the predominant American donors were college and medical-school students looking to make extra money in some of the United States's most prestigious university towns, where banks often locate themselves.[260]

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256. *See supra* note 138 and accompanying text.

257. SWANSON, *supra* note 3, at 37.

258. *Id.* at 171.

259. *Id.* at 193–94 (quoting Lois D.W. Arnold & Laraine Lockhart Borman, *What Are the Characteristics of the Ideal Human Milk Donor?*, 12 J. HUM. LACTATION 143, 144 (1996)).

260. *See, e.g.*, Pino D'Orazio, *Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination*, 2 J. HEALTH & BIOMEDICAL L. 249, 265 n.69 (2006) (acknowledging the "common use of medical students" in sperm donation); Anetta Pietrzak, *The Price of Sperm: An Economic Analysis of the Current Regulations Surrounding the Gamete Donation Industry*, 14 J.L. & FAM. STUD. 121, 132 (2012) (recognizing the impulse to "forum-shop" for sperm banks "near prestigious four-year universities to have a better likelihood of obtaining sperm from dedicated and intelligent donors").

d. Unfair Distribution.—

> A final set of arguments concerns "unfair . . . distribution" [of the good to those who would have received the good in a counterfactual] state of the world where sales are not permitted. There is some relationship between this and the crowding-out arguments discussed above, but the two are independent in that the *supply* of the [good] could *increase* due to permitting sale and yet the *distribution* of [the good] could change in a way that makes the distribution *less just*. . . . [T]hose who would have received the [good] if the system did not permit compensated sale [(i.e., only allowed donation) have lost out and] have been made worse off, even if many more now receive [the good] because of the system change that permits compensation.[261]

Here again I think Swanson has missed an opportunity to make some interesting points about the role of this concern and the history of these types of banks. In sperm banking it appears entirely invisible, as no one laments all those who cannot afford purchased sperm but might receive it in an altruistic market—again this may be because all things being equal, sperm is relatively cheap, at least as compared to buying eggs.[262]

In milk there is a social transformation from a largely private fee-for-service or good form of distribution in wet nursing and early milk banking to a much more distributive-justice-focused approach, wherein both the donating of milk and the management of that donated milk are very self-consciously aimed at helping women of all socioeconomic strata. As milk banking became a high society charitable occupation in the 1940s,[263] I think Swanson is spot on that there was a real transformation from notions of private to civic property. As she points out in the conclusion to the book, the industry on occasion actually used price discrimination as a tool of redistribution in that it charged "some patients over market rates in order to charge others under market rates,"[264] though without more details one wonders how the industry managed to maintain this given how one would usually expect economics to work.

In blood, the pendulum has swung back and forth as to the distribution concern. In Swanson's account blood banking was born of true in-kind exchange, gave rise to cash-for-blood exchange, became much more of a civic property in the Second World War, then ultimately rebounded towards more private property with the country's skepticism of communism, until

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261. Cohen, *Organ Market*, *supra* note 229, at 79, 95.

262. For discussion of pricing on sperm, see, for example, Cohen & Coan, *supra* note 200, at 717.

263. *See supra* note 156 and accompanying text.

264. SWANSON, *supra* note 3, at 250.

safety concerns and fear of the other ultimately moved us against blood sale.

Swanson does a terrific job of charting these back and forths, but I think she obscures an important point—the distributional concern (or in her words the conceptions of private versus civic property) have as much to do with the for-profit versus not-for-profit nature of the blood-banking industry over time as they do with the buying of blood from sellers by that industry. That is, you could (and did) have purchased blood that was distributed without payment according to need, and you could have donated blood that was sold to those who could pay. This echoes a point I have made in other work on buying and selling organs—you can have mixed systems where organs are sold to a centralized buyer, but the allocation criteria are based on principles of justice and not ability to pay. Iran is (at least in theory) an instance of such a system; the government buys organs monopolistically and then distributes them according to principles of just allocation instead of selling them.[265]

To put the point another way: if one of Swanson's main theoretical fulcrums is private versus civic property in the body, might the selling versus donating by individuals to the banks be orthogonal, or at least something of a red herring to the issue? What appears to really matter is the internal organization of the bank and its system of distribution, which is separate from how it acquires the body property to begin with.

All this is to give, in some ways, this book a backhanded compliment in terms of the commodification/taboo trades debates: Swanson's book and the histories she uncovers have a lot to say about this debate. In particular, the book potentially problematizes some of these debates' stock figures and stock arguments as ahistorical fictions or at least oversimplifications of more complex truths. But because the book takes an overly narrow view of what that debate is about, one has to do a fair amount of excavating to bring these histories into dialogue with the book, which is something I have tried to do here.

D. Gender

In many parts of the book Swanson does a terrific job of discussing the way in which racial narratives and fears of mixing affect the way in which blood banks are constructed and organized differently in different parts of the United States and across time. She has comparatively rich material on gender (and perhaps even intersectionality between race and gender in her historical research, though less of it is marshalled) scattered throughout the

265. *E.g.*, Cohen, *Organ Market*, *supra* note 229, at 82.

book, but she misses an opportunity to more deeply examine the ways in which various body banks reinforce but also subvert gender narratives over time.

The professional "donor" of blood of the 1920s and 1930s was really the professional "man," and blood sale was associated with masculinity (he could suffer the perpetually poor arm), virility, and providing for one's family.[266] As Swanson herself points out, though, at the same time women *were* selling body parts in significant numbers, only it was milk and not blood.[267] Why did the early banking industry eschew women's blood when it sought their milk? By contrast, when we get to the war years these narratives of virility drop out and instead it is the duty of every patriotic man and *woman* to become a blood donor; no less an authority than *Vogue* magazine runs a story of a woman giving blood as her husband is drafted to fight so they could both do their part.[268] Was it mere necessity, changing views of women's work (such as female entry into the work force), or changing views about what blood donation was really about that opened up these possibilities for women? Or was it the fact that the World War II form of blood banking, with its emphasis on altruism rather than selling, conflicted less strongly with a meta-narrative of women as altruistic—but if so, why did that narrative not win out in the early days of milk selling? How did women's role as blood providers on equal footing with men mesh with their other more gendered role in the war years, that of the "Gray Ladies" who volunteered with the Red Cross and acted like hostesses for the men who would donate to add a "feminine touch"?[269] What are we to make of Swanson's nods to attempts to "add a little sexual spice" to blood donation, such as the newspaper story about the women working at the Jacksonville blood bank titled "They Call Themselves Lady Draculas," and the American Blood Bank's attempts to publicize their business as "thousands of women out for your blood"?[270]

On the milk side, the gender story is equally complex. It begins with immigrant wet nurses who are on the one hand depicted as victims of financial circumstances at the lowest rung of society but on the other hand are also clearly viewed as workers for whom it would be unthinkable to expect pure altruistic milk provision. Milk banking then becomes a way for married women and others of higher SES to make a little extra money on the side, increasingly in the comfort of their own home, but again with a

266. SWANSON, *supra* note 3, at 39, 43–44.

267. *Id.* at 39.

268. *Id.* at 75.

269. *Id.* at 78.

270. *Id.* at 115 (quoting Patricia McCormack, *Women Are Out for Your Blood*, CHI. DAILY DEFENDER, Mar. 22, 1965, at 18).

strong expectation of payment. It is only later in its history that the assumption of altruism seeps in, when the industry is transformed into a charitable undertaking by society women. Intriguingly, in Swanson's account it was the feminist movement that nurtured the milk-banking industry just as it seemed poised to fade away, but it was the same movement that pushed the absence of payment as being the liberating aspect. Lois Arnold pushed women into milk donation at her Honolulu bank by describing breast-feeding as giving women a feeling "of triumph and enormous power" of "expressing our femininity in the most elemental of ways" but also suggesting that the same power could be had by *donation*, which "allowed her to multiply this 'triumphant feeling as a reward when there are no monetary rewards to be had.'"[271] Was this a true expression of a major strand of feminist thinking at the time or a crass attempt to manipulate a narrative to better sustain a business model if the input was free? Was this an attempt to liberate women or instill a false consciousness that united motherhood, altruism, and feminism? Certainly towards the end of Swanson's account Big Milk seems to glom on to this strategy, depicting the women who would seek to sell their milk as "bad mothers," selling away their child's birthright, adulterating and cheating for a profit unlike the noble good mothers who are willing to quietly donate—and in the case of the for-profit Prolacta, help the industry to ever more profits.

When it comes to sperm and egg, Swanson's account on the egg side is far too short to really say anything meaningful about the role of gender in this market, though others have provided more to chew on.[272]

In these last few paragraphs I have tried to do what Swanson did not: draw together the scattered threads of the role of gender in her stories, juxtapose them, and press on hard questions of exactly what was going on and why. I have a lot of questions. I wish Swanson had drawn more on her rich and detailed historical knowledge to say more about the way in which the story of body banking in America is or is not a story of gender or perhaps parallel stories of the banking of different genders.

IV. Conclusion

All those critiques said, I want to end this Review where I started: This book is an important, well-written, extremely well-researched volume. It is

271. *Id.* at 185 (quoting Lois Dimon Williams Arnold, Donor Human Milk Banking: Creating Public Health Policy in the 21st Century (Feb. 28, 2005) (unpublished Ph.D dissertation, Union Institute and University)).

272. For example, see ALMELING, *supra* note 153.

a must read for anyone seriously interested in the debates about taboo trades and commodification. While admittedly it does not always go where I would want it to go in terms of coverage of kinds of banks and in terms of engagement with theory, what it does do it does exceedingly well, and Swanson is to be commended for providing us with this important work.

Notes

Fraud on the Classroom: Why State False Claims Acts Are Not the Solution to All Fraud on State and Local Governments*

Introduction

In his memoirs Benjamin Franklin wrote "there is no kind of dishonesty, into which otherwise good people more easily and frequently fall, than that of defrauding [the] government."[1] Although Franklin penned this in the nineteenth century, if the billions of dollars recovered under false claims acts over the past five years are any indication, the statement still resonates today. In fact, in light of the modern prevalence of fraud in public-education data reporting—ranging from altered attendance rosters to erased answers—Franklin might have penned instead that "there is no kind of dishonesty into which otherwise good *educators* more easily and frequently fall than that of defrauding the government."

This Note explores the development and the effectiveness of state false claims acts as tools to combat fraud on state and local governments, concentrating on their usefulness in the context of fraud in public-education data reporting. Part I of this Note will examine the growth in the enactment of state false claims acts as a result of the success of the federal False Claims Act (FCA) and the Deficit Reduction Act of 2005. Part II focuses on how the qui tam structure of false claims acts encourages fraud reporting, scholarship about which regulatory mechanisms best promote whistle-blowing, and other factors influencing the effectiveness of monetary rewards. Part III begins by surveying the prevalence of fraud in public-education data reporting and then evaluates the ability of state false claims acts to combat this type of fraud on state governments and their political subdivisions, concluding that this application demonstrates that state false claims acts are not equally effective at addressing all types of fraudulent behavior.

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1. 2 BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 460 (Philadelphia, McCarty & Davis 1834).

I. Growth of the State False Claims Acts

Since 2009, the federal government has recovered $17 billion in judgments and settlements under the civil False Claims Act.[2] The success of the FCA, along with legislative incentives, has prompted over 50% of states to enact their own general- or limited-purpose false claims acts.[3] In this Note, a general-purpose false claims act is defined as one that is coterminous with the FCA, while a limited-purpose false claims act is limited in scope to a particular type of fraud, such as healthcare or Medicaid funds only. This Part surveys the FCA and then catalogs the growth of state and local false claims acts.

A. Overview of the Federal False Claims Act

The FCA was originally enacted in 1863 to help fight defense-contractor fraud during the Civil War.[4] Generally, the FCA creates civil liability for "persons" who knowingly present a false or fraudulent claim for payment to the government or knowingly make a false statement that is material to a false or fraudulent claim for payment to the government.[5] Liability also exists for, *inter alia*, a reverse false claim: making a false or fraudulent statement to reduce an obligation to pay money to the government.[6] The most common sectors for recoveries under the FCA are in connection to defense procurement and health-care fraud.[7] However, cases are not uncommon in

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2. Press Release, U.S. Dep't of Justice, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013) [hereinafter Fiscal Year 2013 Press Release], *available at* http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html, *archived at* http://perma.cc/43RV-A653.

3. *See infra* note 31 and accompanying text.

4. Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458 (1998) ("The Civil War revived interest in the qui tam action due to the inability of the federal government to effectively police defense contractor fraud."). For example, defense contractors made fortunes off of army contracts by providing "for sound horses and mules, spavined beasts and dying donkeys." 1 FRED ALBERT SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861–1865, at 55–56 (1965) (quoting Robert Tomes, *Fortunes of War*, HARPER'S MONTHLY MAG., July 1864, at 227, 228).

5. 31 U.S.C. § 3729(a) (2012). Some circuits also explicitly recognize liability under variations of an implied certification theory, which holds that when a claimant submits a claim for payment, the claimant implies compliance with federal laws and regulations material to the government's decision to pay. *See generally* Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CALIF. L. REV. 227, 231–32 (2013) (comparing the approaches to implied certification of different federal circuits). Criminal liability for false claims to the government also exists under 18 U.S.C. §§ 287, 1001 (2012).

6. 31 U.S.C. § 3729(a)(1)(G).

7. *2013 Year-End False Claims Act Update*, GIBSON DUNN 12–15 (Jan. 8, 2014), http://www.gibsondunn.com/publications/Documents/2013-Year-End-False-Claims-Act-Update.pdf, *archived at* http://perma.cc/3K87-A2DA. For example, in the 2013 fiscal year, the government recovered $2.6 billion from health-care fraud, including claims involving pharmaceuticals, medical devices, and Medicare and Medicaid reimbursements and $887 million from defense procurement fraud, primarily consisting of claims involving defense contractors. *Id.*

other areas of federal activity, including higher education and the financial-services industry.[8] Suits cannot be filed under the FCA against states because they are not considered "persons" under the statute,[9] but suits can be filed against incorporated municipalities on behalf of the federal government.[10] Some lower courts that have addressed whether school districts and charter schools can be subject to suit under the FCA have found that they are "persons," like municipal governments and are not protected by sovereign immunity.[11]

A suit under the FCA can be initiated by the Attorney General or by a private citizen on behalf of the government.[12] When a suit is brought by a private citizen, the suit is known as a qui tam action and the private citizen who files the suit is known as a relator.[13] Qui tam actions began in England in the thirteenth century to allow any individual to enforce any law by bringing suit against other private citizens.[14] Because of the lack of central prosecuting or police authority, such actions were also common in the United States during the American Revolution.[15] These "informer actions," however, fell out of use at the beginning of the twentieth century because of decreased need for private prosecutions.[16]

In order to bring suit as a private citizen under the modern FCA, the allegations in the complaint cannot be based on publicly disclosed information unless the private citizen is the "original source" of the

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8. *See, e.g.*, Press Release, U.S. Dep't of Justice, Four Student Aid Lenders Settle False Claims Act Suit for Total of $57.75 Million (Nov. 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-civ-1307.html, *archived at* http://perma.cc/ZH2-2KUW (announcing a settlement with four student-loan lenders relating to improper interest-rate subsidies from the Department of Education); Press Release, U.S. Dep't of Justice, Pittsburgh-based Bank to Pay U.S. for Failing to Engage in Prudent Underwriting Practices on SBA Loan Guarantees (Jan. 25, 2013), *available at* http://www.justice.gov/opa/pr/2013/January/13-civ-109.html, *archived at* http://perma.cc/TAY8-9CWD (announcing a settlement under the FCA relating to loans issued by the bank and guaranteed by the Small Business Administration).

9. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787–88 (2000).

10. Cook Cnty., Ill. v. United States *ex rel.* Chandler, 538 U.S. 119, 134 (2003).

11. *E.g.*, United States v. Minn. Transitions Charter Sch., Civil No. 12–1359, 2014 WL 4829081, at *12 (D. Minn. Sept. 29, 2014).

12. 31 U.S.C. § 3730 (2012).

13. A qui tam action is defined as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government . . . will receive." BLACK'S LAW DICTIONARY 1444 (10th ed. 2014).

14. Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 909–10 (2002).

15. *Id.*

16. *See id.* at 910–11 (asserting the decreased need for private prosecution as one factor that lead to the lessened use of qui tam actions). For a detailed discussion of the factors that explain the waning of qui tam actions, including the subsidence of revenge as a religious value and abuse of the informer system, see *id.* at 911–15.

information.[17] However, the Patient Protection and Affordable Care Act, passed in 2010,[18] carved out an exception to the public disclosure bar if the government consents by filing a motion opposing the dismissal.[19] When the complaint is filed by a private citizen, the case is initially kept under seal for at least sixty days while the government has the opportunity to review the case and decide whether to intervene or not.[20] To keep the complaint under seal for longer than sixty days, the government can move for an extension.[21]

The FCA encourages private citizens to file suit on behalf of the government by statutorily entitling relators to a bounty (i.e., a percentage of any recovery).[22] What percentage of a recovery the relator is entitled to depends on if the Department of Justice (DOJ) intervenes in the case.[23] If the government intervenes, the relator is entitled to 15%–25% of any recovery; however, if the government does not intervene, the relator may still litigate the case to judgment on behalf of the government and is entitled to 25%–30% of any recovery plus reasonable attorneys' fees and costs.[24] These bounties are often substantial because the FCA provides treble the proven damages sustained by the government.[25] For example, whistle-blowers received approximately $167.7 million as their portions of civil settlements in a recent

17. An original source is defined as:

> [A]n individual who either (1) prior to a public disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. § 3730(e)(4)(B).

18. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered titles of U.S.C.).

19. 31 U.S.C. § 3730(e)(4)(A); *see* David M. Nadler & Justin A. Chiarodo, *The Public Disclosure Bar: New Answers and Open Questions*, PROCUREMENT L., Fall 2011, at 1, 16–17 (describing the ability of the government to oppose dismissal under the public disclosure bar as "particularly troubling, as the new language does not include express limitations (or guidance)").

20. 31 U.S.C. § 3730(b)(2).

21. *Id.* § 3730(b)(3).

22. *Id.* § 3730(d). In 2013, private citizens earned over $345 million in rewards under the FCA. Fiscal Year 2013 Press Release, *supra* note 2.

23. If the government intervenes, the value of the case increases substantially. *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1693 (2013) (noting that "most qui tam recoveries come where DOJ has intervened while most cases in which DOJ declines to intervene end in dismissal").

24. 31 U.S.C. § 3730(d)(1)–(2).

25. *Id.* § 3729(a)(1). However, damages can be reduced to two times the amount of damages the government sustained in certain cases of self-reporting. *See id.* § 3729(a)(2) (allowing a court to reduce damages if the court finds the individual (1) reported the false claims within thirty days, (2) fully cooperated, and (3) no criminal or administrative proceedings were pending at the time of the initial report). In addition to treble damages, a statutory penalty of $5,000–$10,000 is assessed for each violation of the FCA. *Id.* § 3729(a).

case brought against drug manufacturers for submitting fraudulent requests for payment to federal health-care programs.[26]

By providing strong financial incentives for private citizens to report misbehavior, the FCA aims to combat fraud on the federal government.[27] Accordingly, almost 90% of new matters under the FCA in 2013 were initiated by private citizens,[28] which represented a record-setting number of qui tam actions.[29] In fact, the success of the FCA in recent years has not gone unnoticed by local and state governments: between 2009 and 2012, fifteen states enacted new false claims acts to combat fraud at state and local levels.[30]

B. State and Local False Claims Acts

Currently, twenty-nine states and several municipalities have some form of false claims act legislation.[31] The growth in state false claims act legislation has been driven by the financial success of the FCA and, at the state level, has been reinforced by Congress, which passed legislation in 2006 that provided a greater share of any recovery to the state if the state had a qualifying Medicaid false claims statute in place.[32]

Generally, state false claims act statutes have the same basic features of the FCA, like a qui tam structure and cash bounties, and share the

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26. Press Release, U.S. Dep't of Justice, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), *available at* http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html, *archived at* http://perma.cc/5REF-CT62.

27. In addition to offering monetary incentives, the FCA also provides retaliation protection to individuals who report violations of the FCA. 31 U.S.C. § 3730(h)(2). The retaliation protections provide that a whistle-blowing employee is entitled to reinstatement, double the amount of back pay, and reasonable attorneys' fees and costs. *Id.*

28. *See Fraud Statistics*, U.S. DEP'T OF JUSTICE (Dec. 23, 2013, 2:42 PM), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf, *archived at* http://perma.cc/LD4-ERWR (reporting that 753 out of 846 new matters in 2013 were initiated by private citizens).

29. *See id.* (reporting that 753 qui tam actions were filed in 2013).

30. Geoffrey Christopher Rapp, *States of Pay: Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 67 (2012).

31. *See States with False Claims Acts*, TAXPAYERS AGAINST FRAUD EDUC. FUND, http://www.taf.org/states-false-claims-acts, *archived at* http://perma.cc/DHT2-CT33 (listing California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin); *e.g.*, CHI., ILL., MUNICIPAL CODE § 1-22-030 (American Legal Publishing Corporation through council journal of Sept. 10, 2014); N.Y.C., N.Y., ADMIN. CODE § 7-804 (West, Westlaw through Local Law 113 of 2013); PHILA., PA., CODE § 19-3603 (American Legal Publishing Corporation through Feb. 1, 2015).

32. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031, 120 Stat. 4, 73–74 (2006) (codified at 42 U.S.C. § 1396h (2012)) ("[I]f a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.").

fundamental purpose to discourage fraud on the government.[33] However, the statutory schemes of these jurisdictions are far from monolithic—significant differences exist regarding the scope of qui tam provisions,[34] the coverage of non-Medicaid claims,[35] the ability to bring claims on behalf of political subdivisions,[36] and the reward incentive structures.[37] Notably, New York City's False Claims Act even sets a threshold value for the amount in controversy by requiring that the cumulative value of the false claim exceeded $25,000.[38] Jurisdictions also have varying degrees of experience pursuing civil false claim prosecutions: while California has had a false claims act in place since 1987,[39] Georgia did not enact a general-purpose false claims act until twenty-five years later in 2012.[40]

With significant differences in the statutory schemes and available enforcement resources between states,[41] states have experienced various levels of success—as measured by financial recoveries. On one hand, Hawaii recovered only $4 million through its general-purpose false claims act from 2000 to 2004.[42] On the other hand, Texas recovered over $348 million from

33. *See* James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 478–79 (2005) (reviewing nineteen states with some type of false claim statute and finding that, of the nineteen statutes surveyed, thirteen contain qui tam provisions and provide relators with some share of the recovery obtained).

34. *E.g.*, *compare* DEL. CODE ANN. tit. 6, § 1204(d) (2013) (allowing the party bringing suit to proceed in the name of the government), *with* MO. ANN. STAT. §§ 191.905(14) (West Supp. 2015), 191.907 (West 2011) (providing 10% of any recovery to the original source but not allowing the source to proceed on the state's behalf).

35. *E.g.*, *compare* GA. CODE ANN. § 23-3-121 (Supp. 2014) (creating liability for any false claim, except relating to state taxes, to the state or local government), *with* TEX. HUM. RES. CODE ANN. § 32.039 (West 2013) (creating civil liability for false or fraudulent Medicaid claims only).

36. *E.g.*, *compare* MONT. CODE ANN. § 17-8-402(3) (2013) (defining governmental entity to include "a city, town, county, school district, . . . or other political subdivision of the state"), *with* VT. STAT. ANN. tit. 33, § 141 (Supp. 2014) (creating liability only for false claims to state and federally funded assistance programs).

37. *E.g.*, *compare* CAL. GOV'T CODE § 12652(g)(3) (West 2011) (entitling the relator to 25%–50% of any recovery if the state does not intervene), *with* IOWA CODE ANN. § 685.3(4)(b) (West Supp. 2014) (entitling the relator to 25%–30% in the same situation). In the past, some states have also required the suit to be dismissed if the Attorney General declined to intervene. *See* Barger et al., *supra* note 33, at 487 (noting that as of 2005 Texas required the suit to be dismissed if the government did not join the lawsuit).

38. N.Y.C., N.Y., ADMIN. CODE § 7-804(d) (West, Westlaw through Local Law 113 of 2013).

39. 1987 Cal. Legis. Serv. 1420 (West) (codified at CAL. GOV'T CODE § 12650 (West 2011)).

40. 2012 Ga. Laws 127 (codified at GA. CODE ANN. § 23-3-120 (Supp. 2014)).

41. *See, e.g.*, Barger et al., *supra* note 33, at 481–82 (noting that only two jurisdictions had specific budget items to fund qui tam investigations and only five provided for civil investigative demands); Pamela Bucy et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 CARDOZO L. REV. 1523, 1537–38 (2010) (reporting the results of a survey of investigative resources for qui tam cases by state).

42. Barger et al., *supra* note 33, at 485.

2006 to 2012 under the Texas Medicaid Fraud Prevention Act,[43] recovering $61 million in a single settlement with Johnson & Johnson in 2012.[44]

Generally, suits brought under state false claims act have been concentrated in the health-care and procurement sectors like suits under the FCA.[45] But beyond these sectors, state false claims acts have the ability to address fraud in areas that are not reached by the FCA because there are no federal dollars at issue. For example, Florida recently intervened in and settled a qui tam action for $28 million against the Bank of New York Mellon for overcharging a state pension fund for currency exchanges.[46] In another recent example, the Massachusetts attorney general filed a case under the Massachusetts False Claims Act against a contractor for creating and submitting false employee records to the state for school construction projects.[47]

Some states have even used their false claims acts to attempt to avoid sharing Medicaid-based recoveries with the federal government by limiting monetary demands to statutory penalties. For example, instead of joining in the national settlement by the DOJ with a drug manufacturer, Arkansas pursued its own litigation in state court.[48] In the litigation, Arkansas chose to forgo demands for actual damages in favor of the statutory fine per violation[49] and, before the verdict was reversed on other grounds, Arkansas

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43. JACK MEYER ET AL., TAXPAYERS AGAINST FRAUD EDUC. FUND, FIGHTING MEDICAID FRAUD IN TEXAS 9 (2013), *available at* http://www.taf.org/Texas-Report-3-18-13.pdf, *archived at* http://perma.cc/GV2Q-3CVP. As of February 4, 2013, Texas's recoveries surpassed $400 million. Press Release, Office of the Att'y Gen. of Tex., Texas Attorney General's Medicaid Fraud Recoveries Surpass $400 Million Mark (Feb. 4, 2013), *available at* https://www.texasattorneygeneral.gov/oagnews/release.php?id=4287, *archived at* http://perma.cc/8T47-Q2U4.

44. Press Release, Office of the Att'y Gen. of Tex., Statement Regarding Final Agreed Judgment in State's Medicaid Fraud Case Against Johnson & Johnson (Mar. 27, 2012), *available at* https://www.oag.state.tx.us/oagNews/release.php?id=4008, *archived at* http://perma.cc/4AC6-5UP5.

45. *See, e.g.*, Merle M. DeLancey et al., *State False Claims Act Enforcement Explodes in 2014*, LAW360 (May 29, 2014, 7:56 PM), http://www.law360.com/articles/542555/state-false-claims-act-enforcement-explodes-in-2014, *archived at* http://perma.cc/M4C-MGVN (reporting on the recent expansion of state false claims acts suits, especially in the healthcare and contracting sectors, as well as the similarity between trends in state false claims acts and the FCA).

46. Press Release, Office of the Att'y Gen. of Fla., Attorney General Pam Bondi Announces $28 Million Settlement with Bank of New York Mellon (Nov. 1, 2013), http://www.myfloridalegal.com/newsrel.nsf/newsreleases/B342E613410013CA85257C160065FCD8, *archived at* http://perma.cc/63NE-YYFK.

47. Press Release, Office of the Att'y Gen. of Mass., AG Coakley Sues New Hampshire Drywall Company for Allegedly Misclassifying Workers on Construction Projects (May 16, 2014), http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-05-16-universal-drywall-lawsuit.html, *archived at* http://perma.cc/M5P4-UJWF.

48. Jef Feeley, *J&J Gets $1.2 Billion Arkansas Risperdal Verdict Tossed*, BLOOMBERG (Mar. 20, 2014, 1:23 PM), http://www.bloomberg.com/news/2014-03-20/j-j-gets-1-2-billion-arkansas-risperdal-verdict-tossed.html, *archived at* http://perma.cc/92LX-YEBB.

49. Second Amended Complaint at 16, State *ex rel.* v. Ortho-McNeil-Janssen Pharm., Inc., No. 07-15345 (Ark. Cir. Ct. filed Sept. 15, 2011).

maintained that the federal government was not entitled to any share of the recovery.[50]

The explosive growth of state false claims acts suggests a belief that the schemes are the answer to all fraud on state governments and their subdivisions;[51] however, although a state false claims act may technically be available to address activities not reached by the FCA, the question remains whether qui tam provisions can effectively address all types of fraud that occur at the local and state level.

II. Motivations for Reporting Illegality

To be able to evaluate the effectiveness of a state false claims act at addressing fraud, it is necessary to first consider why and how qui tam provisions promote whistle-blowing.[52] This Part reviews the theoretical underpinnings of false claims acts with qui tam structures before examining research on the effectiveness of different reporting mechanisms.

The qui tam structure relies on private individuals to report misconduct and attempts to prompt reporting through the use of substantial monetary

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50. *See* Orthro-McNeil-Janssen Pharm., Inc. v. State, 2014 Ark. 126, at 1–2 (stating that the court would not reach the company's argument that the attorneys' fees were incorrect because they did not include the federal share of the judgment); Ellyn L. Sternfield, *After Arkansas Supreme Court Reverses $1.2 Billion Medicaid False Claims Verdict, Will State Attorneys General Rethink the Use of Private Counsel?*, JDSUPRA (Mar. 26, 2014), http://www.jdsupra.com/legalnews/after-arkansas-supreme-court-reverses-1-39691/, *archived at* http://perma.cc/3F92-FVSZ (summarizing the litigation in Arkansas and explaining how state false claims acts can be used to avoid recovery sharing with the federal government). Arkansas's position, however, appears in conflict with a 2008 Department of Health and Human Services directive. CTR. MEDICAID & STATE OPERATIONS, U.S. DEP'T OF HEALTH & HUMAN SERVS., SHO 08-004, STATE FALSE CLAIMS ACT AND REFUND OF FEDERAL SHARE 1–2 (2008), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO08004.pdf, *archived at* http://perma.cc/93AJ-3UF6; *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., UPDATED OIG GUIDELINES FOR EVALUATING STATE FALSE CLAIMS ACTS 3 (2013), *available at* https://oig.hhs.gov/fraud/state-false-claims-act-reviews/, *archived at* https://perma.cc/4ZXG-HHTA (stating that "[i]f a State obtains a recovery as a result of a State action relating to false or fraudulent claims under the State Medicaid program, it must share the recovery with the Federal Government in the same proportion as the Federal medical assistance percentage").

51. *See* Dean A. Calloway & Dan M. Silverboard, *The Georgia Taxpayer Protection and False Claims Act*, 65 MERCER L. REV. 1, 17 (2013) (concluding that Georgia's false claims act will be a "powerful weapon" to attack fraud in state-funded programs); Michael J. Davidson, *VFATA: Virginia's False Claims Act*, 3 LIBERTY U. L. REV. 1, 13, 14 (2009) (predicting that the Virginia False Claims Act will "provide a financial disincentive that discourages companies and individuals from defrauding the government" and have "enormous potential to deter fraud in state-funded programs"); David G. Wirtes, Jr. & Donald P. McKenna, Jr., *Taking Control: How a False Claims Act Will Allow Alabama to Stop the Leeching of Its Treasury*, 31 AM. J. TRIAL ADVOC. 545, 558 (2008) (advocating the adoption of a state false claims act because the statute would "combat and deter fraud" against Alabama by financially penalizing wrongdoers).

52. In this Note, effectiveness is measured by the statute's ability to encourage those with qualifying "insider information" to come forward to report fraud. Other authors have looked to different measures of effectiveness, like deterrence of false claims, the amount of recovery, the number of cases filed, or a cost–benefit analysis. Bucy et al., *supra* note 41, at 1539–40.

incentives. Monetary incentives are meant to "tip the cost–benefit scale facing a potential whistleblower."[53] On one side of the scale, ethical concerns favor reporting the fraud, while on the other side of the scale, loyalty, concerns for social ostracism from the group, retaliation in the form of termination and harassment, and other social and professional costs favor staying silent.[54] Research shows that those who report misconduct (and their families) experience significant long-term costs, such as stress-related mental and physical health problems, reputational harms, and economic hardship.[55]

In addition to offsetting the pressures against reporting fraud, monetary rewards also enhance publicity and serve a facilitation function. Large monetary rewards attract positive media attention, which in turn reduces stigmatization of whistle-blowers.[56] Likewise, the prospect of financial recovery encourages plaintiffs' lawyers to take on and investigate qui tam cases.[57] A successful private plaintiffs' counsel often receives a combination of court-awarded attorneys' fees and a negotiated portion of the relator's recovery—depending on the agreement with the client.[58] These incentives attract lawyers "who possess both the skill and resources to handle complex, time-consuming, and expensive cases"[59] by compensating them for the risk of extensive investigatory preparation required by FCA suits.[60]

A qui tam structure also benefits the government by allowing private citizens, who have lower monitoring costs due to their insider position and greater access to relevant information, to perform oversight functions that would otherwise be the responsibility of the government.[61] For example: "A knowledgeable insider can point investigators to key records and witnesses, interpret technical or industry information collected during an investigation, provide expertise, and explain the customs and habits of the business or

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53. Rapp, *supra* note 30, at 59.

54. *Id.*; *see also* Bucy, *supra* note 14, at 970. As Pamela Bucy observes:

> The possibility of a large financial recovery may help persuade insiders to risk what they must to reveal information . . . . Perhaps more significantly, because of our status-conscious society, large financial awards help validate that whistleblowing is worthy. Monetary rewards for whistleblowers who "do the right thing" by coming forward enhance the societal value of loyalty to the larger community.

Bucy, *supra* note 14, at 970.

55. Bucy, *supra* note 14, at 948–58.

56. *Id.* at 971.

57. *See* Rapp, *supra* note 30, at 60 (noting that lawyers have little incentive to represent plaintiff whistleblowers without the prospect of bounties).

58. Barger et al., *supra* note 33, at 476.

59. *Id.*

60. Bucy, *supra* note 14, at 972.

61. *See* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1821–22 (1996) ("Due to greater familiarity with, and understanding of, the contractor's activities, contractor employees ordinarily can identify and assess relevant information at a lower cost than external government observers.").

industry."[62] And, in situations where the fraud also implicates an equally complicated cover-up, anecdotal experience indicates that insiders may be even more valuable.[63] Moreover, a qui tam structure mitigates concerns for agency capture by placing oversight ability and authority in multiple entities.[64]

However, although the qui tam structure is designed to incentivize reporting, recent scholarship has suggested that the presence of financial incentives does not necessarily increase reporting behavior in all situations. In a 2010 study, Yuval Feldman and Orly Lobel collected data to measure how different types of regulatory mechanisms influenced fraud reporting behaviors.[65] The different regulatory mechanisms included in the experiment were: a legal duty to report, retaliation protection, financial rewards, and liability fines.[66] The results indicated that offering financial rewards generally increased levels of reporting but was counterproductive in situations where the nature of the fraud triggered a strong ethical response, creating high internal motivation.[67] Instead, in situations triggering a strong ethical response, creating a duty to report the fraud or offering retaliation protection was more likely to encourage reporting behavior.[68] The explanation Feldman and Lobel offered for this finding was that financial rewards commoditize reporting behavior and simultaneously minimize internal, ethical motivations to report the fraud.[69] Thus, the presence of extrinsic rewards "crowds out" intrinsic motivation.[70] For this reason, Feldman and Lobel concluded that creating a duty to report and offering protection from retaliation are the most effective regulatory mechanisms in

62. Bucy, *supra* note 14, at 943–44.

63. *See, e.g.*, *id.* at 946–47 (describing a specific example of health-care fraud on the federal government and implying that no one but the employee who was forced to participate in the cover-up had access to the relevant information).

64. Kovacic, *supra* note 61, at 1824 ("Allowing [qui tam] suits by government employees such as auditors and inspectors may reduce the likelihood that individual employees will be captured or corrupted by firms they oversee."); *see also* Bucy, *supra* note 14, at 947 ("Sometimes regulatory agencies are part of the cover-up because they are compromised, or simply because they are ineffective. In these instances the publicity that whistleblowers can generate may be the only way to reveal the concealment.").

65. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEXAS L. REV. 1151, 1154, 1210 (2010). The study measured "the value individuals attach to different types of regulatory mechanisms in deciding whether to react to illegality within their work environment" by presenting subjects with hypothetical situations and asking the subjects to evaluate the readiness of the employee to report the wrongdoing. *Id.*

66. *Id.* at 1154.

67. *Id.* at 1155.

68. *Id.*

69. *Id.*

70. *Id.* "For instance, paying people in return for their blood might lead donors to view the event as a transaction rather than a charitable act, thereby eroding altruistic blood donations." *Id.* at 1179.

situations that evoke moral outrage because they are less likely to be perceived as forms of external motivation.[71]

Other scholars have looked to situational factors and personal characteristics as valuable indicators of the effectiveness of monetary rewards. For example, some studies have found that younger individuals and individuals with low self-esteem are more likely to "be more susceptible to financial incentives."[72] In studies focused on workplace whistle-blowers, research suggests that "[d]isgruntled employees are more likely to engage in whistleblowing than other employees"[73] and that subordinate status and shorter lengths of employment are correlated with positive responses to financial incentives.[74] Others have concentrated on gender as a salient predictor of fraud reporting, finding that men are more likely than women to be influenced by a sizeable monetary reward.[75]

Accordingly, although the traditional understanding of how qui tam structures encourage fraud reporting remains largely intact, social-psychological research suggests that the effectiveness of this structure must be evaluated in terms of both the specific context of the behavior that the regulatory mechanism is designed to address and the characteristics of the targeted informants. In other words, "policy design must take a more nuanced approach that integrates the moral dimension of the situation."[76]

III. Fraud in Public Education

Given this understanding of the complex behavioral motivations of those who report fraud, state false claims acts may have a marginal impact on uncovering certain types of fraud on state governments and their subdivisions. This means state false claims acts may be far from the panacea that the flurry of state legislative and enforcement activity suggests.[77] Specifically, this Part argues that misrepresentation of student achievement data in the public-education context is one type of fraud that state false claims acts are poorly designed to address. This Part begins by cataloguing the prevalence of fraud in the public-education context, focusing on

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71. *Id.* at 1195.

72. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 295 (1992).

73. Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1907 (2007).

74. *See* Callahan & Dworkin, *supra* note 72, at 296 (noting that supervisors and long-term employees are likely to report fraud without additional incentives).

75. Orly Lobel, *Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems*, 54 S. TEX. L. REV. 37, 49 (2012).

76. Feldman & Lobel, *supra* note 65, at 1207. For a general discussion of moral criticisms of the FCA's use of financial incentives, see Thomas L. Carson et al., *Whistle-Blowing for Profit: An Ethical Analysis of the Federal False Claims Act*, 77 J. BUS. ETHICS 361 (2008).

77. *See supra* Part I.

misrepresentation of data, then examines whether state false claims acts can adequately address this type of fraud.

A. Manipulation of Data as a Form of Fraud in Public Education

Data manipulation by educators on standardized performance measures—such as achievement test scores,[78] graduation rates,[79] and attendance data[80]—is regularly uncovered or alleged in public schools. Between 2009 and 2014 achievement test cheating was documented in thirty-nine states and Washington, D.C.[81] These reports ranged from centralized, district-wide schemes to transfer out low-performing students to individual incidents of a single teacher providing test answers.[82] In a 2013 Government Accountability Office survey of state officials, officials in forty states reported cheating allegations in the previous two school years, and officials in thirty-three states reported confirmed cheating.[83]

For example, in 2013 thirty-five Atlanta Public School educators, including the district superintendent, were indicted under Georgia's state

78. *See* Motoko Rich & Jon Hurdle, *Erased Answers on Tests in Philadelphia Lead to a Three-Year Cheating Scandal*, N.Y. TIMES, Jan. 23, 2014, http://www.nytimes.com/2014/01/24/us/erased-answers-on-tests-in-philadelphia-lead-to-a-three-year-cheating-scandal.html, *archived at* http://perma.cc/DAU2-L5GX (reporting teacher-led test cheating from 2009 to 2011 in Philadelphia schools); Paul Takahashi, *State Investigation Finds Cheating at Las Vegas Elementary School*, LAS VEGAS SUN, Apr. 16, 2014, http://www.lasvegassun.com/news/2014/apr/16/state-investigation-finds-cheating-las-vegas-eleme/, *archived at* http://perma.cc/AS4D-F3TW (reporting that a state investigation found that teachers at a local elementary changed student answer documents but could not determine which teachers).

79. *See infra* notes 95–98 and accompanying text. In fact, when the same El Paso Independent School District associate superintendent moved to a neighboring district, an audit alleged that he texted a school coordinator, ordering him to figure out a way to "fix" the limited English-proficient student graduation rate. Hayley Kappes, *TEA Audit Uncovers Cheating at Canutillo ISD*, EL PASO TIMES, Mar. 10, 2013, http://www.elpasotimes.com/newupdated/ci_22754892/state-auditors-canutillo-isd-administrators-guilty-cheating-students?source=pkg, *archived at* http://perma.cc/Y4U5-SQ3R.

80. *See* Jennifer Smith Richards, *Auditor: Four More School Districts Rigged Student Data*, COLUMBUS DISPATCH, Feb. 12, 2013, http://www.dispatch.com//content/stories/local/2013/02/11/Auditor_reports_on_scrubbing.html, *archived at* http://perma.cc/46GG-NTVM (acknowledging that "nine districts improperly withdrew and re-enrolled students . . . to remove their test scores and absences from calculations used by the state").

81. Bob Schaeffer, *Confirmed Cases of Test-Cheating*, FAIRTEST (Mar. 14, 2014), http://fairtest.org/sites/default/files/CheatingReportsList.pdf, *archived at* http://perma.cc/6T8G-TMF4.

82. *See* Wilford Shamlin III, *Two Principals Charged in School Cheating Scandal*, PHILA. TRIB., Sept. 25, 2014, http://www.phillytrib.com/news/article_b81ba1d4-10ac-57ea-9e9a-0b142ed50c62.html, *archived at* http://perma.cc/9BJN-YFWB (reporting that a grand jury investigation found that two principals had created and distributed answer keys for the state exam); Bob Schaeffer, *50+ Ways Schools "Cheat" on Testing: Manipulating High-Stakes Exam Scores for Political Gain*, FAIRTEST (July 7, 2014), http://fairtest.org/sites/default/files/Cheating-50Ways SchoolsManipulateTestScores.pdf, *archived at* http://perma.cc/9RX7-EL7E.

83. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-495R, K–12 EDUCATION: STATES' TEST SECURITY LEADING PRACTICES 3 (2013).

racketeering law for "conspir[ing] to either cheat, conceal cheating or retaliate against whistle-blowers in an effort to bolster [standardized test] scores for the benefit of financial rewards associated with high test scores."[84] A report by special investigators appointed by the governor's office[85] catalogued systemic cheating that impacted thousands of students.[86] The investigators identified 178 educators, including principals, at 44 different schools involved in the cheating.[87] In fact, 82 of these educators eventually confessed to their involvement.[88]

The methods employed by the educators to manipulate the results of the state's standardized assessment included holding "parties" where staff erased students' incorrect answers and filled in the correct answers,[89] altering seating charts to facilitate student copying,[90] verbally telling students the correct answers,[91] and previewing test content and then reviewing targeted material with students before the exam.[92] These schemes often involved elaborate planning: one teacher confessed to using a razor blade to open the plastic wrap surrounding the test booklets, making copies of the exams, and then resealing the plastic wrap with a lighter.[93]

Unfortunately, the breadth of this scheme is not unique to Atlanta. During the 2009 school year, administrators in the El Paso Independent School District actively worked to prevent migrant students from taking the state's tenth-grade academic assessment in order to artificially inflate tenth-grade scores on the state exam.[94] For example, the district director of secondary schools sent an e-mail to "priority" schools explaining that all students transferring from out-of-country schools should be placed in the

84. Press Release, Office of the Fulton Cnty. Dist. Att'y, Grand Jury Indicts 35 in Connection with Atlanta Public Schools Cheating Scandal (Mar. 29, 2013), *available at* http://www.fultonda.org/pr_032913-1.php, *archived at* http://perma.cc/SD5Q-Z9DF.

85. Press Release, Office of the Governor of Ga., Governor Perdue to Appoint Special Investigator to Dig into CRCT Irregularities in Dougherty, Atlanta Schools (Aug. 18, 2010), http://sonnyperdue.georgia.gov/00/press/detail/0,2668,78006749_161911047_162210290,00.html, *archived at* http://perma.cc/AY6X-3GW9.

86. MICHAEL J. BOWERS ET AL., GA. OFFICE OF THE GOVERNOR, 1 CRCT INVESTIGATION REPORT 2 (2011).

87. *Id.*

88. *Id.*

89. *Id.* at 61.

90. *Id.* at 18, 128.

91. *Id.* at 152, 154.

92. *Id.* at 18.

93. *Id.* at 22. Another teacher detailed her elaborate signaling scheme; telling a student to review an answer meant the answer was incorrect, while later walking away from the same student meant the answer was now correct. *Id.* at 119–20.

94. STATE AUDITOR'S OFFICE, 13-047, AN AUDIT REPORT ON THE TEXAS EDUCATION AGENCY'S INVESTIGATION OF THE EL PASO INDEPENDENT SCHOOL DISTRICT 6 (2013) [hereinafter TEA AUDIT REPORT].

ninth grade.[95] "Priority" schools were schools at higher risk of failure due to previously missed federal accountability measures.[96] Another e-mail from an associate superintendent reminded school officials to keep these specific students in ninth grade regardless of the number of credits they earned during the year.[97] Ultimately, the superintendent admitted that, beginning in 2006, he directed employees to improperly reclassify students and change passing grades to failing grades in order to manipulate the tenth-grade data.[98] The implementation of these directives effectively resulted in false and fraudulent information regarding the demographics of tenth-grade populations.

Overall, the incidents in Atlanta and El Paso represent two of the most prominent and pervasive cases of data manipulation in recent history and are unfortunately representative of broader trends in education.[99]

B. The Alignment of State False Claims Acts with Data Manipulation

The events in Atlanta and El Paso, as misrepresentations that caused the misallocation of government resources and fraudulent payments, are forms of fraud that a false claims act would ideally address and that a qui tam structure would be well suited to uncover. However, a deeper evaluation—in light of recent scholarship—suggests these forms of fraud would be minimally deterred by a state false claims act.

1. Why in Theory State False Claim Acts Could Appropriately Address Data Manipulation.—To begin, empowering those with insider knowledge to take action through external legal mechanisms, e.g., a false claims act with a qui tam structure, would be theoretically well-suited to the context of data manipulation due to the school districts' conflicts of interest. School districts are not incentivized to diligently investigate their own data integrity programs because the districts themselves are beneficiaries of the misrepresentations.[100] In other words, when allegations of data manipulation come to light, district officials are motivated to ignore what no one wants to see in the first place. This conundrum was aptly summarized by a testing expert:

> There is typically little to no incentive for anyone to take threats to test security seriously. . . . Educators are happy when test scores go

95. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., EL PASO INDEPENDENT SCHOOL DISTRICT'S COMPLIANCE WITH THE ACCOUNTABILITY AND ACADEMIC ASSESSMENT REQUIREMENTS OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, at 15 (2013).

96. *Id.* at 2.

97. *Id.* at 16. These students would then be automatically promoted to eleventh grade, bypassing accountability testing. *Id.*

98. *Id.* at 12.

99. *See supra* notes 81–83 and accompanying text.

100. TEA AUDIT REPORT, *supra* note 94, at 11 (acknowledging that a main deficiency of the Texas Education Agency's investigation into El Paso ISD was reliance on the district's own investigation although the district faced significant conflicts of interest).

> up; parents are happy when their children do well; students are pleased when they are declared to be 'proficient'; the public is assuaged when all schools appear to be increasing learning.[101]

Additionally, the lower governmental monitoring costs associated with social policing are particularly attractive in public education. With state education budgets at record lows,[102] a qui tam structure decreases governmental monitoring costs by placing some oversight responsibilities outside of the state and its political subdivisions.[103] This in turn makes more funds available for direct instructional services.

2. Why in Reality State False Claim Acts Would be Minimally Effective.—Although the previous section outlines several reasons why a state false claims act could theoretically be well-suited to uncovering data manipulation, other considerations suggest such legislation would be minimally effective at ferreting out this type of fraud. This section will address two main categories of considerations: (a) the scope of state false claims act coverage and (b) reporting behaviors.

a. Depending on the nature of the fraud underlying the suit and the structure of the suit, many cases of data manipulation would likely fall outside the scope of a general-purpose false claims act.—If the fraudulent behavior underlying the suit is manipulation of attendance or demographic data, whether a suit could be brought on behalf of the state against a school district or an individual would depend on the state's education funding formula. Falsifying attendance or demographic data would have to be considered fraudulent statements material to a claim for payment in order to be within the scope of the statute.[104] This would mean that some portion of state funding to the district would have to be dependent on the manipulated metric. But even if this is true, a suit against the district—as opposed to a suit against the individuals who knowingly reported the false information, e.g., teachers, clerks, or district administrators—would likely raise concerns about whether a school district could be subject to liability.

Whether a district can be subject to liability often turns on the text and judicial construction of the state's false claims act. For example, the California Supreme Court held that public school districts are not "persons"

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101. M.B. Pell, *More Cheating Scandals Inevitable, as States Can't Ensure Test Integrity*, ATLANTA J.-CONST., Sept. 29, 2012 (quoting Greg Cizek), http://www.ajc.com/news/news/more-cheating-scandals-inevitable-as-states-cant-e/nSPqj/, *archived at* http://perma.cc/KZ63-R9AV.

102. *See* MICHAEL LEACHMAN & CHRIS MAI, CTR. ON BUDGET AND POLICY PRIORITIES, MOST STATES FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION 1 (2014) (reporting that, on average, states are providing less funding per pupil than in years past).

103. *See supra* note 61 and accompanying text.

104. 31 U.S.C. § 3729(a) (2012).

under the California False Claims Act.[105] The court reasoned that the legislature did not intend public-school districts to be subject to suit because public entities were not included in the text of the statute and because the state's sovereign powers would be impinged by liability.[106] The court specifically rejected the line of reasoning of lower courts that "no government agency has the power, sovereign or otherwise, knowingly to present a false claim."[107] Instead, the court emphasized that:

> School districts must use the limited funds at their disposal to carry out the state's constitutionally mandated duty to provide a system of public education. . . .
>
> . . . If found liable under the [Act], . . . [s]uch exposure, disproportionate to the harm caused to the treasury, could jeopardize a district financially for years to come. It would injure the districts' blameless students far more than it would benefit public fisc, or even the hard-pressed taxpayers who finance public education.[108]

On the other hand, the court found charter schools and charter-school networks could be subject to suit because, under California law, charter schools are considered nonprofit public-benefit corporations that are nongovernmental in nature and without "sovereign significance."[109] Moreover, courts in other states have engaged similar logic to reach the opposite conclusion. For example, charter schools are *not* subject to suit under Minnesota's false claims act because charter schools are treated like school districts in other areas of Minnesota law.[110] Thus, the ability to bring suit against a district if the fraudulent behavior underlying the suit is manipulation of attendance or demographic data is generally contingent on the text of the respective statute and the structure of the public-school system in the state.

In contrast, if the fraudulent behavior underlying the suit is the manipulation of student achievement data, whether a suit could be brought against individuals would depend on the use of performance pay in the

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105. Wells v. One2One Learning Found., 141 P.3d 225, 229 (Cal. 2006). In the same proceeding, the court also held that charter schools are "persons" under the California False Claims Act. *Id.* The potential liability of charter schools under state false claims acts raises some interesting issues, especially given the proliferation of accusations of fraud at some charter schools; however, the topic is beyond the scope of this Note.

106. *Id.* at 238–40.

107. *Id.* at 238 (quoting LeVine v. Weis, 68 Cal. Rptr. 2d 439, 442 (Cal. Ct. App. 1998)) (internal quotation marks omitted).

108. *Id.* at 239.

109. *Id.* at 244.

110. *See* United States v. Minn. Transitions Charter Sch., Civil No. 12–1359, 2014 WL 4829081, at *14 (D. Minn. Sept. 29, 2014) (concluding that because the "charter school statute treats charter schools the same as school districts for purposes of tort liability," charter schools should be considered "political subdivisions" under Minnesota's false claims act).

district, as well as how the performance pay is funded.[111] First, to fall within the scope of the state's false claims act, some portion of the teacher's salary would have to be dependent on the manipulated metric. This pay structure is commonly known as incentive or performance pay.[112] If the incentive pay was state funded with the funds administered by the district, a qui tam action could be brought regardless of whether the state's false claims act allowed suits on behalf of political subdivisions because the funds would still be traceable to the state. On the other hand, if the incentive pay was entirely locally funded by the district, a qui tam action could only be brought if the state's false claims act allowed suit on behalf of political subdivisions.[113]

Accordingly, only a limited category of fraudulent behavior would be clearly covered by a state false claims act: suits against individuals for the manipulation of student achievement data in school districts with specific performance-based pay structures.[114]

b. Even in the limited category of scenarios where data manipulation would be covered by a state false claims act, the effectiveness of the qui tam structure would likely be dampened by the financial rewards at issue.—First, the small financial rewards at issue in a typical data-manipulation situation would be less effective at facilitating representation by attracting qualified counsel. For example, consider the following hypothetical: there are thirty teachers at one campus in a school district where the average incentive-pay award is $5,000 per teacher. If each of these teachers' incentive-pay awards would have been zero except for data manipulation by one administrator, the administrator potentially caused $5,000 in fraudulent statements material to false claims to be made to the school district for every teacher on campus. In other words, the maximum damages to the school district from the administrator's actions would be $150,000. Trebled, this would be $450,000.

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111. The possibility of a suit under a state false claims act against a school district for falsified test scores is not considered because the author is unaware of any state school funding formula that incorporates this metric.

112. Incentive pay refers to teacher compensation systems that are based on teacher performance metrics, such as student academic growth, teacher evaluations, and performance reviews. *See* BROOKE DOLLENS TERRY, TEX. PUB. POLICY FOUND., PAYING FOR RESULTS: EXAMINING INCENTIVE PAY IN TEXAS SCHOOLS 25–27 (2008) (elaborating on the merits of these compensation systems).

113. For example, bringing suit on behalf of a school district would be feasible under Montana's false claims act. *See supra* note 36.

114. For example, Houston Independent School District uses a performance-pay system that takes into account value-added analysis and student achievement data for individual teacher performance and campus-wide group performance. *2012–2013 ASPIRE Award Program Payouts Frequently Asked Questions*, HOUS. INDEP. SCH. DISTRICT (Jan. 22, 2014), http://static.battelleforkids.org/documents/HISD/ASPIRE_Award_Payment_FAQs.pdf, *archived at* http://perma.cc/R5ZB-BX7S. For work performed during the 2012–2013 school year, the district distributed over $18.2 million through this performance-pay system. *Id.* The average award for core-subject teachers was $4,465. *Id.*

If a qui tam act action was brought and a court awarded the highest statutory percentage allowed, the relator's award would be $150,000. Notably, this amount is *de minimis* when compared with the multi-million-dollar relator awards in prominent qui tam judgments or settlements, even though the hypothetical assumes manipulation of *every* metric for *every* student at the school and that, but for the manipulation, each merit bonus would have been zero. Additionally, as an individual defendant, the administrator is more likely to be judgment proof than a corporate qui tam defendant. Accordingly, the effectiveness of one of the integral features of a false claims act—the cash bounty—is likely diminished in this context.

A more significant concern about the effectiveness of state false claims acts against data manipulation in public education arises out of social-psychological research on monetary rewards.[115] If manipulating student data is the type of fraud that elicits a strong ethical response, then according to Feldman and Lobel's research, reporting behavior may actually be discouraged by the existence of a monetary reward for the relator.[116] And, it is not difficult to imagine that fraud by public educators would elicit strong moral outrage: beyond the abuse of a position of trust, the actions of the educator harm the very children the educator is employed to help. For example, a student whose test scores are artificially inflated may be denied access to the appropriate intervention services (based on inaccurate scores) and thus denied the opportunity to make legitimate academic gains.[117]

Feldman and Lobel, however, studied fraud reporting in general—not specifically the filing of qui tam actions under false claims acts.[118] Some scholars have questioned whether the fact that the monetary reward in a qui tam action must be aggressively pursued is a basis for distinction.[119] Also,

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115. *See supra* notes 52–60 and accompanying text.

116. *See supra* notes 65–71 and accompanying text. Districts that have been at the center of recent cheating scandals may spend millions of dollars on remediation programs in an attempt to remedy these harms. *See, e.g.*, Kim Severson & Alan Blinder, *Test Scandal in Atlanta Brings More Guilty Pleas*, N.Y. TIMES, Jan. 6, 2014, http://www.nytimes.com/2014/01/07/education/test-scandal-in-atlanta-brings-more-guilty-pleas.html?_r=0, *archived at* http://perma.cc/HQ69-4X6W ("The 50,000-student district could end up spending more than $6 million offering remedial instruction to thousands of students.").

117. *See* Kathleen Foody, *Defense Attorneys' Opening: Clients Targeted by Ex-Atlanta Schools Colleagues in Cheating Case*, U.S. NEWS & WORLD REP., Sept. 29, 2014, http://www.usnews.com/news/us/articles/2014/09/29/defense-prosecutors-preview-school-cheating-cases, *archived at* http://perma.cc/BG22-AXA8 (recounting an anecdote prosecutors emphasized during opening statements about a child who was denied extra help for a learning disability because her falsified scores disqualified her); Michael Winerip, *Ex-Schools Chief in Atlanta Is Indicted in Testing Scandal*, N.Y. TIMES, Mar. 29, 2013, http://www.nytimes.com/2013/03/30/us/former-school-chief-in-atlanta-indicted-in-cheating-scandal.html?pagewanted=all, *archived at* http://perma.cc/5M4X-54FY (reporting that, due to falsified test scores, one school in Atlanta lost $750,000 in aid funds meant to provide academic support to struggling students).

118. Feldman & Lobel, *supra* note 65, at 1187–88.

119. Callahan & Dworkin, *supra* note 72, at 294. Callahan and Dworkin had abstractly considered that nonfinancial incentives might be "preferable motivators in some, and perhaps many,

because Feldman and Lobel only studied the effect of high rewards ($1,000,000) and low rewards ($1,000), more data is needed on the effect of interim reward values.[120] Personal characteristics, like gender or seniority level, of those most likely to be aware of the fraudulent data may also dampen the effectiveness of financial rewards in the public education context.

Overall, these considerations show that state false claims acts may have a negligible influence on discouraging data manipulation in public education, suggesting that state false claims acts are not a miracle cure to all fraud on state governments and their subdivisions.

Conclusion

In the two-hundred years since Benjamin Franklin's death, a lot has changed within America. Unfortunately, the prevalence of fraud on the government has not. In light of the success of the FCA, jurisdictions have recently rushed to enact their own false claims acts to combat fraud; however, an analysis of the ability of these statutes to reach fraud in public-education data reporting indicates that false claims acts may not effectively reach and discourage a major type of fraud perpetrated against state governments and their subdivisions. In this respect, these schemes deserve an "I" for incomplete.

—*Marianne W. Nitsch*

circumstances because of the relationship between extrinsic rewards and intrinsic motivation" but concluded that the effectiveness of the FCA would only be "minimally affected" by its focus on monetary rewards. *Id.* at 286–94.

120. Feldman & Lobel, *supra* note 65, at 1210–11.

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Somebody's Watching Me: Civilian Oversight of Data-Collection Technologies*

Introduction

Technology has provided police departments with powerful tools to collect extensive data on private citizens. Those tools have captured images of every license plate passing through an intersection;[1] used facial-recognition technology to determine whether Super Bowl attendees had criminal records;[2] and implemented multi-technology systems that "aggregate[] and analyze[] information from approximately 3,000 surveillance cameras around the city . . . ."[3] New technologies allow police departments to collect a range of data on the public space, including private citizens not under investigation, raising concerns regarding how that data may be used in the future.[4] And as storage and database capabilities have become cheaper and more efficient, the potential for expansive databases has become not only a science-fiction trope[5] but a reality.[6]

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1. AM. CIVIL LIBERTIES UNION, YOU ARE BEING TRACKED: HOW LICENSE PLATE READERS ARE BEING USED TO RECORD AMERICANS' MOVEMENTS 4–6 (2013) [hereinafter YOU ARE BEING TRACKED], https://www.aclu.org/files/assets/071613-aclu-alprreport-opt-v05.pdf, *archived at* http://perma.cc/GAP8-SDYE.

2. Vickie Chachere, *Biometrics Used to Detect Criminals at Super Bowl*, ABC NEWS (Feb. 13, 2001), http://abcnews.go.com/Technology/story?id=98871, *archived at* http://perma.cc/QLG3-U8DK.

3. I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 961 (2013).

4. *See, e.g.*, John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA TODAY, June 13, 2014, http://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/, *archived at* http://perma.cc/KG8V-W6MD ("Armed with new technologies, including mobile devices that tap into cellphone data in real time, dozens of local and state police agencies are capturing information about thousands of cellphone users at a time, whether they are targets of an investigation or not . . . .").

5. *See generally* ORIN S. KERR, USE RESTRICTIONS AND THE FUTURE OF SURVEILLANCE LAW, BROOKINGS INST. (2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/4/19%20surveillance%20laws%20kerr/0419_surveillance_law_kerr, *archived at* http://perma.cc/7WNJ-C9RB (discussing the hypothetical establishment of a federal surveillance system in the near future).

6. *See* Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 437 (2012) (noting that the Automated Biometric Identification System already contained records of "over 139 million

But despite potential, these new tools fit poorly within the current regulatory framework. Police departments have embraced the information age with little guidance or oversight, raising significant privacy concerns regarding the effect of mass-data collection on the privacy rights the general public has enjoyed for centuries.[7] At the same time, current regulatory mechanisms have not adequately addressed how police departments should use cutting-edge surveillance technologies.[8] Such regulatory mechanisms often are inhibited by conflicting motivations[9] or poorly adapted to technological change.[10] Scholars have proposed a variety of solutions to address the privacy and criminal law concerns raised by these "data-collection technologies," but these approaches often provide inadequate flexibility to local jurisdictions to address their unique problems[11] or focus too narrowly on correcting a particular, novel iteration of the problem.[12]

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individuals" by 2011 and is expected to grow by "approximately 25 million additional records . . . annually").

7. *Cf.* David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 69 (2013) (noting that advanced surveillance technologies affect factors "core to our liberty interests and essential to a functioning democracy").

8. *See* United States v. Jones, 132 S. Ct. 945, 957–58 (2012) (Alito, J., concurring) (criticizing the majority's reliance on eighteenth-century tort law to conclude that the police action in question constituted a search); *infra* Part II.

9. *See infra* subpart II(A).

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

11. *See, e.g.*, Gus Hosein & Caroline Wilson Palow, *Modern Safeguards for Modern Surveillance: An Analysis of Innovations in Communications Surveillance Techniques*, 74 OHIO ST. L.J. 1071, 1089–1103 (2013) (analyzing the treatment of modern surveillance techniques under current Fourth Amendment jurisprudence); Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL'Y 281, 318–27 (2011) [hereinafter Rushin, *Judicial Response*] (proposing that courts should judicially limit "surveillance technologies"); Stephen Rushin, *The Legislative Response to Mass Police Surveillance*, 79 BROOK. L. REV. 1, 51–59 (2013) [hereinafter Rushin, *Legislative Response*] (proposing a model state statute to regulate police surveillance).

12. *See, e.g.*, Jeremy Brown, Note, *Pan, Tilt, Zoom: Regulating the Use of Video Surveillance of Public Places*, 23 BERKELEY TECH. L.J. 755, 755 (2008) (arguing for greater regulation of law enforcement use of video camera surveillance of public spaces); Sabrina A. Lochner, Note, *Saving Face: Regulating Law Enforcement's Use of Mobile Facial Recognition Technology & Iris Scans*, 55 ARIZ. L. REV. 201, 204 (2013) (arguing for greater regulation of law enforcement's collection of facial pictures and iris scans); Benjamin S. Mishkin, Note, *Filling the Oversight Gap: The Case for Local Intelligence Oversight*, 88 N.Y.U. L. Rev. 1414, 1415–16 (2013) (proposing adapting federal oversight mechanisms to local law enforcement agencies' intelligence gathering). As part of Benjamin Mishkin's larger proposal for transposing federal oversight mechanisms, Mishkin does argue that established federal civilian oversight mechanisms could be adapted to local jurisdictions. Mishkin, *supra*, at 1439–41. However, Mishkin focuses on whether the current form of the federal mechanisms could be readily transposed into the local context and the challenges raised by such a transposition. *Id.* at 1439–47. In contrast, this Note proposes a novel approach to civilian oversight—including board members who hold countervailing views to police departments' generally—as a means for overcoming the weaknesses of current civilian oversight models. *See infra* subpart IV(A). Furthermore, Mishkin focuses exclusively on the issues raised by local law enforcement participation in counterterrorism and intelligence gathering for national security. Mishkin, *supra*, at 1417–20. While police department involvement in counterterrorism intelligence is a subissue raised by the use of data-collection technologies, this Note focuses more

To overcome this regulatory deficit, civilian oversight can provide effective regulatory oversight of police departments' use of new and emerging technologies. Specifically, I argue that a specialized form of civilian oversight, the "Loyal Opposition" Policy Review Board (LOPRB), would function as a regulatory mechanism that not only provides proactive regulatory guidance on technology usage by police departments but would also allow for that guidance to be specifically tailored to the local community.[13] LOPRBs, composed of members who are informed on and invested in technology and civil rights, would undertake policy review of police department procedures for the use of new technologies and recommend "best practices" approaches to ensuring that individual privacy rights and police department investigative needs are effectively balanced.[14] Such a civilian oversight mechanism would ensure that the privacy concerns of the average citizen remain protected as new technologies are incorporated into the daily operations of police departments.

Part I explores the growth and impact of data-collection technologies on the surveillance capabilities of police departments. Part II discusses the concerns raised by data-collection technologies and the failures of other oversight mechanisms. Part III discusses why civilian oversight is the appropriate oversight mechanism for the usage of data-collection technologies and details the strengths and weaknesses of traditional civilian oversight. Finally, Part IV details the Loyal Opposition Policy Review Board and how LOPRBs create an effective regulatory mechanism for data-collection technologies.

I. The Growth of Mass Surveillance and Data-Collection Technologies

A. Data-Collection Technologies: Improving Surveillance Capabilities

Surveillance has become a ubiquitous feature of the public space.[15] While historically, long-term surveillance was "difficult and costly,"[16] modern surveillance now "relies on widespread surveillance of the entire community."[17] Modern surveillance can record a person's every move in

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broadly on the impact of such data-collection technologies on local police departments' own local investigative activities (e.g., gathering evidence for a murder investigation or tracking a suspected robber) rather than on the specific need to regulate police department involvement in national security concerns.

13. *See infra* Part IV.

14. Such specialized civilian oversight will not replace already existing civilian oversight; rather, successful civilian oversight often involves multiple mechanisms in the same jurisdiction working together to provide sufficient oversight. Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 19–20 (2009).

15. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1936 (2013).

16. United States v. Jones, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring).

17. Rushin, *Legislative Response*, *supra* note 11, at 7.

the public space, often through methods poorly regulated under current constitutional protections.[18] This pervasiveness of modern surveillance is possible because of continuing technological advancements that allow for more efficient collection and retention of data. This advancement in data-collection technologies involves two distinct categories of technologies: surveillance technologies and storage technologies.[19]

1. Surveillance Technologies.—Surveillance technologies encompass a number of individual technologies that increase the breadth and volume of collected data. Cameras,[20] global positioning systems (GPS),[21] automatic license plate readers (ALPR),[22] and technologies collecting cell-phone data[23] and biometric data (e.g., iris scans and facial-recognition technology)[24] allow police departments to gather expansive data from the public space. Police departments already network integrated camera systems that stretch across large spans of the public space[25] and use GPS monitoring to "generate[] a precise, comprehensive record of a person's public movements."[26] Recently, police departments have begun using cellphone tracking, undertaking "tower dumps" that "captur[e] information

18. Capers, *supra* note 3, at 960. Surveillance expansion is often purposed toward addressing terrorist threats or the prevention of ordinary crime. Jack M. Balkin, Essay, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 4 (2008). However, that expansion has become so significant that invocations of *1984* have become commonplace. *E.g.*, Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEXAS L. REV. 1349, 1377 (2004); Richards, *supra* note 15, at 1934; Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 214 (2002). Other scholars have used less inflammatory rhetoric, merely labeling the modern approach to pervasive surveillance as the "digitally efficient investigative state," Rushin, *Legislative Response*, *supra* note 11, at 6, or the "National Surveillance State," Balkin, *supra*, at 3.

19. *See* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1468 (2000) (drawing a distinction between technologies that enable the gathering of raw data and those that organize that data).

20. Brown, *supra* note 12, at 756.

21. Jones, 132 S. Ct. at 948 (2012) (majority opinion).

22. YOU ARE BEING TRACKED, *supra* note 1, at 4–6.

23. Kelly, *supra* note 4.

24. Emily Steel & Julia Angwin, *Device Raises Fear of Facial Profiling*, WALL ST. J., July 13, 2011, http://online.wsj.com/news/articles/SB10001424052702303678704576440253307985070, *archived at* http://perma.cc/PZZ2-W9TR.

25. Brown, *supra* note 12, at 757. In 2007, Britain had over 4.2 million cameras, and the average person in London was caught on camera "300 times a day." *Id.* at 758 & n.17, 19. In America, Rushin found that almost 77,000 cameras were operated by police departments in 2007, with the average department using nearly 27 cameras. Rushin, *Legislative Response*, *supra* note 11, at 16. Those numbers underrepresent the extent of camera usage because cities often provide police access to the city's own integrated camera network. *Id.*

26. *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *see also* Eli R. Shindelman, Note, *Time for the Court to Become "Intimate" with Surveillance Technology*, 52 B.C. L. REV. 1909, 1919 (2011) ("GPS has proven to be a more cost-effective and precise way for law enforcement to monitor the movements of individuals . . . .").

about thousands of cellphone users at a time, whether they are targets of an investigation or not . . . ."[27] ALPR systems allow police departments to record the license plate and the exact time and location of a passing vehicle.[28] And local and state law enforcement have started following the federal government's lead in the use of biometric identification, including the use of facial-recognition technology.[29] These surveillance technologies only cover the technologies police departments use to directly collect information; social-media websites and the growing ubiquity of smart devices both provide alternative means for police to gather information.[30]

The use of such technologies is widespread.[31] For example, a 2007 survey by the Bureau of Justice Statistics estimated that "66% of local police departments . . . used video cameras on a regular basis."[32] Another survey found that approximately 19% of all police departments and 48% of departments with more than 1,000 sworn officers used ALPR technology.[33] Such surveillance technology is not limited to only larger police departments; approximately 61% of police departments in small cities regularly use video cameras.[34] Ultimately, those surveillance technologies

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27. Kelly, *supra* note 4; *see also* Eric Lichtblau, *Police Are Using Phone Tracking as a Routine Tool*, N.Y. TIMES, Mar. 31, 2012, http://www.nytimes.com/2012/04/01/us/police-tracking-of-cellphones-raises-privacy-fears.html, *archived at* http://perma.cc/PAY-5PKY.

28. Rushin, *Judicial Response*, *supra* note 11, at 285.

29. Steel & Angwin, *supra* note 24; *see also* Charlie Savage, *Facial Scanning Is Making Gains in Surveillance*, N.Y. TIMES, Aug. 21, 2013, http://www.nytimes.com/2013/08/21/us/facial-scanning-is-making-gains-in-surveillance.html, *archived at* http://perma.cc/J5KZ-GXND (describing the FBI's $1 billion "Next Generation Identification" initiative, which will give local police departments access to a national mug-shot database).

30. Heather Kelly, *Police Embrace Social Media as Crime-Fighting Tool*, CNN (Aug. 30, 2012, 5:23 PM), http://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/, *archived at* http://perma.cc/T9CL-VVG2; *see* Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEXAS L. REV. 85, 164–65 & Appendix (2014) (indicating that many privacy policies and data security agreements for networked devices do not prohibit turning over collected data to law enforcement in response to a subpoena).

31. Rushin, *Legislative Response*, *supra* note 11, at 14–20.

32. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 21 (2010), *available at* http://www.bjs.gov/content/pub/pdf/lpd07.pdf, *archived at* http://perma.cc/74UV-KVSJ. The survey sample "includes all departments employing 100 or more full-time sworn personnel and a systematic random sample of smaller agencies stratified by size." *Id.* at 8.

33. DAVID J. ROBERTS & MEGHANN CASANOVA, INT'L ASS'N OF CHIEFS OF POLICE, AUTOMATED LICENSE PLATE RECOGNITION SYSTEMS: POLICY AND OPERATIONAL GUIDANCE FOR LAW ENFORCEMENT 6 & tbl.1 (2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/239604.pdf, *archived at* http://perma.cc/ZN65-M5HP. The adoption rate of data-collection technologies is likely higher than the reported levels. For instance, when USA Today attempted to obtain public records from police departments regarding cellphone data surveillance, approximately a quarter of departments refused to answer, citing concerns that revealing the information could undermine department surveillance techniques. *Kelly*, *supra* note 4.

34. REAVES, *supra* note 32, at 21 tbl.20.

are used "not just for observational comparison but also indiscriminate data collection."[35]

Not only do these technologies enjoy widespread adoption, but the amount of data such surveillance technologies can gather is staggering. ALPR systems can photograph up to 1,800 license plates per minute,[36] and approximately 10–12 million per day."[37] Cameras, a traditional surveillance technology used by police departments, can gather general information or be used as "tracking devices" on particular persons.[38] Even newer surveillance technologies are seeing widespread use, with police departments making extensive use of new technology that allows for police to harvest call information from cell phone towers, "yielding hundreds or thousands of phone numbers of innocent Americans along with those of potential suspects."[39] Such individual technologies can be improved by combining other technologies.[40] An example of such an integrated system is New York City's Domain Awareness System.[41] Operating twenty-four hours a day,[42] the system "incorporates more than 3,500 cameras in public places, license-plate readers at every major Manhattan entry point, . . . and a trove of Police Department data, including arrests and parking summonses."[43] Combining surveillance technologies not only allows for more information to be collected but also allows for powerful inferences to be drawn from that information; inferences that may not have been readily apparent from each individual piece of information by itself.[44]

2. Data Storage Technologies.—While surveillance technologies have increased the amount of data that police departments can collect, storage technologies have improved retention capabilities and reduced the cost of

35. Rushin, *Legislative Response*, *supra* note 11, at 21.

36. Rushin, *Judicial Response*, *supra* note 11, at 285.

37. ROBERTS & CASANOVA, *supra* note 33, at 5.

38. Blitz, *supra* note 18, at 1383.

39. Ellen Nakashima, *Agencies Collected Data on Americans' Cellphone Use in Thousands of 'Tower Dumps,'* WASH. POST, Dec. 9, 2013, http://www.washingtonpost.com/world/national-security/agencies-collected-data-on-americans-cellphone-use-in-thousands-of-towerdumps/2013/12/08/20549190-5e80-11e3-be07-006c776266ed_story.html, *archived at* http://perma.cc/9R49MWWM. This process, known as a "tower dump," involves the local police department requesting from local providers the cell-phone activity information associated with specific cell towers or geographic areas. *Id.* Such information only rarely requires a warrant. *Id.*

40. Blitz, *supra* note 18, at 1383.

41. Capers, *supra* note 3, at 960–61.

42. *Id.* at 961.

43. Sam Roberts, *Police Surveillance May Earn Money for City*, N.Y. TIMES, Apr. 3, 2013, http://www.nytimes.com/2013/04/04/nyregion/new-york-citys-police-surveillance-technologycould-bring-in-money.html, *archived at* http://perma.cc/WME9-AKND. Since the system's unveiling, smaller municipalities, sheriff's departments, and police chiefs from several major cities have expressed interest in accessing the software. *Id.*

44. *See infra* note 82 and accompanying text.

retaining data.[45] Long-term surveillance was historically limited because of the "limited data retention capabilities of the state."[46] Advances in data storage and computational algorithms not only allow law enforcement entities to collect and analyze more data but also allow for "creating new information by the clever organization of existing data."[47] This happens because extensive databases multiply the effect of data-collection technologies, allowing for more data to be stored, and thus, available for cross analysis.[48] Private citizens "leave traces of ourselves continually," and analyzing that data allows police departments "to draw increasingly powerful inferences about [a] person's motives, desires, and behaviors."[49]

Advances in data-collection technologies encourage police departments to develop new databases and to creatively utilize already existing ones.[50] While new database systems may take years to develop and implement,[51] existing databases may be utilized in new ways distinct from their original purpose.[52] For example, most states authorize law enforcement agencies to search driver-license-photo databases for persons of interest in investigations.[53] The use of surveillance technologies also improves databases, as the new data collected by surveillance technologies becomes incorporated into existing databases.[54] Technological advances in

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45. Froomkin, *supra* note 19, at 1468. Michael Froomkin recognized that data-collection technologies and data-retention technologies were two distinct categories which he termed "privacy-destroying technologies." *Id.*

46. Rushin, *Legislative Response*, *supra* note 11, at 10.

47. Froomkin, *supra* note 19, at 1468.

48. *Id.* The D.C. Circuit has also recognized the cumulative impact of analyzing large amounts of data. *See* United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) ("Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation."). And in fact, data retention has become an industry of its own in the private sector, often labeled "Big Data." Richards, *supra* note 15, at 1938–39; Steve Lohr, *The Age of Big Data*, N.Y. TIMES, Feb. 11, 2012, http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html, *archived at* http://perma.cc/X3EU-6X95.

49. Balkin, *supra* note 18, at 12–13.

50. Robert O'Harrow Jr. & Ellen Nakashima, *National Dragnet Is a Click Away*, WASH. POST, Mar. 6, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/03/05/AR2008030503656.html, *archived at* http://perma.cc/L2MZ-ZM5A.

51. *See* Roberts, *supra* note 43 (discussing the process of implementing New York's Domain Awareness System).

52. *See* Craig Timberg & Ellen Nakashima, *State Photo-ID Databases Become Troves for Police*, WASH. POST, June 16, 2013, http://www.washingtonpost.com/business/technology/state-photo-id-databases-become-troves-for-police/2013/06/16/6f014bd4-ced5-11e2-8845-d970ccb04497_story.html, *archived at* http://perma.cc/QZ3-YK6H (detailing the trend toward broadening access and use of facial-recognition databases by the police and describing the concerns of civil libertarians for its potential misuse).

53. *Id.*

54. *See* Froomkin, *supra* note 19, at 1465 ("[T]he potential effect of citizen profiling is vastly increased by the power of information processing and the linking of distributed databases.").

data storage and retention have thus increased the utility and feasibility of maintaining large databases of detailed information on public space activities.

B. Changing Surveillance

The discussion on the technological advances of data-collection technologies elucidates how modern surveillance differs significantly from past forms of surveillance. First, new technology allows surveillance to extend longer and cost less than in the past.[55] What once was accomplished by expending significant police resources can now be easily accomplished with a small GPS tracking device.[56] And the police department "can store such records and efficiently mine them for information years into the future."[57] This makes it easier for police departments to undertake "indiscriminate data collection;"[58] as Stephen Rushin explains: "[I]ndiscriminate data collection refers to data retention practices whereby police indefinitely retain all information collected by digitally efficient technologies, regardless of whether the data is linked to any criminal investigation."[59] Such a capability is concerning because many police departments have failed to address or formulate a policy on revealing potentially sensitive data.[60]

Second, while the cost has decreased and the breadth has increased, the ability to retain more data for longer expands the uses for the data.[61] In the past, limited data-retention capabilities constrained law enforcement's ability to collect large amounts of data.[62] These restraints could be both physical constraints from relying on officers' recollections to constraints on actual data storage.[63] However, the cost of data storage has decreased, allowing police departments to retain large amounts of data which previously would have had to be discarded.[64]

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55. Blitz, *supra* note 18, at 1375.

56. United States v. Jones, 132 S. Ct. 945, 963–64 (2012) (Alito, J., concurring).

57. *Id.* at 955–56 (Sotomayor, J., concurring).

58. Rushin, *Legislative Response*, *supra* note 11, at 10. Another commentator has termed this ability "[d]ragnet surveillance." Slobogin, *supra* note 18, at 216.

59. Rushin, *Legislative Response*, *supra* note 11, at 10.

60. *See, e.g.*, Shawn Musgrave, *Boston Police Halt License Scanning Problem*, BOS. GLOBE, Dec. 14, 2013, http://www.bostonglobe.com/metro/2013/12/14/boston-police-suspend-use-high-tech-licence-plate-readers-amid-privacy-concerns/B2hy9UIzC7KzebnGyQ0JNM/story.html, *archived at* http://perma.cc/EHC3-SDZZ (noting that fewer than a third of Massachusetts police departments had any policy governing the use of potentially revealing data).

61. Rushin, *Legislative Response*, *supra* note 11, at 10.

62. *Id.*

63. For instance, one of the first state-of-the-art video camera systems had such expensive tapes that the police department "regularly record[ed] over them" to reduce costs. Brown, *supra* note 12, at 757.

64. Rushin, *Legislative Response*, *supra* note 11, at 10.

Third, the ubiquity of data-collection technologies has been coupled with greater sharing of surveillance data across police departments. For instance, Congress has incentivized federal agencies to share information.[65] Such information sharing is not only at the federal level: Minnesota and Wisconsin both have statewide biometric-identification-sharing systems.[66] These information sharing regimes also exist at the local level.[67] Information sharing extends across jurisdictional types, such as local police departments sharing information with federal agencies to establish national data networks in return for federal information.[68] Such actions blur the line between federal and local law enforcement, as well as between law enforcement and national security.[69] Cross-jurisdictional data sharing also decreases an individual's control of the data, raising significant concerns regarding how data may be used in these new contexts.[70] Thus, technological advances in surveillance have created a host of new concerns compared to surveillance of the past.

II. The Problem: Inadequate Oversight of Data-Collection Technologies

A. Concerns Raised by Data-Collection Technologies

Data-collection technologies raise concerns regarding actual and potential police misconduct. Police officers have abused data-collection technologies for improper motives, such as spying on sexual encounters and ogling citizens.[71] Other examples of police departments' misuse of technology are

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65. Donohue, *supra* note 6, at 455–57.

66. *Id.* at 459–60.

67. *Id.* at 460.

68. *Id.* at 461.

69. *Id.* at 461–62.

70. Rushin, *Legislative Response*, *supra* note 11, at 12. Daniel Solove has described the use of data for a new purpose beyond its original purpose as a "secondary use." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 490 (2006). As Solove explains: "The potential for secondary use generates fear and uncertainty over how one's information will be used in the future, creating a sense of powerlessness and vulnerability." *Id.* at 522.

71. In New York City, police officers taking video surveillance with thermal-imaging technology detoured to record a couple having sex on a secluded rooftop terrace for nearly four minutes. Jim Dwyer, *Police Video Caught a Couple's Intimate Moment on a Manhattan Rooftop*, N.Y. TIMES, Dec. 22, 2005, http://www.nytimes.com/2005/12/22/nyregion/22rooftop.html, *archived at* http://perma.cc/5CMY-RAS9. And a San Francisco police officer misused surveillance cameras to inappropriately track women at the San Francisco International Airport. *SF Cop Who Reportedly Ogled Women is Suspended for 9 Months*, S.F. GATE (Apr. 21, 2005, 4:00 AM), http://www.sfgate.com/news/article/SF-cop-who-reportedly-ogled-women-is-suspended-3329181.php, *archived at* http://perma.cc/67S3-GC8G. In Chicago, a surveillance camera was allegedly redirected in order to not record police officers breaking up a fight. David Lepeska, *When Police Abuse Surveillance Cameras*, CITYLAB, ATLANTIC (Dec. 27, 2011), http://www.theatlanticcities.com/politics/2011/12/surveillance-cameras-threat-policeprivacy/806/, *archived at* http://perma.cc/R9DC-NEND. The former head of the Chicago Police Department mentioned in a

more chilling. In Massachusetts, the Boston Police Department implemented a fourteen-scanner ALPR system with "the capacity to scan as many as 4 million vehicles a year."[72] After critics raised concerns that the department was not using the ALPR for the original purpose of checking for parking tickets and other driving violations, the department suspended the ALPR program.[73] The critics were particularly concerned that the department failed to follow up on repeated alarms triggered by the system.[74] In six months, almost 1,700 license plate numbers triggered scanner alerts at least five times; two vehicles triggered scanner alerts 59 and 97 times over six months without the police department ever following up on violation alerts.[75] Most concerning, the department never reviewed the program "to determine how well it works or follows the privacy policy" and had stored six months of data when its rule was to only retain three months of records.[76] That discovery prompted Representative Jonathan Hecht to state: "[A]t a minimum [the data release] says that the police don't have an adequate oversight system in place."[77]

This is not surprising, considering that such data-collection technologies raise significant concerns about other potential abuses. On the one hand, data-collection technologies allow police departments to collect a breadth of information, often from private citizens who are unaware of the scope of collection and possibilities of the data's usage.[78] Systems of unobtrusive data collection—such as ALPRs or cell-phone tower dumps—are often "designed to ensure that the individual is unaware of their use."[79] And those collecting such data may be reluctant to make the mass surveillance public knowledge.[80]

A public unaware of mass surveillance is less likely to censor their own activities in the public space.[81] By analyzing all the information collected by data-collection technologies, police departments can draw "surprisingly powerful inferences" from a collection of normal behaviors; the aggregated data may reveal private ideas, beliefs, and values that are otherwise not discernable from a particular piece of information.[82] That

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radio interview that Chicago often had a similar problem with officers turning off their dashboard cameras. *Id.*

72. Musgrave, *supra* note 60.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (internal quotation marks omitted).

78. Balkin, *supra* note 18, at 12.

79. Hosein & Palow, *supra* note 11, at 1085.

80. *Id.*

81. *Cf. The Wire: Straight and True* (HBO television broadcast Oct. 17, 2004) ("Is you taking notes on a criminal fucking conspiracy?").

82. Balkin, *supra* note 18, at 12.

aggregated data could be used to blackmail or discredit opponents of the police department.[83] Such a risk persists over time because the stored data may include "crimes or embarrassing activity beyond or unrelated to [the surveillance's] original purpose."[84] The collected information could also be analyzed to allow for discrete cataloguing, raising fears of discrimination by police departments.[85] For instance, there was public uproar upon the discovery of a secret program run by the New York Police Department that targeted Muslim communities and neighborhoods, ultimately leading to the shuttering of the program.[86]

On the other hand, when the public is aware of surveillance, those data-collection technologies could be used as forms of persuasion and control on citizen's behavior.[87] Such control increases the power of the police department relative to individual citizens, allowing departments to curb certain behavior.[88] However, open surveillance may also deter individuals from engaging in deviant behavior from the mainstream.[89] Such surveillance thus could discourage individuals from undertaking legitimate and constitutionally protected behavior.[90]

Citizens also have difficulties in properly accounting for the long-term costs of data-collection technologies compared to their short-term benefits. When faced with a decision between costs and benefits occurring at different times, an individual may greatly overvalue present benefits compared to future benefits or merely discount long-term costs while inflating the relative value of short-term gains.[91] Individuals have greater difficulty imagining the effects of decisions in the future compared to the present,[92] and that difficulty is exacerbated by the distinction between the types of gains and harms: individuals can more easily appreciate the short-

83. Richards, *supra* note 15, at 1953.

84. *Id.* at 1954. As an example, Neil Richards points to the evidence of Dr. Martin Luther King Jr.'s marital infidelity that was collected as part of FBI surveillance. *Id.*

85. *Id.* at 1956–57.

86. Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. TIMES, Apr. 15, 2014, http://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html, *archived at* http://perma.cc/T5DJ-7UJP.

87. Richards, *supra* note 15, at 1955–56.

88. *Id.*

89. *Id.* at 1948.

90. *See* Slobogin, *supra* note 18, at 245 ("None of these activities are illegal, but it is easy to imagine why those who engage in them might want to keep them secret.").

91. For discussion of this problem of "time discounting," see, for example, Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 351–52 (2002); Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 352–53 (2009); and Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1150 (2010).

92. Elizabeth Atherton, *From Discounting to Incorporating Decisions' Long-Term Impacts*, 11 RISK: HEALTH, SAFETY & ENV'T 125, 139 (2000).

term concrete gains to crime control and public safety than imagine the long-term harms to individual privacy.[93]

Individual citizens may thus suffer from "privacy myopia," in that they are unaware of, or discount, the value of data collected in aggregate by the police department.[94] Citizens may not adequately value the loss of privacy from each individual instance of data collection or may incorrectly measure the specific data-collection instance against the short-term "gain" of greater crime control and public safety, rather than weighing the long-term cost of all the instances of data collection against any short-term gain.[95] This privacy myopia is also implicitly affected by the normalizing function created from the public's increased willingness to consent to data collection by private entities.[96] Citizens may discount the costs of data-collection technologies because of their acceptance of such data collection by private entities, even though government-based data collection can have comparatively more significant consequences.[97] Police department use of data-collection technologies is thus rife with potential and actual misuse, emphasizing the need for an effective oversight mechanism.

B. Weaknesses of Other Oversight Mechanisms

Of course, alternative oversight approaches have also been used to regulate police behavior, including self-regulation, legislative and executive action, and judicial oversight.[98] However, while each of those alternative

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93. Richards, *supra* note 15, at 1951.

94. Froomkin, *supra* note 19, at 1501–05.

95. *Id.*

96. For example, many customers sign up for rewards programs at businesses such as Starbucks and Whole Foods. Bruce Horovitz, *Whole Foods to Test First Rewards Program*, USA TODAY, Sept. 18, 2014, http://www.usatoday.com/story/money/business/2014/09/18/whole-foods-rewards-program-grocery-stores-supermarkets-organic-natural-foods/15828413/, *archived at* http://perma.cc/ZA8R-YFBU. While such programs provide benefits to customers, they also allow business to collect extensive information on customer's preferences. *Id.*; *see also* Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG., Feb. 16, 2012, http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html, *archived at* http://perma.cc/JN4F-4FQ6 ("If you use a credit card or a coupon, or fill out a survey, or mail in a refund, or call the customer help line, or open an e-mail we've sent you or visit our Web site, we'll record it and link it to your Guest ID . . . . We want to know everything we can." (internal quotation marks omitted)).

97. *See* Richards, *supra* note 15, at 1940 (noting that consumers have become increasingly more likely to consent and participate in surveillance programs as a result of the widespread use of the internet and smartphones which has, in turn, led to an unraveling of privacy).

98. Other scholars have offered a variety of approaches to address the regulatory issues surrounding police misconduct and data-collection technologies, often focusing on strengthening current judicial or legislative protection. *E.g.*, Blitz, *supra* note 18, at 1405, 1434–49 (advocating for the expansion of "Fourth Amendment safeguards" to address video surveillance in the public space); Joshua S. Levy, *Towards a Brighter Fourth Amendment: Privacy and Technological Change*, 16 VA. J.L. & TECH. 502, 516–39 (2011) (proposing the creation of "bright line Fourth Amendment rules" to deal with privacy issues related to the use of new technologies in law enforcement); Richards, *supra* note 15, at 1959 (advancing four principles to "guide the treatment

mechanisms has some advantages, inherent weaknesses undermine their effectiveness in regulating police behavior in the context of data-collection technologies.

1. Self-Regulation.—Police departments could be left to self-regulate, using internal affairs divisions to investigate complaints against police department employees and to discipline improper police behavior.[99] However, police department self-regulation is often ineffective because of four major limitations: the "code of silence"; leadership failures; incompatible incentives; and actual and perceived lack of objectivity. Internal regulation must overcome the code of silence in which police officers close ranks when faced with an investigation to protect fellow officers, making it difficult for both bad and good officers to report police behavior.[100] Higher ranked officers may set a tone of disrespect and disregard for internal policies or may normalize improper behavior by viewing the behavior and associated litigation as a "cost of doing business."[101] Furthermore, police departments aim to protect public safety for the community as a whole and have little incentive to hamper that goal through internal regulations that may be aimed towards protecting

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of surveillance" and balance "its benefits without sacrificing important civil liberties"); Rushin, *Legislative Response*, *supra* note 11, at 41–59 (introducing a model state statute to improve legislative oversight of surveillance technologies).

99. *See, e.g.*, *Internal Affairs*, AUSTIN POLICE DEPARTMENT, http://austintexas.gov/department/internal-affairs, *archived at* http://perma.cc/N466-5LK3 ("The mission of Internal Affairs is to review officer involved critical incidents and investigate complaints received on sworn and non-sworn employees of the Austin Police Department.").

100. JOHN HAGEDORN ET AL., CRIME, CORRUPTION AND COVER-UPS IN THE CHICAGO POLICE DEPARTMENT 1, 9 (2013) [hereinafter CHICAGO CORRUPTION REPORT], *available at* http://www.uic.edu/depts/pols/ChicagoPolitics/policecorruption.pdf, *archived at* http://perma.cc/PE2H-TZ7D; *see also* Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 156–57 (2003) (describing the "blue wall" as a "code of silence" among police officers enforced "by intimidating any officer who shows any willingness to cooperate with investigators, or point the finger at a fellow officer"); Rick Bragg, *Blue Wall of Silence: Graft Shielded Behind Old Code*, N.Y. TIMES, Apr. 26, 1994, http://www.nytimes.com/1994/04/26/nyregion/blue-wall-of-silence-graft-shielded-behind-old-code.html, *archived at* http://perma.cc/FTN9-Q3UC ("Even though that corruption taints them all, it is a fact of life that telling on an officer is viewed as a betrayal worse than corruption itself . . . .").

101. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 474–75 (2004); *see also* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 780 (1993) ("The chief and higher-ranking supervisors establish the tone and culture within a police department."). This failure may not be a conscious act; often it can be as simple as creating systems which discourage or make it difficult for higher-ranked officers to review important data on individual officer's performances. Armacost, *supra*, at 474 ("[M]any (perhaps most) police departments do not keep records in a form that encourages or even permits supervisors to review reports of lawsuits, citizens complaints, and use-of-force reports on individual officers whose performance they are evaluating.").

individuals' rights.[102] Finally, internal mechanisms are often hampered by documented police department hostility towards complaints and public perception of the process being "biased, ineffective, and illegitimate."[103]

These problems are exacerbated when internal regulation aims at regulating data-collection technologies. Police departments have a strong incentive to use data-collection technologies and retain collected data as much as possible because the gathered information may be beneficial in the long term to the department's enforcement and investigative functions.[104] And the reduced costs of storage continue to make it more economically feasible for police departments to save more information.[105] Furthermore, self-regulation often happens in response to perceived misconduct, which is absent in the data-collection technologies area because the public often lacks knowledge of the activities.[106] Internal regulatory mechanisms thus are poorly positioned to provide adequate regulatory oversight of data-collection mechanisms that effectively balance the needs of both police and citizens.

2. Legislative and Executive Oversight.—Police departments could also be regulated by legislative and executive regulatory mechanisms, such as through legislation, blue-ribbon commissions,[107] and Department of

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102. Levy, *supra* note 98, at 513.

103. Clarke, *supra* note 14, at 9–10; *see also* SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CIVILIAN OVERSIGHT 127 (2001) (documenting the discouragement of individuals attempting to file complaints against police officers); Tim Cushing, *Internal Affairs Divisions Dismissing 99% of Misconduct Cases Against New Jersey Police Officers*, TECHDIRT (Jan 8, 2014, 5:22 AM), https://www.techdirt.com/articles/20140106/10162825772/internal-affairs-divisions-dismissing-99-misconduct-cases-against-new-jersey-police-officers.shtml, *archived at* http://perma.cc/FA2G-M67H; Alex Emslie, *California 'Deadliest State' in U.S. for Shootings by Police*, KQED (Apr. 9, 2014), http://blogs.kqed.org/newsfix/2014/04/08/california-deadliest-state-for-shootings-by-police, *archived at* http://perma.cc/5FQN-TX8C (expressing skepticism that shootings by police officers are investigated thoroughly or with an adequate level of accountability).

104. Rushin, *Legislative Response*, *supra* note 11, at 21.

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

106. Balkin, *supra* note 18, at 12. And because much public surveillance occurs without the public's knowledge, there may be little public pressure on police departments to protect those privacy rights.

107. Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 J. LEGIS. 1, 12 (2005). *See generally* Kristen Chambers, Note, *Citizen-Directed Police Reform: How Independent Investigations and Compelled Officer Testimony Can Increase Accountability*, 16 LEWIS & CLARK L. REV. 783 (2012) (critiquing temporary oversight commissions as "unsuccessful" at "producing long term solutions"); Andrea Ford & Tracy Wood, *Major LAPD Changes Weighed, Hahn Says: Police: Christopher Commission Will Reportedly Recommend New Policy on Complaints and Discipline*, L.A. TIMES, June 7, 1991, http://articles.latimes.com/1991-06-07/news/mn-99_1_police-department, *archived at* http://perma.cc/RS65-DQFD (reporting on commission recommendations directed at improving how the Los Angeles Police Department handles complaints of officer misconduct).

Justice (DOJ) investigations.[108] However, statutory changes and commissions are generally reactive mechanisms responding to existing misconduct and lacking the power to enforce their own recommendations.[109] Similarly, the DOJ's limited resources and manpower allows the department to only focus on some instances of police behavior, often the most egregious or publicized incidents of systemic police department failures.[110]

Those legislative and executive regulatory mechanisms often provide insufficient regulation of data-collection technologies. While Congress has passed statutory protections limiting certain types of data collection, those statutory protections often do not regulate state and local governments nor include new forms of data-collection technologies.[111] Legislatures also face stronger political pressure to be "tough on crime" than to protect privacy rights, especially when those rights may be popularly associated with those prosecuted and labeled as criminals.[112] A politically salient incident may spur legislative or executive actors to take oversight action, but the oversight often wanes as a new, pressing crisis enters the public consciousness.[113] Similar issues arise for executive regulatory mechanisms, since such mechanisms are directed towards addressing perceived police officer and department misconduct, providing a poor framework by which to regulate data-collection technologies in situations not clearly rising to the level of misconduct. And the DOJ may not have the resources necessary to gather information on police departments that may be misusing data-collection technologies.[114] Legislative and executive oversight thus only provides limited oversight of police department usage of data-collection technologies when those technologies are misused or abused by police departments.

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108. 42 U.S.C. § 14141 (2012); Bobb, *supra* note 100, at 164.

109. Chambers, *supra* note 107, at 794; Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3191 (2014).

110. In fact, the DOJ conducted only thirty-three full § 14141 investigations between 1994 and 2009. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 53 (2009) [hereinafter Harmon, *Promoting Civil Rights*]. And only fourteen of those investigations concluded with "mandates that the police department adopt remedial measures." *Id.* at 54. As several commentators have noted, the existence of more than 15,000 local police departments makes it unfeasible for § 14141 enforcement to "achieve national reform" alone. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 44 (2012).

111. Donohue, *supra* note 6, at 471, 504.

112. Levy, *supra* note 98, at 510; *see also* Clarke, *supra* note 14, at 6 ("[L]egislative committees . . . are unlikely to launch investigations or hold hearings regarding misconduct absent a major political scandal.").

113. *See* WALKER, *supra* note 103, at 9 (explaining that the democratic political system is "the primary mechanism for holding the police accountable"); Clarke, *supra* note 14, at 2 (describing how scandals encourage momentary political salience that lead to the creation of oversight boards to address police misconduct).

114. Alexandra Holmes, Note, *Bridging the Information Gap: The Department of Justice's "Pattern or Practice" Suits and Community Organization*, 92 TEXAS L. REV. 1241, 1242 (2014).

3. Judicial Oversight.—Police departments could be regulated by judicial oversight, ensuring that constitutional and statutory rights are adequately protected from certain uses of data-collection technologies. But regulating data-collection technologies presents a unique challenge for the judiciary. The Fourth Amendment and other constitutional and statutory provisions provide privacy rights some protection from encroachment.[115] However, civil claims, such as § 1983 claims,[116] face significant obstacles to protecting privacy rights from encroachment, including that litigation is "too rare to deter misconduct" and unlikely to encourage changes to systemic police misconduct.[117] Furthermore, judicial oversight through constitutional protections only sets a floor of the minimum-required conduct for police officers and departments.[118] As Armacost recognizes: "[E]ven when criminal laws are enforced effectively, they do not describe sufficiently high norms of behavior to constrain police discretion within professionally acceptable boundaries."[119] Judicial oversight thus only provides a "minimum guarantee," rather than a best practices approach.[120]

The judicial regulatory mechanisms can only provide that minimum guarantee if a claimant can overcome the hurdle of showing that use of the data-collection technologies has created an actionable claim.[121] And the minimum guarantee provided by the Fourth Amendment may weaken as data-collection technologies become more prevalent. The determination of a person's "reasonable expectation of privacy" under the Fourth Amendment turns on whether (1) the individual had a subjective expectation of privacy, and (2) society recognizes that expectation as reasonable.[122] As data-collection technologies are further integrated and become more common in the public space, it is less likely that society would recognize privacy in public as reasonable. Judicial oversight thus becomes *weaker* the more widespread and common mass surveillance becomes.[123] That is, society's shifting perspective regarding what

115. *E.g.*, U.S. CONST. amend IV; 42 U.S.C. § 1983 (2012).

116. For more information on Section 1983 claims, see generally Armacost, *supra* note 101.

117. Harmon, *Promoting Civil Rights*, *supra* note 110, at 9.

118. Armacost, *supra* note 101, at 466.

119. *Id.*

120. Shindelman, *supra* note 26, at 1922.

121. Clarke, *supra* note 14, at 6–9; *cf.* WALKER, *supra* note 103, at 10 (calling someone an "asshole" is not an actionable claim).

122. Kyllo v. United States, 533 U.S. 27, 33 (2001); Marc McAllister, *The Fourth Amendment and New Technologies: The Misapplication of Analogical Reasoning*, 36 S. ILL. U. L.J. 475, 475–76 (2012). For more information on current Fourth Amendment jurisprudence regarding unreasonable searches and seizures, see generally United States v. Jones, 132 S. Ct. 945 (2012).

123. *See* Blitz, *supra* note 18, at 1373–74 (describing how Justice Potter Stewart's focus on "knowing exposure" has limited Fourth Amendment protections to only activities actively being concealed).

constitutes a reasonable expectation of privacy lowers the minimum guarantee of constitutional protections.[124]

The Supreme Court's difficulty in fitting new data-collection technologies within current Fourth Amendment jurisprudence tracks with the judiciary's general problems responding to technological changes. When the Supreme Court had the opportunity in *United States v. Jones*[125] to decide whether long-term monitoring over four weeks using a GPS device violated the Fourth Amendment, the Court punted the issue.[126] Rather than recognizing the changing technology and updating modern judicial precedent to address new and emerging technologies,[127] the Court instead held that the GPS device's *physical installation* on the vehicle constituted a "search" and a Fourth Amendment violation.[128]

Jones does little to address current and future data-collection technologies that do not involve a physical intrusion of a person's property.[129] This is unsurprising because courts often have difficulty analogizing emerging data-collection technologies with the past technology that precedent is based upon.[130] Even as the Court has previously recognized that such surveillance may violate the Fourth Amendment,[131] subsequent precedent has failed to address whether the use of data-collection technologies constitutes such surveillance. The difficulties of judicial oversight to adapt precedent to changing technologies, coupled with the only minimum guarantee provided from constitutional protections, cuts against utilizing judicial oversight as the primary mechanism for regulating police department use of data-collection technology.

III. A Potential Alternative: Civilian Oversight as an Effective Oversight Mechanism

A. Why Civilian Oversight?

Civilian oversight can effectively address the failings of other oversight mechanisms. Historically, civilian oversight entails "institutions that empower individuals who are not sworn police officers to influence how police departments formulate policies and dispose of complaints

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124. Levy, *supra* note 98, at 507.

125. 132 S. Ct. 945 (2012).

126. *Id.* at 954.

127. *Id.* at 957 (Sotomayor, J., concurring).

128. *Id.* at 949 (majority opinion).

129. *See id.* at 962 (Alito, J., concurring) ("[T]he Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked.").

130. *See* McAllister, *supra* 122, at 483–508 (illustrating the Court's misapplication of analogical reasoning in cases involving GPS tracking and e-mail).

131. United States v. Knotts, 460 U.S. 276, 283–84 (1983).

against police officers."[132] These oversight bodies are generally "created by ordinance or referendum"[133] and exist at all levels of law enforcement.[134] More than 100 civilian oversight bodies exist, and approximately 80% of large American cities have some form of civilian oversight mechanism.[135]

Civilian oversight bodies regulating one police department may differ significantly from another civilian oversight body. Traditionally, civilian oversight emphasized reviewing complaints against police officers,[136] but civilian oversight may also include policy review and public outreach.[137] Civilian oversight has generally been categorized based on two characteristics: (1) the structural independence of the civilian oversight body from the regulated police department, often either as an internal division of, or an independent and external body from, the police department, and (2) the scope of the body's powers, ranging from purely supervisory to investigative or auditing powers.[138] For example, the Civilian Complaint Review Board (CCRB) in New York City was originally an internal unit of the police department that could review reports and make recommendations to the police commissioner;[139] in contrast, the Office of the Police Monitor in Austin, Texas, is an independent city office that assesses citizen complaints and monitors internal affairs investigations.[140]

Data-collection technologies represent fertile ground of concern regarding police department policies and procedures. In the past, the public's reaction to the persistent problem of police misconduct helped spur the proliferation of civilian oversight.[141] Well-publicized incidents of

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132. Clarke, *supra* note 14, at 2.

133. WALKER, *supra* note 103, at 41.

134. *See, e.g.*, *id.* at 6 ("[O]versight agencies are quite prevalent. Over 100 different agencies exist, covering law enforcement agencies that serve nearly one-third of the American population . . . ."); Clarke, *supra* note 14, at 20–24 (describing the scope and structure of New York City's Civilian Complaint Review Board); Mishkin, *supra* note 12, at 1434–39 (describing two civilian boards that oversee federal intelligence operations and are appointed by the President, the President's Intelligence Advisory Board and the Privacy and Civil Liberties Oversight Board).

135. Clarke, *supra* note 14, at 2.

136. *Id.* at 2.

137. Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505, 505 (1994).

138. *See* WALKER, *supra* note 103, at 61–62 (distinguishing four classes of oversight systems of varying authority and independence from the police department); Clarke, *supra* note 14, at 11 ("Most civilian-oversight bodies in America fall into four broad categories: (1) civilian in-house, (2) civilian external supervisory, (3) civilian external investigatory, and (4) civilian auditor.").

139. Clarke, *supra* note 14, at 20. Subsequent changes have transformed the CCRB into an external investigative body focusing on complaint, rather than policy, review. *Id.* at 21, 43.

140. *Welcome to the Office of the Police Monitor*, AUSTINTEXAS.GOV, https://austintexas.gov/department/police-monitor; *archived at* http://perma.cc/WGV8-Y2QT.

141. For a history on the rise of civilian oversight, see generally WALKER, *supra* note 103, at 20–40.

police misconduct made the issue politically salient, creating an impetus for governmental bodies to form civilian oversight mechanisms.[142] As police departments begin to set policies and procedures for new technologies, there exist very real concerns that the local community will disagree with how the police department plans to use new data-collection technologies. Civilian oversight thus provides the public with a formal voice in police department activities, providing the local community with a ready means to communicate regarding perceived misuses and abuses of such technologies.

The local nature of civilian oversight also allows for a tailored regulatory mechanism. Policing is primarily a local task, and the vast majority of law enforcement agencies are local police departments.[143] Local oversight boards reviewing local police department policy can tailor which police misconduct issue to review and what recommendation would best address that issue, based on the needs and desires of the local community.[144] Thus, the closeness of civilian oversight to the immediate community allows the regulatory mechanism to exert significant corrective power on local police departments based on the concerns most pressing to the local community.

Finally, the fundamental attribute of civilian oversight—civilian participation in the oversight mechanism—makes civilian oversight an attractive remedy. While each of the other three regulatory mechanisms—self-regulation; executive and legislative action; and judicial oversight—involve civilian participation, that participation is indirect. Civilians may pressure police departments to self-regulate, lobby legislatures to enact new laws, and advocate courts to update legal doctrine, but ultimately they are reliant on those other parties (police departments, legislators, and judges) to actually act. That lack of direct participation likely makes it more difficult for communities to believe such regulatory mechanisms are legitimate oversight mechanisms.

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142. Clarke, *supra* note 14, at 2; Harold Beral & Marcus Sisk, Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499, 512 (1964).

143. Bobb, *supra* note 100, at 153.

144. Such local oversight may ultimately be more successful because it is closer to the very people it regulates. Stressing the relationship between the people and their local government, James Madison observes:

> Truth, . . . requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.
>
> Many considerations . . . seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.

THE FEDERALIST NO. 46, at 291 (James Madison) (Clinton Rossiter ed., 1961); *see also* Dan Merica, *Poll: Americans Trust Local Government More Than Federal*, CNN (Oct. 3, 2011, 11:43 AM), http://politicalticker.blogs.cnn.com/2011/10/03/poll-americans-trust-local-governmen t-more-than-federal/, *archived at* http://perma.cc/X3J8-C4NT (reporting that the majority of Americans trust their local government more than the federal government).

For example, the recent shooting of Michael Brown[145] involved an extensive discussion of regulatory mechanisms. Darren Wilson, a white police officer, spoke with Michael Brown, a black teenager, after a reported theft at a nearby convenience store.[146] Following an altercation,[147] Brown was shot six times by Wilson.[148] After three months, a grand jury failed to indict Wilson, leading to riots in Ferguson, Missouri, and protests throughout the United States.[149] In the coverage leading up to and after the grand jury's decision, commentaries often spoke not only about the case itself but also discussed and analyzed the oversight mechanisms covering an officer-involved shooting.[150] Such coverage often found the alternative oversight mechanisms were insufficient, or worse, fundamentally broken.[151] In the case of Michael Brown, the only "civilian participation" in regulatory oversight came through this public discourse over the actual in-effect regulatory mechanisms. The widespread discussion, and the subsequent condemnation of the regulatory mechanisms, both suggest that more direct civilian participation in police oversight is an important element of an effective oversight mechanism.

Although civilian oversight represents a viable regulatory approach, the civilian oversight mechanism must be modified in order for civilian oversight to adequately regulate data-collection technologies. Traditional civilian oversight must overcome several weaknesses in order for the benefits of civilian oversight to provide an effective regulatory framework for data-collection technologies' use by police departments. However, the LOPRB model provides an effective approach to adequately regulate police

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145. *See generally* Larry Buchanan et al., *Q&A: What Happened in Ferguson?*, N.Y. TIMES, Nov. 25, 2014, http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0, *archived at* http://perma.cc/7KYC-ZJSR (chronicling the events following the Michael Brown shooting through the grand jury's decision and the subsequent protests).

146. *Id.*

147. The facts of which are quite disputed. As the New York Times chronicled:

> Several witnesses reported seeing an altercation in the S.U.V. between Officer Wilson and Mr. Brown. Some said Mr. Brown punched Officer Wilson while Mr. Brown was partly inside the vehicle. At least one witness said no part of Mr. Brown was ever inside the vehicle. In his own testimony, Officer Wilson said that Mr. Brown reached into the vehicle and fought for his gun.

Id.

148. Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES, Aug. 17, 2014, http://www.nytimes.com/2014/08/18/us/michael-brownautopsy-shows-he-was-shot-at-least-6-times.html, *archived at* http://perma.cc/4NQJ-QYLN.

149. Buchanan et al., *supra* note 145; Robles & Bosman, *supra* note 148.

150. *E.g.*, Chase Madar, *Why It's Impossible to Indict a Cop*, NATION, Nov. 24, 2014, http://m.thenation.com/article/190937-why-its-impossible-indict-cop, *archived at* http://perma.cc/8EME-TUF7.

151. *Id.*

departments, emphasizing the strengths of civilian oversight while minimizing the traditional weaknesses of the approach.

B. Strengths of the Civilian Oversight Regulatory Paradigm

1. Independence.—Perhaps the greatest strength of civilian oversight is its independence from police departments. The structural independence of civilian oversight mechanisms from police departments ensures that departments do not unduly influence the civilian oversight mechanism and provides the necessary independence for informed judgments.[152] That independence ultimately "help[s] ensure the integrity" of the oversight and provides legitimacy to the civilian oversight decisions.[153]

For instance, public distrust often exists toward internal review because of the perception "that a police-oriented perspective necessarily colors complaint review by police, resulting not only in concealment of officers' past misdeeds but also in encouragement of further abuse of authority."[154] By providing an independent review mechanism on police department use of data-collection technologies, civilian oversight is not hampered by potential biases undermining legitimate review or plagued by the perception of bias often associated with internal review mechanisms.[155]

2. Transparency.—Second, civilian oversight can improve transparency in regulating police departments.[156] Some have called for transparency from the perspective that "law enforcement's business, in general, is the public's business."[157] Police departments have historically been "closed, self-protective bureaucracies."[158] This led to many reforms designed to make police departments less isolated from the public.[159]

Just the existence of an external regulatory mechanism increases transparency by forcing a closed bureaucracy to share information with outside parties. Furthermore, civilian oversight entities can use pamphlets, public hearings, and other methods to increase public awareness of the

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152. Clarke, *supra* note 14, at 16.

153. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 664 (1997).

154. Beral & Sisk, *supra* note 142, at 516.

155. Clarke, *supra* note 14, at 9–10.

156. *See* WALKER, *supra* note 103, at 5 (enumerating the goals of citizen oversight, including opening up a traditionally closed complaints process, breaking down the isolation of the police, and providing independent perspective).

157. Bobb, *supra* note 100, at 158.

158. WALKER, *supra* note 103, at 88.

159. *Id.*

oversight and of any corrective action taken.[160] Such actions help achieve civilian oversight's goal of "enhancing public confidence in the police generally."[161] This increased transparency and openness helps reduce police–community tensions and improves the perception of legitimacy in the process.[162]

3. Individual Deterrence and Systemic Correction.—Finally, civilian oversight has some meaningful deterrence on individual actors while also providing a functioning mechanism to address local systemic issues.[163] Individual police officers are more likely to undertake regulation of their own behavior when the officer knows that they are being watched by an oversight body.[164] External civilian oversight can ensure greater accountability not only among rank-and-file officers, but also among command officers, and can also address systemic issues facing dysfunctional departments.[165] Approximately two-thirds of civilian oversight entities undertake policy review in addition to complaint review,[166] allowing civilian oversight bodies to review general policies and advocate for systemic reform.[167] Samuel Walker, a scholar whose work focuses on police accountability, emphasized that successful civilian oversight bodies "take a *proactive view of their role* and actively *seek out the underlying causes of police misconduct or problems in the complaint process*."[168] If civilian oversight mechanisms continually provide policy recommendations to police departments, those recommendations as a whole can have a significant effect on police misconduct, while at the same time making the police department more "accustomed to input from outsiders."[169] Civilian oversight thus can have a transformative impact on entire police departments rather than only correcting the actions of a singular officer.

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160. *Id.* at 189; *see also* Jones, *supra* note 137, at 516 (highlighting the Milwaukee Fire and Police Commission's use of pamphlets to increase awareness of its oversight board and citizen-complaint process).

161. WALKER, *supra* note 103, at 157.

162. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 503–04 (2008).

163. *See* WALKER, *supra* note 103, at 172–74 (identifying a type of citizen oversight program that promotes general deterrence by addressing potentially troubling actions of individual officers and also by changing general police subculture to not tolerate unwanted behaviors).

164. *See supra* notes 87–89 and accompanying text.

165. Beral & Sisk, *supra* note 142, at 517.

166. WALKER, *supra* note 103, at 94.

167. Clarke, *supra* note 14, at 17–18.

168. WALKER, *supra* note 103, at 15.

169. *Id.* at 183.

C. *Weaknesses of the Current Paradigm*

Although civilian oversight has demonstrated advantages over comparable regulatory mechanisms, the current civilian oversight paradigm suffers from several weaknesses that must be addressed for civilian oversight to effectively oversee data-collection technologies.

1. Lack of Power.—First, civilian review mechanisms often do not possess the regulatory power necessary to enforce their recommendations to police departments. Most civilian oversight models "may only recommend discipline for individual officers and recommend changes in departmental policy."[170] The fact that policy reviews are only recommendations means that police departments are free to merely reject the proposed change.[171] The lack of enforcement power can undermine civilian oversight's independence by making the mechanism susceptible to "regulatory capture"—where the regulated entity exerts control over the very mechanism meant to regulate it.[172] If the civilian oversight body is reliant on the regulated department to implement recommendations, the body may be incentivized to appease the police department or become so highly supportive of the police department's view that the civilian oversight functions as little more than a "police buff."[173] The merely recommendative power of civilian review thus mitigates civilian oversight's effectiveness.

2. Lack of Adequate Resources.—Civilian oversight entities also suffer from a lack of resources. Limited resources can quickly undermine the ability of civilian oversight to fulfill its complaint and policy-review responsibilities.[174] For example, stagnant funding caused the CCRB to reduce community outreach and cease policy review in order to focus on complaint investigation.[175] The CCRB's internal policy changes in response to funding issues led to the agency investigating fewer complaints

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170. Clarke, *supra* note 14, at 11.

171. WALKER, *supra* note 103, at 151.

172. *Cf.* Frank N. Von Hippel, Op-Ed., *It Could Happen Here*, N.Y. TIMES, Mar. 23, 2011, http://www.nytimes.com/2011/03/24/opinion/24Von-Hippel.html, *archived at* http://perma.cc/4WVM-BEE3 (asserting that the Nuclear Regulatory Commission has often been timid in assuring safe reactor operation as a result of regulatory capture); Thomas Frank, Opinion, *Obama and 'Regulatory Capture'*, WALL ST. J., June 24, 2009, http://online.wsj.com/news/articles/SB124580461065744913, *archived at* http://perma.cc/D7NF-X2F9 (discussing the need for the Obama administration to call out the issue of regulatory capture in the banking industry in order to avoid a future economic crisis).

173. Clarke, *supra* note 14, at 13. This may explain why weaker forms of civilian oversight have been abandoned in favor of the stronger external-investigative model. *Id.* at 19–20.

174. *Id.* at 17.

175. *Id.* at 30–31.

and becoming more deferential to the police.[176] Lack of funding or staffing resources is not a problem particular only to the CCRB.[177] Inadequate resources lead to difficult decisions regarding how to allocate those resources among several responsibilities, including complaint review, policy review, and community outreach.[178] And when civilian oversight focuses on complaint processing rather than policy review, the mechanism often becomes judged based on its complaint processing speed rather than on the mechanism's other responsibilities.[179]

3. Regulated-Entity Resistance.—Police departments themselves are often resistant to civilian oversight. Police unions are often at odds with civilian oversight mechanisms; in New York, the CCRB was dismantled and reorganized after the local police union pushed for the CCRB's abolishment by referendum.[180] Police unions and police departments may oppose civilian oversight because they believe that civilians cannot accurately judge police behavior[181] or because of beliefs regarding the "nature of [the] job" of policing.[182] The disciplinary origin of civilian oversight creates an adversarial model between the civilian oversight and police departments, encouraging police resistance.[183] Whatever the reason, vocal and pervasive resistance from regulated police departments pushes against the effectiveness of civilian oversight.

4. Reactive Approach.—Civilian oversight often attempts to oversee police departments through reactive, rather than proactive, review. Reviewing complaints against police and police departments takes manpower and time, while simultaneously addressing individual behaviors rather than encouraging systemic change.[184] This reactive approach of focusing on individual incidents also means that when police departments enact controversial polices, the oversight entity may be unable to

176. *Id.* at 37.

177. *See* WALKER, *supra* note 103, at 77–78 (describing the perils of understaffing to oversight work in Cincinnati, Berkeley, New York City, Baltimore, Omaha, Portland, Washington, D.C., San Francisco, and San Diego).

178. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1822 (2005).

179. *See* Armacost, *supra* note 101, at 540 (reasoning that an oversight committee cannot be an effective tool for systematic reform and fulfill other necessary functions when the committee's primary focus is complaint processing); Clarke, *supra* note 14, at 38–44 (explaining how the CCRB's focus on individual complaint processing made it vulnerable to the NYPD's changing disciplinary policies—without a platform to advocate for policy reform, the CCRB had to defend each of its individual complaint decisions against the NYPD's allegations of mismanagement).

180. WALKER, *supra* note 103, at 29–30. For instance, Walker points to the civilian oversight movement as a driving force behind the creation of police unions. *Id.* at 27.

181. Armacost, *supra* note 101, at 539.

182. Jones, *supra* note 137, at 510.

183. Armacost, *supra* note 101, at 539–40.

184. *Id.* at 540.

adequately scale its operation to address a significant increase in complaints of police misconduct.[185] This "rule enforcement" model means civilian oversight often focuses on purely punitive measures.[186] Because civilian oversight entities often have similar sustain rates as internal review mechanisms,[187] it can be difficult to justify civilian oversight on the complaint-review model. Such an emphasis on complaint review blinds civilian oversight from broader policy questions, especially if the complaint review is directed towards establishing veracity rather than analyzing "what it was about police operations that antagonized people."[188] A primary purpose of complaint review also narrows the focus of the civilian oversight; many examples of potential police misconduct may not even spur actionable complaints. Thus, although civilian oversight has had success in some jurisdictions,[189] ultimately some commentators find it be an "unfulfilled promise."[190]

IV. A Solution: "Loyal Opposition" Policy Review Boards

While scholars have offered a variety of methods for improving civilian oversight generally,[191] civilian oversight of surveillance must be specifically designed to address the unique problems raised by the advancement in data-collection technologies, including that the public is often unaware of how new technologies are being used and even when informed, often discount the potential effect of such technologies because of privacy myopia. Through a membership of invested and knowledgeable "Loyal Opposition" citizens, a more directed focus on policy review, and an emphasis on community outreach, Loyal Opposition Policy Review Boards (LOPRBs) can ensure that the privacy rights of individual citizens are protected while still allowing police departments to use data-collection technologies to improve law enforcement and public safety.

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185. For example, the stop-and-frisk policy of the NYPD increased the number of filed complaints that the CCRB had to review. Clarke, *supra* note 14, at 38. *See generally* Katherine E. Kinsey, Note, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEXAS L. REV. 219, 221–27 (2014) (describing the implementation of and constitutional basis for the stop-and-frisk policy). This increase in complaint review impaired the policy-review responsibilities of the CCRB. Clarke, *supra* note 14, at 44–45.

186. Armacost, *supra* note 101, at 541.

187. WALKER, *supra* note 103, at 120. "Sustain rate" means "the percentage of complaints sustained in the complainant's favor." *Id.*

188. Livingston, *supra* note 153, at 665 (quoting HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 170 (1977)) (internal quotation marks omitted).

189. WALKER, *supra* note 103, at 14.

190. Debra Livingston, Commentary, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 653 (2004).

191. *E.g.*, Clarke, *supra* note 14, at 11–20, 48–49; Livingston, *supra* note 190, at 661–69; Mishkin, *supra* note 12, at 1439–47; Patton, *supra* note 101, at 806–07.

A. *"Loyal Opposition" Membership*

First, LOPRBs would be composed of a group of Loyal Opposition members to ensure the community's and police department's interests are effectively balanced. "Loyal Opposition" refers to a civilian oversight mechanism that would share a similar commitment as police departments to effective policing and ensuring public safety but holds alternative views regarding how those goals can appropriately be achieved.[192] Particularly, the Loyal Opposition of the LORPB would have not only a differing viewpoint on how data-collection technologies can and should be used by police departments[193] but would also be particularly invested in ensuring that such technologies do not unnecessarily infringe on a citizen's rights.

This is accomplished by having the board membership composed of individuals representing public-interest or community organizations that are particularly concerned with technology and privacy or with protecting constitutional rights.[194] Membership can also be drawn from academics specializing in criminal justice issues[195] or from individuals particularly concerned with privacy rights, regardless of law enforcement experience.[196] LOPRBs would thus be staffed by highly knowledgeable experts in the field, who would, through their interaction with the police departments, have a keen understanding of how data-collection technologies are currently used *and how they may be used in the future.* Ultimately, this positions LOPRBs to effectively balance the long-term privacy costs with the short-term policing gains of data-collection technologies.

By drawing membership from these sources, a LOPRB can act as an effective oversight mechanism by providing a countervailing viewpoint to police departments. A fundamental problem with self-regulation is the lack of incentive for police departments to voluntarily implement policies that

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192. *See* Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1373 (2013) (comparing the Loyal Opposition to political minorities that "share the majority's basic commitments but differ as to how these commitments ought to be carried out").

193. *See* George Anastaplo, *Loyal Opposition in a Modern Democracy*, 35 LOY. U. CHI. L.J. 1009, 1010 (2004) (describing Loyal Opposition as a group that "criticizes the party in power and offers its own programs as alternatives").

194. *See, e.g.*, *About the ACLU*, ACLU, https://www.aclu.org/about-aclu-0, *archived at* http://perma.cc/QVQ4-RJN5 ("The ACLU is our nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country."); *About EFF*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/about, *archived at* http://perma.cc/X9WB-TR58?type=source ("We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.").

195. For example, Rachel Harmon has written extensively on the topic of effective police oversight. *E.g.*, Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012); Rachel Harmon, *Promoting Civil Rights*, *supra* note 110.

196. Bobb, *supra* note 100, at 163. Potentially, a member could have some previous law enforcement experience as long as the individual was not currently associated with a law enforcement entity.

are against their interests.[197] On the other hand, the LOPRB mechanism relies on the self-interest of the loyal opposition to counter that of the police department, creating a system similar to the checks-and-balances approach of the tripartite federal government. The investigative interest of the police department and the constitutional rights and privacy interests of the LOPRB will interact against one another to create the proper balance of interests.[198] Furthermore, the public will likely perceive the actions of LOPRBs as not being unduly influenced by the police department because of the loyal opposition members' competing interests to the police department. Thus, the existence of an entity championing the competing privacy interests ensures that the use of data-collection technologies by police departments will neither stray into Orwellian totalitarianism nor into powerless policing.

B. Reviewing Policy, Not Complaints

LOPRBs would also make a significant departure from the traditional civilian oversight paradigm by abandoning complaint review to focus purely on reviewing and recommending police department policies for data-collection technologies. The policy review undertaken by LOPRBs would concern all aspects of data-collection technology, from recommending policies for the use of surveillance technologies to addressing how long collected information should be retained by police departments. The emphasis on policy review means LOPRBs provide proactive oversight of police departments' use of data-collection technologies. Other regulatory approaches, especially complaint-directed civilian oversight, usually only reactively respond to the filing of a complaint.[199] Reactive responses only provide a remedy to current practices without providing sufficient guidance on potential future issues that may arise because of advancing technologies that are often significantly dissimilar compared to past technologies.[200] And, because citizens are often unaware of the implementation of data-collection technologies, there is a very low likelihood that a sufficient number of complaints would arise to even correct current practices. By reviewing and recommending proactively, LOPRBs can establish "best practices" for both current and new technologies, providing adequate oversight to protect the constitutional rights and privacy interests of the community.[201] Policy review thus is a powerful tool because it allows civilian oversight to proactively address current and future issues facing

197. *See supra* notes 99–102 and accompanying text.

198. *See generally* Joseph W. Hatchett & Annette Boyd Pitts, *A Balancing Act*, FLA. B.J., Nov. 2006, at 27 (considering the balance of powers between the three branches of government and their roles in protecting constitutional rights).

199. *See supra* notes 184–85 and accompanying text.

200. *See supra* note 127 and accompanying text.

201. And a policy focus would protect the continued viability of the LOPRB by removing the significant expenses involved in complaint investigation.

police departments rather than only focusing reactively on complaints against the past actions of departments and their officers.

Furthermore, LOPRBs, by focusing on policy review at the local level, can provide a more nuanced best practice policy for the local community. Policing is primarily a local activity,[202] and the effects of data-collection technologies will be greatest in the local community where the police department uses such technologies. Just as different states often have diverging viewpoints on a variety of issues, each local community may have a unique viewpoint regarding what the community considers a reasonable expectation of privacy. LOPRBs can formulate policy recommendations that represent the local community's privacy expectations, creating a best practices approach that provides community-sensitive protections above the floor set by constitutional protections. While one LOPRB may recommend relaxed policies for the use of ALPRs in a community with significant car thefts,[203] another LOPRB may recommend strict data retention policies in a community with a history of discriminatory police practices.[204]

Finally, having LOPRBs review data-collection-technology procedures ensures such policies will actually be addressed, compared to being reliant on civilian complaints to bring such technology procedures to the board's attention. A policy-centric approach also helps bring data-collection technologies and how police departments use those technologies into the public consciousness, as the publically available reports and recommendations of LOPRBs would provide the public with greater information regarding how data-collection technologies affect the everyday privacy of the average citizen. This is especially relevant, considering that the public may often be unaware of the use of data-collection technology by police departments.

C. *Community Outreach and Education*

Third, LOPRBs would devote the remainder of their resources to community outreach, particularly the dissemination of their policy research. Community outreach would involve both informing the community about the purpose and incentives of the LOPRB and teaching the community about potential future issues arising from how technological changes impact policing in the community. Policy recommendation has a qualitative

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202. *See supra* note 143 and accompanying text.

203. Police departments in California, for example, would benefit from such recommendations, as the state holds the unfortunate position of leading the country in number of annual car thefts. Hannah Elliott, *The Cities with the Most Stolen Cars*, FORBES (June 19, 2012, 1:27 PM), http://www.forbes.com/sites/hannahelliott/2012/06/19/the-cities-with-the-most-stolen-cars/, *archived at* http://perma.cc/W7B6-M6T5.

204. For example, the Arab and Muslim communities targeted by New York's now-abandoned Demographics Unit. *See supra* note 86 and accompanying text.

impact on police departments, rather than the quantitative impact of complaint review; for this reason, policy recommendations make it more difficult for the community to have simple metrics to understand the impact of LOPRBs. LOPRBs must establish open and continuous dialogue with the community at large so that the community can learn of the qualitative impact of LOPRBs. That dialogue also provides LOPRBs the opportunity to inform the community not only of the LOPRB's policy recommendations but also to teach the public regarding the changing nature of policing and the impact of data-collection technologies on individuals' privacy and constitutional rights.

Community outreach will also provide greater legitimacy to LOPRBs as a regulatory form. The legitimacy of civilian oversight mechanisms is correlated to the activeness and effectiveness of community outreach;[205] thus, the emphasis of LOPRBs on effectively using community outreach to establish a dialogue with the community will give LOPRBs greater legitimacy. LOPRBs will also have greater legitimacy than traditional civilian oversight because LOPRBs are specifically designed to represent and protect the interests of the general population, rather than merely to function as a punitive measure against police departments.

Strong community outreach can also help overcome the problem of "privacy myopia."[206] By educating the public regarding data-collection technologies and the LOPRB's policy recommendations for effective regulation, the community becomes more informed on the privacy costs associated with data-collection technologies. This will allow the public to overcome internal discounting that makes it difficult for individuals to properly value future costs compared to apparent present gains.

D. Addressing Two Concerns

While LOPRBs would function as an effective regulatory mechanism for police department use of data-collection technologies, there are two potential concerns with the approach: (1) police department resistance to LOPRBs and (2) the potential application of LOPRBs to very small police departments. While these concerns at first glance appear to be significant hurdles to LOPRBs, neither truly presents a serious issue.

First, even a highly effective LOPRB providing quality policy recommendations to a police department would likely encounter some department resistance to the civilian oversight. This resistance may be created because of police department views of a civilian entity "meddling" or just the potential perception of an adversarial relationship between the

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205. WALKER, *supra* note 103, at 149.

206. *See* Froomkin, *supra* note 19, at 1504 (noting that privacy myopia may be remedied if people begin to consider the long-term impacts of selling their privacy); *supra* notes 94–97.

LOPRB and police department.[207] However, the structure of LOPRBs help overcome most of this resistance traditionally leveled against civilian oversight from police departments. The emphasis on policy review, rather than complaint review, means that LOPRBs will not directly regulate individual police officers but rather the department as a whole. This change in focus will likely reduce the intensity of any police department resistance because the potential adversarial relationship will be between the LOPRB and the police department instead of individual officers.[208] Furthermore, any resistance can be ameliorated by public pressure on police departments to enact the LOPRB's policy recommendations. The LOPRB's outreach will inform the local community of the use of data-collection technologies, potentially generating popular support behind LOPRB recommendations. LOPRBs can thus indirectly enforce their recommendations through utilizing that popular support and pressure on police departments. That indirect pressure on police departments will help reduce potential police department resistance because policy changes brought about through public pressure will be a reaction by the police department to the public at large, rather than directly reacting to the adversarial LOPRB. Thus, while police department resistance likely cannot be completely overcome, LOPRBs can ameliorate this traditional civilian oversight problem.

Second, the valid criticism can be raised that not all jurisdictions or departments have the resources to create a local LOPRB. A LOPRB requires not only financial resources but also a sufficient number of invested and informed community members to draw from to form the Loyal Opposition.[209] In smaller towns and communities where the police department may contain only a few officers, it may be particularly difficult to justify the expense of a LOPRB, let alone draw qualified members to sit on the board. However, LOPRBs do not have to be created in every jurisdiction for LOPRBs to provide effective regulatory oversight of data-collection technologies nationwide. The exclusive policy-review focus of LOPRBs means that even in communities that do not have their own LOPRB, that community can look to other cities or towns to find the best best practices to implement in their own community. This sharing of policy recommendations across communities is also facilitated by the civilian outreach of LOPRBs; just as the local community can learn about data-collection technologies and policy recommendations from their LOPRB's website or other resources, other communities can also access those resources. And communities that are too small to feasibly implement a LOPRB would be able to look to a variety of approaches taken by other

207. *See supra* section III(C)(3).

208. For a discussion of the failings of complaint-focused civilian oversight, see generally Clarke, *supra* note 14.

209. *See supra* subpart IV(A).

cities' LOPRBs, allowing those communities to determine which approach is most appropriate for their own community.

Conclusion

Ultimately, effective oversight of police departments often involves multiple oversight mechanisms working together to ensure that the rights and privacy of private citizens are protected. LOPRBs are not a panacea to all oversight woes created by ever-changing technology, but LOPRBs can supplement other oversight mechanisms (including other civilian oversight bodies) by effectively regulating data-collection technologies to ensure that police departments utilize best practices above and beyond the protections provided by current oversight mechanisms.

Civilian oversight through LOPRBs ensures that the policy recommendations balance the needs of local police departments with the desires of their communities. As time progresses, technology will continue to evolve and present new dangers to the rights of citizens; implementing LOPRBs at the local level will ensure that a regulatory mechanism exists which can ensure that even as new technologies appear, an appropriate balance can be maintained.

—Steven D. Seybold

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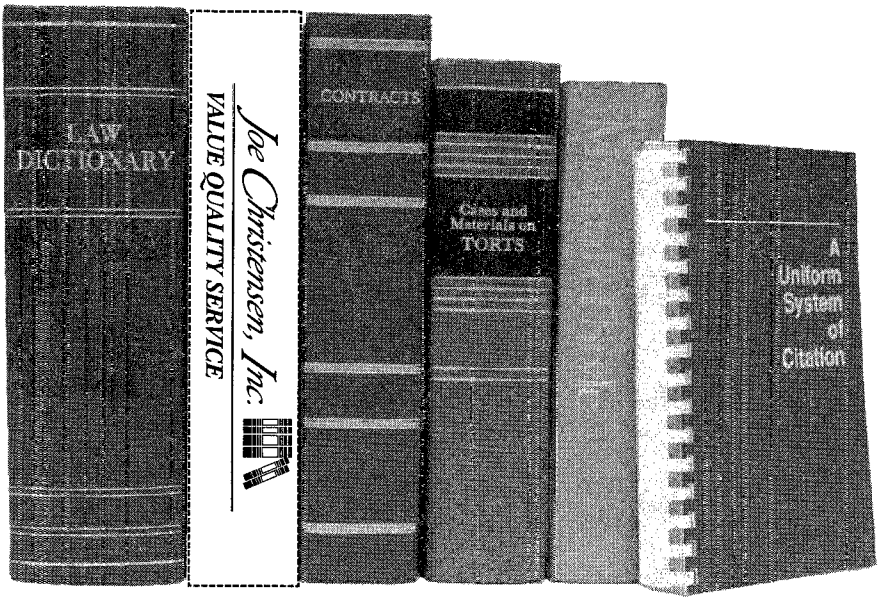

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TEXAS
TLR
LAW REVIEW