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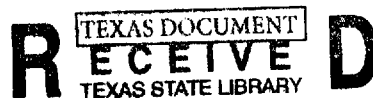
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Article

Redundancy: When Law Repeats Itself

John M. Golden *

The idea that law should generally be understood or designed to minimize redundancy informs much legal reasoning. Judges frequently invoke anti-redundancy principles in the interpretation of legal language, whether it appears in classic private-law documents such as contracts or classic public-law documents such as constitutions and statutes. Such invocations of anti-redundancy principles merit scrutiny. The canon against surplusage, an interpretive canon commonly deployed in the interpretation of constitutions, statutes, and contracts, provides an example of both an anti-redundancy principle and the capacity of such a principle to run contrary to actual practice. Among fields of law, modern patent law offers particularly dramatic examples of how excessive adherence to anti-redundancy can lead to perverse or otherwise unintended results. Patent law also illustrates how, despite frequent invocation of anti-redundancy principles, legal redundancy in the form of functionally overlapping language, doctrines, processes, and institutions remains ubiquitous.

The pervasiveness of legal redundancy has at least one straightforward explanation. Redundancy has much to offer. As engineers, biologists, linguists, and information theorists have long appreciated, redundancy can help secure key interests, prevent or correct errors, enable nuance, and foster evolutionary potential. Hence, in a complex society, redundancy is a crucial tool of legal design. Of course, redundancy can be overdone. But instead of

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enjoying presumptive hegemony, anti-redundancy principles should generally be contextually confined to condemnation of excessive or otherwise problematic redundancy, rather than redundancy per se. In the development and application of law, anti-redundancy should often be no more than a factor, as opposed to a source of general presumption. Particularly when law mediates between competing interests of comparable social weight, anti-redundancy can have merit. Nonetheless, even in such situations, smart legal design, as through the layering of rule-like “safe harbors” over comparatively vague standards, can employ redundancy while satisfying anti-redundancy concerns. Generally speaking, opportunities for intelligent design mean that legal policy makers and decision makers should not seek to banish redundancy, but instead work to optimize its use.

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Introduction

The idea that law should generally be understood or designed to minimize redundancy is a force in legal reasoning. Judges frequently cite anti-redundancy principles in interpreting legal documents, opining on the structure of legal doctrine or objecting to “relitigation” of issues under ostensibly different legal headings.¹ These principles, which are instances of what this Article terms “anti-redundancy,” can operate not only to determine results in individual cases but also to shape the form and scope of legal doctrines themselves. In fields ranging from constitutional law to contracts, anti-redundancy can support hostility to doctrines such as substantive due process² or unconscionability³ that serve—or could serve—as at least partially redundant “backups” for other legal principles.⁴

The too-easy hold of anti-redundancy rhetoric is both troubling and peculiar. For decades, information theory, data compression, and ordinary persons’ success concise communication via modern “text” or historical telegram have made clear that standard human communication tends to be full of redundancy⁵ and often desirably so.⁶ Further, attention to the actual

1. See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (invoking as a “sensible rul[e] of statutory construction” the rule that “the Court will avoid a reading which renders some words altogether redundant”); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640 (1975) (“As nature abhors a vacuum, the law cannot abide a redundancy.”); F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. (forthcoming) (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664135 [<http://perma.cc/H5Z2-UBYD>] (“Courts and commentators usually argue against redundancy in the law.”).

2. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (“Any protection that ‘substantive due process’ affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment.”).

3. See Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1082 (2006) (noting that in various cases “the unconscionability analysis is either ancillary to the application of a more specific policing doctrine or is a purely redundant and unnecessary support for voiding an offending clause or contract”); Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts’ Grapple with Challenges to Mandatory Arbitration Agreements*, 62 HASTINGS L.J. 1065, 1082 n.109 (2011) (“Many arbitration agreements are invalidated for lack of offer and acceptance, rendering defenses to acceptance, such as unconscionability, redundant.”).

4. Cf. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 834 (2003) (arguing that the rule “that substantive due process may not be invoked where a claim is ‘covered by’ another, more explicit, constitutional provision . . . reinforce[s] questions about [the substantive due process doctrine’s] very legitimacy”).

5. C. E. Shannon, *Prediction and Entropy of Printed English*, 30 BELL SYS. TECHNICAL J. 50, 50 (1951) (noting a prior finding that “when statistical effects extending over not more than eight letters are considered[,] . . . the redundancy [of language is] about 50 per cent,” and suggesting “that, in ordinary literary English, the long range statistical effects (up to 100 letters)” raise “redundancy [to] roughly 75%”); cf. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 248 (2010) (“[I]t is probably *not* true that redundancy is exceedingly rare in everyday communication.”).

results of legal drafting and the motivations of legal drafters suggests that drafters of legal documents ranging from statutes to contracts pay no more than limited heed, if any, to concerns with avoiding redundancy.⁷ To the extent one considers the generation of legal documents or doctrines as a problem of “legal engineering”—a practical process of harnessing human artifacts “to better achieve objectives”⁸—the desirability of a general rule against redundancy is highly questionable.⁹ Mechanical, electrical, and civil engineers are commonly advised (or even required) to build redundancy into systems so that important ends such as safety are not compromised if one element fails.¹⁰ Consistent with conclusions about

6. See, e.g., Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 81 (2014) (“The key to noise detection and correction by a message recipient is redundancy in a message.”); Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 126 (1972) (noting that a communications engineer “finds it wise . . . to introduce redundancy . . . because otherwise any loss of information due to malfunctions in the transmission system would be undetectable and irremediable”).

7. E.g., Royce de R. Barondes, *Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 BAYLOR L. REV. 651, 704 (2012) (noting that the “commonly applied principle” disfavoring “a construction that causes some provision to be ‘surplusage’ (alternatively referenced as ‘redundant’ or ‘meaningless’ or ‘superfluous’) . . . seems somewhat at odds with what is involved in negotiating a large, complicated contract”); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 932, 934 (2013) (reporting that a survey of 137 congressional staffers indicated that drafters of statutory provisions “intentionally err on the side of redundancy”); Mark A. Lemley, *The Limits of Claim Differentiation*, 22 BERKELEY TECH. L.J. 1389, 1394 (2007) (“Patent applicants who draft multiple claims quite often *are* trying to be redundant.”); see also *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (“[R]edundancy is ‘hardly unusual’ in statutes addressing costs.”).

8. HENRY PETROSKI, *INVENTION BY DESIGN: HOW ENGINEERS GET FROM THOUGHT TO THING 2* (1996); see also Sheri Sheppard et al., *What Is Engineering Practice?*, 22 INT’L J. ENGINEERING EDUC. 429, 430 (2006) (“Engineering work is focused on resolving an undesirable condition through the application of technologies.”).

9. *But see* Hessick, *supra* note 1 (manuscript at 36) (concluding that “courts should generally avoid creating doctrinal redundancies”).

10. E.g., PATRICK D.T. O’CONNOR & ANDRE KLEYNER, *PRACTICAL RELIABILITY ENGINEERING* 146 (5th ed. 2012) (“In aircraft, dual or triple active redundant hydraulic power systems are often used, with a further emergency (standby) back-up system”); see also, e.g., IGOR BAZOVSKY, *RELIABILITY THEORY AND PRACTICE* 97 (Dover ed., 2004) (1961) (“If very high system reliabilities are required, the designer must duplicate components, and sometimes whole circuits”); CHARLES E. EBELING, *AN INTRODUCTION TO RELIABILITY AND MAINTAINABILITY ENGINEERING* 164 (Eric M. Munson & John M. Morriss eds., 1997) (“When it is impossible to achieve the desired component reliability through inherent component design, redundancy may provide the only alternative.”); *In Praise of Celestial Mechanics*, ECONOMIST TECH. Q., June 1, 2013, at 16, 18, <http://www.economist.com/news/technology-quarterly/21578513-space-technology-fixing-unmanned-spacecraft-thousands-or-millions> [<http://perma.cc/V8ZQ-WGVS>] (“[R]edundancy, resiliency, adaptability and programmability, along with human ingenuity, seem to be the keys to keeping distant hardware going, years or even decades longer than planned.”).

“high-reliability organizations”¹¹ in business or government, the U.S. Constitution enshrines a governmental system of “checks” that falls far short of an ideal of minimalist design.¹² Indeed, in many respects, recognition of the desirability of redundancy to protect against human limitations pervades the law.¹³ Yet somehow when fallible, limited humans or human institutions generate legal documents or doctrines, there is a persistent tendency to view—or at least presumptively to view—these artifacts of human endeavor as heroically lacking in redundancy.¹⁴

This Article explores the puzzle of legal anti-redundancy and examines how legal doctrine can be designed to obtain important benefits from redundancy while substantially mitigating anti-redundancy concerns. The potential desirability of such mitigation reflects acknowledgment that, although redundancy often provides positive value, there can be strong interests in limiting redundancy in various contexts. In law as in other areas, negative trade-offs can counterbalance any positive value that redundancy provides.¹⁵ Most obviously, redundancy can lead to inefficiency, with repetition adding less value than it costs. More subtly, overlaps between doctrines or areas of law can promote uncertainty and even confusion, leading to unpredictable or inappropriate application of corollary principles associated with one doctrine or area but not another. In

11. ROBERT POOL, *BEYOND ENGINEERING: HOW SOCIETY SHAPES TECHNOLOGY* 265–66 (1997) (observing that “high-reliability organizations” generally appear to feature a “layered organizational structure” and “constant communication . . . far in excess of what would be thought useful in normal organizations”).

12. See, e.g., CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 41 (2001) (discussing “the American constitutional framework” and its “system of checks and balances”); I LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-1, at 118 (3d ed. 2000) (discussing how “[t]he Madisonian clockwork would enable the forces and counterforces of government . . . to check one another as needed”); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 639–40 (1981) (noting the frequently overlapping jurisdictions of state courts and the common “concurrency or overlap of jurisdiction” between state and federal courts); Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 36 (2013) (observing that, under the U.S. federal system, “enforcement redundancy [of federal law] is the norm”).

13. See Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1435 (2011) (contending “that many institutional structures, rules, and practices have been justified as mechanisms for requiring or permitting decision makers to obtain second opinions”).

14. Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 119 (2005) (“Courts generally interpret statutes and the Constitution to avoid redundancy and apply the same rule at the doctrinal level.”); cf. Peter Goodrich, *Maladies of the Legal Soul: Psychoanalysis and Interpretation in Law*, 54 WASH. & LEE L. REV. 1035, 1072 (1997) (“Love of texts . . . is a symptom . . . of an image of temporal distance and an aura of mystical authority.”).

15. See EBELING, *supra* note 10, at 164 (noting that in designing a physical system for optimal redundancy “trade-off analysis should consider the increased costs of additional components, the size or weight added to the system, and possibly the increase in repair and preventive maintenance”).

contrast, clear definition and distinction of legal doctrines—aspects of law commonly associated with anti-redundancy—can channel the efforts of courts and lawyers in ways that facilitate more precise and self-consistent legal reasoning as well as the development of a deeper and more instructive case law and body of experience.

U.S. patent law offers particularly fertile ground for consideration of such concerns of redundancy and anti-redundancy. Patent law's fertility in this regard reflects its technical nature, its reliance on a largely privately drafted document to define rights against the world, and its possession of three decades of case law under a national court of first appeal, the United States Court of Appeals for the Federal Circuit. The technical nature of patent law and its subject matter,¹⁶ as well as the frequent complexity of associated legal disputes,¹⁷ can lead judges to grope for legal tools, such as anti-redundancy doctrines, that at least superficially promise to ease decision making.¹⁸ Hence, anti-redundancy might be predictably prominent in the technical process of construing patent claims, the numbered clauses of a patent document that are the primary determinants of patent scope.¹⁹ Further, heavy demands for predictability in patent law²⁰ might help explain its historical trends toward increased doctrinal differentiation and compartmentalization, trends that have both fed and fed off anti-redundancy.²¹

The Federal Circuit has played a significant role in patent law's investment in anti-redundancy. Although the Federal Circuit has suffered a hailstorm of criticism for its performance as a centralized appellate tribunal

16. See *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015) (“[P]atent law is ‘a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience.’”).

17. FED. JUDICIAL CTR., 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY 5 tbl.1 (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/\\$file/CaseWts0.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf) [http://perma.cc/KN7W-NWTE] (assigning patents a “Case Weight” for judicial workload that was fourth highest among forty-two categories of civil cases, following only “Death Penalty Habeas Corpus,” “Environmental Matters,” and “Civil RICO” cases).

18. See Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 658 (1992) (contending that “often judges use the canons to avoid having to immerse themselves in highly complex, technical areas of the law where the probability of error is particularly high”).

19. John M. Golden, *Construing Patent Claims According to Their “Interpretive Community”*: A Call for an Attorney-Plus-Artisan Perspective, 21 HARV. J.L. & TECH. 321, 322 (2008) (“Claims—numbered clauses at the end of a patent—are meant to provide notice of what a patent covers and to describe a patented invention in a way that distinguishes it from prior art.”); *id.* at 325–26 (noting that the Federal Circuit has “reemphasized the importance of the rule that claims must be construed from the perspective of one having ordinary skill in the relevant technological art”).

20. *Cf. id.* at 322 (“Patents play a critical role in modern business planning and finance.”).

21. See *infra* section II(B)(1).

for patent law,²² the circuit has commonly—if sometimes grudgingly—received praise for success in clarifying various aspects of patent law’s content and application.²³ Part of this success has come naturally from the centralization of first-level appellate review in a single national tribunal. But the Federal Circuit’s success in clarifying various aspects of patent law has also derived at least partly from its provision of crisper definitions of the bounds of legal doctrines.²⁴

The sort of doctrinal refinement and distinction that patent law has experienced under the Federal Circuit’s watch might commonly be a good thing. But compartmentalization of legal doctrines can also multiply opportunities for loophole seekers and can help distance the daily operation of law from its constitutional or statutory aims. In patent law, the United States Supreme Court’s recent interventions on questions of subject-matter eligibility are partly understandable as a reaction against efforts to delineate the law in parsimonious ways that sacrifice richness in favor of at least superficially clearer direction.²⁵ In like vein, the Federal Circuit itself has sometimes reacted against anti-redundancy in patent law—for example, by rejecting district courts’ conclusions that arguments for infringement by equivalence constituted improper efforts to relitigate questions about patent claims’ literal scope.²⁶

This Article proceeds as follows. Part I provides a taxonomy of redundancy forms and discusses redundancy and anti-redundancy in relation to legal processes and institutions, the interpretation of legal documents, and the structural design of legal doctrine. Part II narrows the focus by discussing redundancy and anti-redundancy in U.S. patent law, particularly in relation to patent claim construction and the structure of patent law doctrine. Part III returns the Article to a broader focus. This Part acknowledges that anti-redundancy can have especially strong justification in situations where the law seeks to mediate between conflicting interests of comparable social weight. Part III contends, however, that even in situations where anti-redundancy’s justifications are particularly strong, the interests that anti-redundancy seeks to protect can often be substantially

22. John M. Golden, *The Supreme Court as “Prime Percolator”*: A Prescription for Appellate Review of Questions in Patent Law, 56 UCLA L. REV. 657, 659 (2009) (“A number of commentators have concluded that, since the Federal Circuit’s creation in 1982, the Circuit has come to embody a number of long-theorized problems with specialized courts . . .”).

23. *See id.* at 677 (“[M]ost commentators appear to agree that the [Federal] Circuit has generally improved the coherence and predictability of judge-made aspects of patent law . . .”).

24. *See id.* at 681 (observing that in context the Federal “Circuit has commonly been criticized and sometimes praised for embracing formal rules that, whatever their faults, appear intended to promote goals of certainty, predictability, and fidelity to recent [Supreme Court] directions” (footnotes omitted)).

25. *See infra* section II(B)(3).

26. *See infra* section II(B)(2).

satisfied through smart doctrinal design—for example, by fitting overlapping doctrines to a model in which one doctrine provides a rule-like overlay (e.g., a safe harbor) for a more fundamental legal standard or, alternatively, by limiting the independent force of one doctrine to relatively extreme situations. In short, this Article analyzes redundancy and anti-redundancy as general legal phenomena, illustrates their interaction through detailed examples from patent law, and suggests how redundancy and anti-redundancy might be reconciled through intelligent legal design.

I. Redundancy and Anti-Redundancy Overview

This Part provides a taxonomy of different forms of redundancy, describes how redundancy and anti-redundancy commonly appear in legal processes and institutions, the drafting and interpretation of legal documents, and the structuring of legal doctrine. In a final section on redundancy and anti-redundancy as design principles, the Part discusses pluses and minuses of redundancy and suggests explanations for anti-redundancy's peculiar hold in legal thought despite redundancy's many advantages.

A. *Forms of Redundancy*

Consistent with a “legal engineering” perspective and the range of situations in which anti-redundancy principles appear, this Article takes a broad, functionalist view of the scope of the term “redundancy.” In essence, the Article defines legal redundancy as occurring when legal devices—terminology hereinafter commonly used to describe legal processes, institutions, language, or doctrines—have overlapping and reinforcing coverage. Such reinforcing coverage means that, within the scope of the overlapping coverage, the two devices work toward a shared outcome that, at least under ideal conditions, either of them might generate by itself.²⁷

The breadth of this outcome-oriented definition for redundancy means that the concept encompasses a variety of different forms of redundancy, including what this section describes as “partial redundancy” as opposed to “complete redundancy.” This section discusses such forms of redundancy as well as the phenomenon of “spurious redundancy” and ways of classifying redundancy by provenance—for example, by whether or not the redundancy was intentionally created.

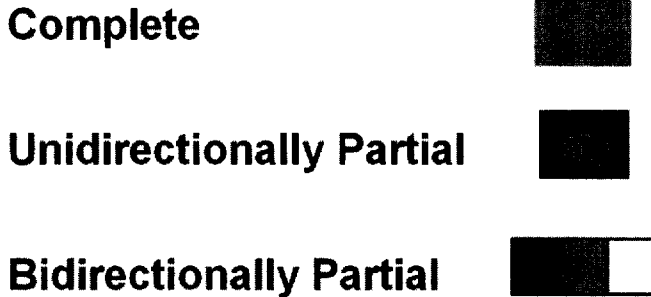
27. This outcome-oriented definition of “redundancy” seems to be at least potentially broader than the facially more content-specific and motivation-specific definition adopted by Andrew Hessick within the context of judicially generated legal doctrine. See Hessick, *supra* note 1 (manuscript at 6) (“Doctrinal redundancy occurs when two judicially created doctrinal tests seek to protect the same set of interests through the same basic inquiry.”).

1. *Redundancy v. Superfluity.*—Before examining different forms of redundancy, one should make a note of what even this Article’s broad conception of redundancy excludes. As defined here, redundancy is a kind of superfluity, but it is only a subset of superfluity. Redundancy does not encompass superfluity in the absence of work toward a shared outcome that either of the two relevant devices can suffice to generate. Hence, certain legal language can be superfluous because it is simply meaningless or devoid of effect even though that language is not redundant of any other legal language. A legal rule, doctrine, set of terms, institution, or process can be devoid of effect because of a constant and irreconcilable conflict with a superior source of authority. Likewise, a legal device can lack practical significance because circumstance or other legal authority effectively eliminates the body of subject matter on which the language, doctrine, institution, or process was meant to act. None of these situations necessarily involves redundancy. Instead, redundancy results when legal devices provide overlapping coverage of subject matter with respect to which they work, at least to some degree, toward a shared outcome.

2. *Complete Redundancy.*—Having considered what redundancy is and is not as a matter of general principle, let us now consider some of the forms in which redundancy manifests itself. As Figure 1 illustrates below, one form of redundancy is “complete redundancy.” Complete redundancy occurs when there is an essential identity between the coverage and outcomes associated with the two legal devices being compared. Such complete redundancy occurs when a provision in a legal document includes two synonymous terms presented in the alternative, as some might suggest is the case with the terms “arbitrary” and “capricious” in the language providing for “arbitrary or capricious” review of agency decisions under the Administrative Procedure Act.²⁸ More generally, legal writing commonly uses couplets or even triplets of terms that appear to be substantially synonymous—for example, “cease and desist”; “aid and abet”; “will and testament”; or (in a will) “give, devise, and bequeath.”²⁹

28. 5 U.S.C. § 706(2)(A) (2012).

29. *E.g.*, Jonathan K. Van Patten, *On Editing*, 60 S.D. L. REV. 1, 6 (2015) (“There is also a long tradition of rhetorical excess in legal style where synonyms are utilized without necessarily adding meaning: cease and desist; aid and abet; aid and comfort; custom and usage; fraud and deceit; free and clear; null and void; true and correct; last will and testament; give, devise, and bequeath; right, title, and interest; rest, residue, and remainder; ordered, adjudged, and decreed; and . . . necessary and proper.”).

Figure 1: Forms of Redundancy

The color grey indicates areas in which relevant institutions or processes, portions of legal language, or doctrines overlap. Except for black borders included for clarity in illustrating bidirectionally partial redundancy, the colors black and white indicate areas in which either of two institutions or processes, portions of legal language, or doctrines acts in a way that does not overlap with the other.

Complete redundancy in the form of common legal couplets or triplets is often of only relatively trivial significance because the package of synonymous terms has come to be treated as an undifferentiated unit, without any effort wasted on attempting to differentiate the separate parts. Recognition of complete redundancy between the components of a couplet such as “cease and desist” can naturally—and perhaps optimally—lead private and public actors to collapse their understanding and analysis of the separate terms, making their combination, at least in effect, a single term of art. If this occurs, the redundancy probably adds little value but, correspondingly, imposes little legal cost, particularly when drafting and recognition of the redundancy (or single term of art) have become essentially automatic. In short, once complete redundancy in legal language or doctrine is generally recognized, it likely becomes relatively uninteresting from a social-welfare perspective.

On the other hand, when complete redundancy—or at least apparently complete redundancy—is not reduced to triviality, it can lead to significant waste or confusion. The latter undesirable result has arguably occurred with respect to the first two prongs of a test for permanent injunctions embraced by the United States Supreme Court in 2006. Under this test, a movant for an injunction must show “(1) that it has suffered an irreparable injury” and “(2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury.”³⁰ Although, at least in the

30. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

permanent injunction context, these required showings seem fundamentally “one and the same,” courts have commonly appeared hesitant to recognize this explicitly even while, in case after case, they tend overwhelmingly to generate identical outcomes through their analysis of the separate prongs.³¹

In combination with the relative triviality of “collapsed redundancies” such as that of “cease and desist,” courts’ struggles with the test for injunctions might suggest a substantial risk that complete redundancy in legal language and doctrine will be either problematic or largely insignificant. On the other hand, complete redundancy—or something very close to complete redundancy—might have a greater propensity to be useful and meaningful in institutional and procedural contexts. For example, one entity might productively help prevent or correct errors by repeating work separately performed by itself or an equivalent under equivalent circumstances. One often finds checking one’s work useful even if there is little reason to think one is wiser or even in a substantially different frame of mind at one point as opposed to the next.

But beyond the simple possibility of waste if few errors are found, there can be dangers even with procedural and institutional redundancy. One can be careless in checking one’s own—or, for that matter, another’s—work, and the expectation of a check can also breed relative carelessness in an original performance. For the redundancy to serve its error-limiting purpose, government might need to put in place incentives or controls to ensure that the existence of redundancy does not lead to shirking by one or the other entity involved in the repetitive performance. If the redundancy comes through the actions of separate entities who do not know the results achieved by the other, a natural check on shirking might come through concern that the other’s work might prove one’s own results to be wrong or, more positively, through a competitive urge to outperform the other entity.³²

31. Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 209 (2012); see also Golden, *supra* note 22, at 695 (“As Douglas Laycock remarks in his remedies casebook, the Court obtained four factors by doubling up, confusingly, on the irreparable harm factor, redundantly restating it as a requirement that legal remedies be inadequate.”); Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. (forthcoming 2016) (manuscript at 53), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632834 [<http://perma.cc/ZSH6-SPG4>] (reporting that in 135 of 136 post-*eBay* decisions on motions for permanent injunctions in which a district court made an explicit finding of irreparable injury the court also found legal remedies to be inadequate, and that in 41 of 42 post-*eBay* decisions in which courts made an explicit finding of lack of irreparable injury the court also found legal remedies to be adequate).

32. See EVERETT M. ROGERS & REKHA AGARWALA-ROGERS, COMMUNICATION IN ORGANIZATIONS 93 (1976) (“If an official has reason to doubt the accuracy with which events are reported by those under his authority, he may establish two or more channels (sometimes competitively) to report the same event.”).

3. *Partial Redundancy*.—One potential way of responding to concerns about waste, shirking, or confusion is to arrange for redundancy to be partial, rather than complete. Figure 1 illustrates two of the forms that partial redundancy can take, forms in which reinforcing legal devices have incompletely overlapping coverage.³³ In the first of these forms, redundancy is only unidirectionally partial because one legal device provides a full backstop for the other, encompassing all that the other covers and thereby potentially rendering the other wholly redundant with respect to outcomes produced. But this unidirectionally partial redundancy is not complete redundancy because the “backstop” does not merely replicate the coverage or capacities of the other device: the backstop’s coverage or capacities reach beyond those of the other. Some might argue the doctrine of unconscionability should be understood to play this role with respect to a number of other more specific limitations on contract validity or enforceability, such as doctrines of duress, incapacity, and undue influence, which might be viewed as more specific instances, but not an exclusive set of instances, of situations in which enforcing a contract as written should be considered unconscionable.³⁴ Perhaps less controversially, “safe harbors” in tax and other areas of law can have relationships of unidirectionally partial overlap with more general standards whose outcomes they largely look to replicate more automatically and with greater ex ante clarity in a particular subset of situations.³⁵

Figure 1 also includes a graphical representation of bidirectionally partial redundancy. In a situation characterized by bidirectionally partial redundancy, each of the overlapping legal devices has coverage or capacities that are not shared by the other. An example of such bidirectionally partial redundancy comes in common provisions for trial and

33. Some biologists might prefer to use the term “degeneracy” for forms of partial redundancy that result from incompletely overlapping coverage. *E.g.*, Giulio Tononi, Olaf Sporns & Gerald M. Edelman, *Measures of Degeneracy and Redundancy in Biological Networks*, 96 *PROC. NAT’L ACAD. SCI.* 3257, 3257 (1999) (distinguishing degeneracy, which describes “elements that are structurally different but which, under certain conditions, can perform similar functions” from redundancy, which “refers to duplication or repetition of elements within electronic or mechanical components to provide alternative functional channels”).

34. *Cf.* John Phillips, *Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine*, 45 *WAKE FOREST L. REV.* 837, 861 (2010) (contending that “the doctrine of unconscionable bargains should . . . replace the existing doctrines of duress and undue influence”). *But cf.* Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 *AM. BUS. L.J.* 193, 228 (1998) (“As a general rule, a finding of unconscionability requires both a modicum of procedural impropriety, something akin to fraud, duress, or undue influence, and a substantive claim to resulting unfairness.”).

35. *Cf.* Saul Levmore, *Double Blind Lawmaking and Other Comments on Formalism in the Tax Law*, 66 *U. CHI. L. REV.* 915, 917–18 (1999) (discussing an example of a safe harbor in tax law and noting that “[s]imilar safe harbors exist in many areas of law”).

appellate review. Under such provisions, the trial court has distinctively primary responsibility for factual findings: the appellate court is generally confined to the factual record developed by the trial court and offers only limited review of trial court factual findings.³⁶ At the same time, the appellate court typically has at least one capacity that the trial court lacks—namely, the capacity to revisit (albeit perhaps only through a mechanism like *en banc* review) its own precedent on legal matters.³⁷ Thus, although the trial and appellate courts have significantly overlapping coverage of pure questions of law and overlapping coverage of at least some issues relating to facts, each has capacities that the other lacks, a fact rendering their redundancy bidirectionally partial.

4. *Probabilistic Redundancy*.—Forms of partial redundancy are not exhausted by those most straightforwardly suggested by Figure 1. Partial redundancy can also result because the extent of overlapping coverage or capacities is in fact only a matter of probabilities, dependent on the uncertain nature of the actual legal audience or other exogenous circumstances.

Such probabilistic redundancy can result when the drafters of a legal document or the generators of alternative legal doctrines do not know with certainty how separate terms, provisions, or doctrines will be later understood or applied. They might suspect that these legal devices will ultimately turn out to be completely redundant as understood and applied, but they might believe there is value in including the potential redundancy to protect against alternative paths of development. As students of language have long appreciated, understood or perceived redundancy is frequently as much a result of the knowledge and understandings of a communication's audience as it is a result of the intentions and actions of the communication's originator.³⁸ Thus, a later, generally recognized

36. JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* § 13.4, at 636, 638, 640 (4th ed. 2005) (noting that appellate review is restricted to errors that “appear clearly in the trial-court record,” that “[t]he appellate court cannot . . . receive new evidence concerning the facts,” and that review of factual findings is typically limited by a “clearly-erroneous standard”).

37. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 798 (2012) (“Sitting *en banc*, circuit judges are not bound by prior panel decisions, but may give some deference to well-entrenched precedent.”).

38. David V. Gibson & Barbara E. Mendleson, *Redundancy*, J. BUS. COMM., Winter 1984, at 43, 48 (“[T]rue redundancy and meaning are unlikely to be equal for any two people since cognitive structures applied by the sender and the receiver are unlikely to be the same.”); see also *id.* at 49 (“Abbreviations and disciplinary jargon (e.g., legalese and computer languages) are useful means of communication only if they are redundant with the reader’s memorized information.”); cf. LINGUISTICS 13 (Anne E. Baker & Kees Hengeveld eds., 2012) (“[U]sers of natural languages often omit things which they can assume their listeners will fill in on the basis of their knowledge of the matter under discussion.”).

redundancy might have been only latent or probabilistic at an earlier time. At least at an earlier time, understandings of relevant legal language or doctrines such as the Free Speech and Free Press Clauses of the U.S. Constitution might have had the chance of following divergent, rather than convergent or otherwise redundancy-generating, evolutionary paths.³⁹ Alternatively, at an earlier time, there might have been at least a chance that the relevant audience for legal language or doctrine would be more heterogeneous along lines that would give functional distinction to legal provisions that might later appear to be completely redundant. A classic example of such a situation is the story often told to explain many of Anglo-American law's traditional legal couplets and triplets—namely, that they date to a post-Norman Conquest practice of using both French and English synonyms as a matter of either courtesy or communicative efficacy in a society whose members might have different linguistic capacities.⁴⁰ As the post-Norman Conquest story suggests, differences in background knowledge can mean that certain members of a legal audience view the same language as entirely redundant whereas others view it as at most only partially redundant. Lacking full knowledge of the nature of a message's recipients, the originator of a message might only be able to make a probabilistic assessment of the message's effective redundancy. Thus, for example, one might speak of “the present Chief Justice of the United States Supreme Court, John Roberts.” If one's audience is entirely confined to U.S. lawyers at a time when the Chief Justice is John Roberts, the term “John Roberts” might be entirely redundant in effect. On the other hand, if the audience is broader, the term “John Roberts” might add distinct value. Many people in the United States, never mind the broader world, would obtain additional information through the use of the appositive—namely, the statement of the fact, previously unknown or forgotten, that the present Chief Justice of the United States Supreme Court is named “John Roberts.”⁴¹ In short, probabilistic redundancy, under which the nature or degree of functional redundancy can differ across times and even within populations, is likely to be a significant form of partial redundancy.

39. Cf. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533 (1983) (“If the Court has never given the press clause independent significance, neither has it foreclosed the possibility.”).

40. J. F. Macdonald, *The Influence of Latin on English Prose Style*, 5 PHOENIX 31, 34 (1951) (“When a Norman used a French word, he tried to use the English word for it also, and Englishmen returned the courtesy.”).

41. Rene Lynch, *Most Americans Don't Know, or Seem to Care, About Supreme Court*, L.A. TIMES (June 25, 2012), <http://articles.latimes.com/2012/jun/25/nation/la-na-nn-supreme-court-poll-20120625> [<http://perma.cc/E5VJ-C7UB>] (reporting that, in response to a 2010 Pew Research Center Poll, “[o]nly 28% [of those surveyed] correctly identified John Roberts as the chief justice of the Supreme Court” and “[m]ore than half said they didn't know” the name of the chief justice).

5. *Hierarchical and Trans-Dimensional Redundancies.*—Other forms of partial redundancy that merit attention are hierarchical and trans-dimensional redundancies. Hierarchical redundancy, which is a form of partial redundancy between distinctive levels of a legal hierarchy, has already been illustrated by the example of trial and appellate courts. Instinctively, one might want to deny that the relationship between trial and appellate courts features “redundancy” because of obvious distinctions between these bodies. But with respect to a variety of questions, the roles played by trial and appellate courts significantly overlap. From the functionalist perspective of this Article, there is simply categorical error in an effort to deny partial redundancy on grounds, for example, that non-overlapping features dominate overlapping features or involve different dimensions orthogonal to these overlaps. As Robert Cover noted decades ago, federal habeas corpus for state prisoners involves a form of redundancy,⁴² even though this redundancy results from the overlapping jurisdictions of different judicial hierarchies operating within the broader hierarchy of “constitutional federalism.”⁴³ Just as redundancy can be trans-dimensional in the sense that the shadow cast by a three-dimensional, ten-story building can overlap and reinforce the shadow cast by a comparatively two-dimensional sheet of paper, very distinct legal processes, institutions, language, and doctrines can have partial overlaps that operate as redundancies.

In multidimensional or hierarchical situations, an instinct to reject a recognition of partial redundancy might reflect a background calculation or intuition that, in such instances, there is little reason to attach the stigma commonly associated with redundancy. The implicit calculation might be that the cost of redundancy is substantially mitigated or subsumed by the relatively complex nature of one of the overlapping entities or the relation between them. For example, the cost of the appellate court’s performance of some substantive review of district court fact-finding might be mitigated by facts that (1) difficulty drawing strict lines between factual and legal questions could make an effort to strip out all associated redundancy more trouble than it is worth; (2) understanding of at least some aspects of the factual record might be necessary for an appellate court to evaluate whether a trial court has applied the correct legal tests; and (3) understanding of at least some aspects of the factual record might help an appellate court

42. Cover, *supra* note 12, at 648 (characterizing federal habeas corpus as “a large and important instance” of “sequential redundancy”); see also Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045 (1977) (“[E]ven without the special awareness and position of federal judges, redundancy fosters greater certainty that constitutional rights will not be erroneously denied.”).

43. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 445 (1963).

develop better legal doctrine by providing a context for understanding what such doctrine means in practice. But the fact that a certain degree of redundancy might seem naturally acceptable in such a context should not result in a denial of redundancy's existence. Instead, recognition of the common acceptability of overlaps between the functions of appellate and trial judges is better taken as testimony to the fact that at least some forms of redundancy are not necessarily bad. As always, the ultimate functionalist question should be whether redundancy or lack thereof advances interests in social welfare.

6. *Spurious Redundancy*.—In considering forms of redundancy, one should recognize the phenomenon of “spurious redundancy,” which arises when there is an appearance or allegation of redundancy that is either wholly false or at least partly overdone. In many situations, a facial appearance or allegation of complete redundancy corresponds to a reality of no more than partial redundancy. For example, as Carla Bazzanella has pointed out, an apparently blatantly redundant request for “coffee coffee” can be understood not to feature complete redundancy, but instead to involve a specific request “for a real coffee, not a surrogate.”⁴⁴ Likewise, as the linguist Paul Grice pointed out, a classically redundant statement such as “*War is war*” might facially appear “totally noninformative” as a result of an appearance of complete redundancy between the first use of “war” and the second.⁴⁵ Nonetheless, the statement, in particular the second use of “war,” can in fact be “informative at the level of what is implicated”—i.e., because of what the hearer understands to be the reason for making “this particular patent tautology.”⁴⁶ If someone like General Sherman says that “*War is war*” in the context of a military campaign criticized for its brutality, one can readily understand that the speaker means to assert that we cannot reasonably expect brutality to be absent from war.⁴⁷

Spurious redundancy can also involve communication of emphasis or nuance.⁴⁸ The linguist Laurence Horn has observed that two statements can be “informationally redundant” in a technical sense but “argumentatively

44. Carla Bazzanella, *Redundancy, Repetition, and Intensity in Discourse*, 33 LANGUAGE SCI. 243, 250 (2011); see also L. DAVID RITCHIE, INFORMATION 34 (1991) (noting that repetition can “be used to communicate new ideas, as when an exasperated parent repeats a request to emphasize that ‘this is a demand, not merely a request’”).

45. PAUL GRICE, STUDIES IN THE WAY OF WORDS 33 (1989).

46. *Id.*

47. Cf. 2 WILLIAM T. SHERMAN, MEMOIRS OF GENERAL WILLIAM T. SHERMAN 111 (1875) (quoting a letter to General Halleck as stating, “[i]f the people raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity-seeking”).

48. Cf. A. Daniel Oliver-Lalana, *What I Tell You Three Times Is True: A Pragmatic Approach to Redundancy in Legal Information*, 15 INT’L REV. L. COMPUTERS & TECH. 141, 147 (2001) (“[T]he use of redundancy indicates which issues are important for the communication parties.”).

distinct” in that one argues for one conclusion and the other argues for its opposite.⁴⁹ For example, one might say, “Candidate *X* won by a small margin, but Candidate *X* did win.”⁵⁰ In Horn’s terms, the second clause is informationally redundant with the first, but nonetheless has nontrivial, communicative value that trumps a potential implication of the first statement. Specifically, the first clause noting the small margin of victory can “constitute an argument for . . . the relative lack of popular mandate” for *X*, whereas the second, by focusing on “winning per se argues for the opposite conclusion.”⁵¹

Such examples of spurious redundancy not only highlight distinct forms of redundancy but also show how partial redundancy can allow for shades of meaning and complexity that might be difficult to achieve with more parsimonious and facially efficient speech. Substantial capacity for context-specific nuance tends to be common in natural human languages but can be comparatively absent from formal languages such as those used for computer programming.⁵² A relationship between redundancy and complexity has also been posited for biological systems, where complicated arrays of functionally overlapping subsystems can help ensure both overall system robustness and broad multifunctionality.⁵³

7. *Redundancy Classified by Provenance.*—A further axis for differentiation of forms of redundancy relates to redundancy’s provenance. First, redundancy might be fully intended in that a legal decision maker has deliberately deployed redundancy to reinforce a legal device against misapplication or misunderstanding. An example could be the drafting of separate patent claims that are fundamentally intended to cover the same subject matter but that use different language to try to protect against misinterpretations. A second form of redundancy is only probabilistically intended. In the claim drafting context, a claim drafter might write different claims that the drafter realizes might be later viewed as redundant but the drafter might also hope will be ultimately viewed, at least under favorable

49. Laurence R. Horn, *Given as New: When Redundant Affirmation Isn’t*, 15 J. PRAGMATICS 313, 326 (1991) (emphasis added).

50. See *id.* at 325–26 (discussing the statement “He won by a small margin, but win he did” and later substituting “Candidate *X*” for the pronoun “he”).

51. *Id.* at 326.

52. LINGUISTICS, *supra* note 38, at 14 (“Everything written in a formal language is taken literally, and cannot be interpreted as nuance, colouring, flavouring, innuendo or spin.”).

53. Cf. Joseph Lehár, Andrew Krueger, Grant Zimmermann & Alexis Borisy, *High-Order Combination Effects and Biological Robustness*, 4 MOLECULAR SYSTEMS BIOLOGY 215 (2008) (describing both the robustness and the complexity of biological systems as tied to “the many redundancies and feedbacks . . . that allow [them] to dynamically adapt or compensate for losses or environmental changes”).

circumstances, as having somewhat different scope.⁵⁴ A third form is accidental redundancy, which is not intended at all, but which results instead from a legal device being construed or applied in a way the drafter had not contemplated.⁵⁵ Thus, for example, if a drafter of patent claims developed one claim for a “circular” plate and another for an “octagonal” plate, the drafter might have fully believed that “circular” and “octagonal” would be viewed as describing wholly different sets of shapes, whereas a later interpreter might generate “accidental redundancy” by understanding the term “circular” as broadly encompassing “circle-like” shapes such as octagons.⁵⁶ Such accidental redundancy could emerge from an evolutionary process, in which the scope of the term “circular” gradually stretches over time. Alternatively, it could result more immediately from contemporaneous mistake either in the drafter’s expectations or the interpreter’s understanding.

In sum, there are various forms of complete or partial redundancy that can arise accidentally or deliberately in law. But although a thesaurus might present the terms “redundant” and “superfluous” as synonyms,⁵⁷ redundancy’s requirement of functionally reinforcing overlaps means that there are certain forms of superfluity that are not instances of redundancy.

B. *Redundancy and Anti-Redundancy in Context*

In light of the functionalist approach to defining redundancy described above, this section examines how redundancy and anti-redundancy appear in different legal contexts. Across such legal contexts, redundancy and anti-redundancy commonly feature in (1) processes and institutions, (2) documents and their interpretation, and (3) the structure of legal doctrine. A relatively balanced, engineering perspective on redundancy seems more common with respect to processes and institutions than with

54. RONALD D. SLUSKY, INVENTION ANALYSIS AND CLAIMING: A PATENT LAWYER’S GUIDE 246 (2d ed. 2012) (advocating “[v]arying the claim terminology” in the interests of “claim diversity” and providing examples of “claim terminology alternatives” that “might be deemed to mean exactly the same thing” but might also be viewed as having different meanings).

55. *Cf.* Anderson, *supra* note 39, at 533 (“Though scholars today may debate whether the press clause has any significance independent of the speech clause, historically there is no doubt that it did.”).

56. The hypothetical example loosely derives from the fact pattern in *Winans v. Denmead*, 56 U.S. (15 How.) 330 (1854), in which the U.S. Supreme Court held that a jury had to decide whether a patent claim calling for a “body of a car for the transportation of coal . . . in the form of a frustum of a cone,” *id.* at 342, effectively encompassed a car having a cross-section that “was octagonal instead of circular,” *id.* at 340.

57. *See, e.g., Redundant*, THE DOUBLEDAY ROGET’S THESAURUS IN DICTIONARY FORM (1977) (making the term “superfluous” the first-listed synonym for the term “redundant”).

respect to legal interpretation or doctrinal design. Consequently, concern with the latter two legal enterprises will dominate subsequent sections of this Article.

1. Procedural and Institutional Design.—Generally speaking, attention to concerns of redundancy and anti-redundancy seems reasonably balanced with respect to procedural and institutional issues in U.S. law. Indeed, redundancy in relation to procedure or institutions seems often to be appreciated as a positive value—even a positive requirement—in the context of U.S. law.⁵⁸ Of course, as in engineering, inclinations toward redundancy ultimately become subject to practical concerns and limits. But although redundancy in procedural and institutional contexts commonly invites criticism,⁵⁹ there appears relatively general recognition that redundancy in the form of processes or institutions to “check” decisions by one governmental entity or another can generate value even while imposing costs.⁶⁰ A typical corollary to this recognition is acceptance that, even when some redundancy is perceived as desirable, there is likely a need to limit the degree of redundancy—to make trade-offs in light of the expense of redundant coverage, including the opportunity costs that redundancy and

58. See, e.g., Cover, *supra* note 12, at 657 (contending that jurisdictional redundancy can address concerns about the self-interest and ideological commitments of elites as well as with capacity for innovation in “consciously determined policies”); Lance Gable & Benjamin Mason Meier, *Complementarity in Public Health Systems: Using Redundancy as a Tool of Public Health Governance*, 22 ANNALS HEALTH L. 224, 225 (2013) (“[O]verlapping systems serve many beneficial functions in public health law.”); Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 356 (1969) (“[R]edundancy serves many vital functions in the conduct of public administration.”).

59. See JONATHAN B. BENDOR, PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT 2 (1985) (“Since the days of scientific management, scholars have advised decision-makers to reduce duplication and overlap in the public bureaucracy.”); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. (forthcoming 2016) (manuscript at 2), <http://ssrn.com/abstract=2579137> [<http://perma.cc/NQ2G-H2K3>] (“Criticism of redundant enforcement is equal opportunity.”); James C. Cooper, *The Costs of Regulatory Redundancy: Consumer Protection Oversight of Online Travel Agents and the Advantages of Sole FTC Jurisdiction*, 17 N.C. J.L. & TECH. 179, 181 (2015) (manuscript at 2), <http://ssrn.com/abstract=2579738> [<http://perma.cc/382C-YC4H>] (“Every administration in recent history has attempted to reform the inevitable overlaps and redundancies that arise from an ever-growing federal bureaucracy.”).

60. See, e.g., Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 620–21 (2006) (arguing that although the U.S. Constitution “seems to be bursting with procedural mandates,” it also suggests “concern about decision costs”); cf. *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (concluding that “[i]n striking the appropriate due process balance,” the Court needed to consider “the administrative burden and other societal costs” of added process).

redundancy-related transaction costs can impose by diverting government and private energies and by delaying, or possibly even frustrating, government decision making or action.⁶¹

Perhaps most fundamentally, basic pro-redundancy principles in the form of principles of governmental "checks and balances" and federalism are well-accepted parts of U.S. law.⁶² In the *Federalist*, James Madison explicitly argued that maintenance of a proper scheme of limited government, a scheme in which each part of the government would stay within its appropriate sphere and not excessively trample on private liberties, requires that the separate powers of the executive, legislative, and judicial branches at least partially overlap so that each branch remains subject to restraint by the others.⁶³ Madison further contended that, by providing a further layer of checks, "the federal system of America" provided "a double security . . . to the rights of the people."⁶⁴ Much more recently but along related lines, Laurence Tribe has highlighted that the "separated and divided powers" model of U.S. government⁶⁵ stresses the importance not only of "the independence and integrity of . . . the branches or levels of government," but also of "the ability of each to fulfill its mission in checking the others so as to preserve the interdependence

61. See Vermeule, *supra* note 13, at 1458 ("The main costs [of second opinions] are the direct costs of obtaining a second opinion, the opportunity costs of delayed decision making, and the risk of indeterminacy if the two opinions differ." (emphasis omitted)); cf. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1315 (1975) (noting that, across a wide variety of contexts, "the [due process] problem is always the same—to devise procedures that are both fair and feasible").

62. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937 (1988) (noting that the U.S. Constitution's framers believed "that the best safeguard against administrative capriciousness and oppression lay in a structure in which the factional or self-aggrandizing impulses of any one branch could be checked by another"); Martin Landau, *Federalism, Redundancy and System Reliability*, in THE FEDERAL POLITY 173, 188 (Daniel J. Elazar ed., 1974) (describing U.S. "constitutional designers" as having "built what was, and probably still is, the most redundant government in the world").

63. THE FEDERALIST NO. 48, at 305–06 (James Madison) (Clinton Rossiter ed., 1961) (contending that protection of "the more feeble against the more powerful members of the government" requires that "the legislative, executive, and judiciary departments . . . be so far connected and blended as to give to each a constitutional control over the others"); cf. TRIBE, *supra* note 12, § 2-2, at 121 (noting that the separated-powers model for U.S. constitutional law has "always remained important"). *But cf.* 1 BRUCE ACKERMAN, WE THE PEOPLE 191 (1991) (emphasizing the status of "the checking role of the separation of powers as 'auxiliary'" to concern with "the People's capacity to organize").

64. THE FEDERALIST NO. 51 (James Madison), *supra* note 63, at 320.

65. TRIBE, *supra* note 12, § 2-1, at 118 (discussing, as "Model I" of U.S. constitutional law, a "separated and divided powers" model in which "the forces and counterforces of government . . . check one another as needed").

without which independence can become domination.”⁶⁶ At a relatively fundamental level, a commitment to checks and balances has commonly demanded or supported the presence of multiple, partially redundant “veto gates” in legislative processes.⁶⁷ Although this redundancy imposes the added costs of maintaining “checking” institutions or procedures, as well as a potential risk of undue “gridlock,”⁶⁸ there remains a common commitment to the notion that redundancy might on average be expected to generate better governance and thus to operate as “a feature and not a bug.”⁶⁹

As with linguistic and doctrinal redundancies, procedural and institutional redundancies—e.g., review by both houses of Congress, review by the President, and, for some questions, judicial review⁷⁰—are generally not complete redundancies because each of the major institutional reviewers generally has different characteristics or competences⁷¹ and because reviewers often examine somewhat different sets of related issues under different standards of review.⁷² Nonetheless, the level of even partial redundancies in U.S. procedure and institutions is striking when one considers the existence of plausible alternatives such as unicameral legislatures, single-house-dominated legislatures, or more limited judicial

66. *Id.* § 2-2, at 121 (emphasis omitted).

67. THE FEDERALIST NO. 62 (James Madison), *supra* note 63, at 377 (contending that the U.S. “senate, as a second branch of the legislative assembly distinct from and dividing the power with a first, must be in all cases a salutary check on the government”); THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 63, at 442 (arguing for an executive veto on the ground that “[t]he oftener [a] measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of . . . errors [or] . . . missteps”); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1476 (1995) (observing that the many “veto gates” imposed on “national political decisionmaking diminish the problem of congressional cheating on the federal arrangement”). *But cf.* Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 335 (2013) (contending that, although bicameralism can promote compromise, it also “attenuates the threat of repeal” and, under some circumstances, can thereby encourage “extreme policies”).

68. Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2075 (2013) (“The United States federal government has a relatively more cumbersome process for enacting laws than most . . . democracies.”); *see also* SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 133–34 (2012) (discussing the “threat of deadlock” that bicameralism poses).

69. LEVINSON, *supra* note 68, at 163.

70. *See id.* (noting that the U.S. Constitution might be viewed as effectively giving each of the House of Representatives, Senate, President, and judiciary the capacity to have “the last word” on an attempted statute).

71. *See* Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22 (1992) (describing the U.S. Constitution as establishing “branches of government that are ‘omnicompetent’ as regards subject-matter but ‘unipowered’ as regards the tools at their disposal”).

72. *Cf.* Vermeule, *supra* note 13, at 1445 (commenting on “[w]hole versus partial [second] opinions” (emphasis omitted)).

review.⁷³ On this last point, the U.S. commitment to judicial review of administrative decisions, which is commonly presumed to be available even when not explicitly made so by statute,⁷⁴ attests to a strong embrace of at least partially redundant checks and balances.⁷⁵

Likewise, commitment to substantial redundancy in legal institutions and processes appears through common recognition of rights to appeal the decisions of trial courts.⁷⁶ The redundancy here can be viewed as more complete than between initial administrative review and subsequent judicial review because of the likely greater commonality between the outlooks and competences of trial and appellate judges, a likely greater commonality that might help explain the longtime failure to recognize a federal constitutional right to appellate review of trial court judgments.⁷⁷ Nevertheless, as discussed in subpart I(A), this redundancy is generally only partial because of significant differences between trial courts and appellate courts and the determinations made by them. For example, adjudication in the trial courts often involves only one judge, might involve a jury in addition to the judge, and generally involves presentation of evidence in addition to legal argument. In contrast, appellate adjudication commonly involves a panel of

73. See Chafetz, *supra* note 68, at 2076 (observing that, under the British form of government, “achieving unified government requires convincing a plurality of voters in a majority of constituencies to cast a single vote for an MP of your party”); John C. Reitz, *Political Economy and Separation of Powers*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 579, 593 (2006) (discussing the broad influence of the British model); *id.* at 611–12 (observing that the U.S. version of “judicial review of legislation” has been “so robust that many other countries long rejected the idea”).

74. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (stating that the U.S. Administrative Procedure Act “embodies [a] basic presumption of judicial review” of agency action); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 5.2, at 120 (6th ed. 2014) (“When legislative intent is not clear, courts presume that Congress intended to provide a right to judicial review of an agency action.”); BERNARD SCHWARTZ, ROBERTO L. CORRADA & J. ROBERT BROWN, JR., *ADMINISTRATIVE LAW* 655 (7th ed. 2010) (“[R]eview by a three-judge district court was the method of review provided for a number of federal agencies. The Judicial Review Act [then] . . . substituted the more common FTC-type review by courts of appeals for those agencies.”).

75. See *THE FEDERALIST* NO. 78 (Alexander Hamilton), *supra* note 63, at 468 (describing the “independence of . . . judges” as “requisite to guard the Constitution and the rights of individuals”).

76. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 *UCLA L. REV.* 503, 513 (1992) (noting that commentators had commonly “point[ed] out that forty-seven of the fifty states in the union provide the criminal defendant with the right to appeal at least once without obtaining prior court approval”); Cassandra Burke Robertson, *The Right to Appeal*, 91 *N.C. L. REV.* 1219, 1222 (2013) (“[T]he federal court system and forty-seven states provide—as a matter of state law—either a constitutional or statutory requirement for appeals as of right in both civil and criminal cases.”).

77. Robertson, *supra* note 76, at 1221 (“[T]he Supreme Court has repeatedly declined to recognize a due process right to appeal in either civil or criminal cases.”).

multiple judges,⁷⁸ generally does not involve a jury,⁷⁹ and generally does not involve presentation of new evidence beyond a very limited set of materials, such as legislative history or dictionary definitions, of which a court may take judicial notice.⁸⁰ Further, appellate review can serve interests such as a desire to facilitate uniformity in controlling principles of case law⁸¹ that are not as characteristic of error checking or redundancy per se as of the typically hierarchical, telescoping nature of court organization as one moves up paths of appeal.

Finally, it seems worth noting that, at a more micro level, the legal process over which courts preside is, from the filing of a complaint onward, awash in redundancy. Although legal stylists commonly condemn aspects of this redundancy as a bug, much of it might be, like checks and balances, an important engineering feature. As Cover observed, “redundancy features in procedure” such as the use of “[m]ultiple witnesses” help not only to confirm what appears to be true but also, where the presumptively redundant features in fact conflict, to identify “the areas of uncertainty.”⁸² With respect to questions of law as opposed to pure questions of fact, Martin Shapiro remarked that, in part because of “rules of *stare decisis*[.] . . . the rules of legal discourse seem to require each attorney to suppress as much information and transmit as much redundancy as possible.”⁸³ Legal communications marked by the “string citation[.] . . . highly redundant synonym use,” and a reader’s capacity to predict citations from text and vice versa give routine evidence of high levels of

78. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 42 (1994) (“District court judges almost always decide cases alone, judges sitting on circuit courts of appeals generally decide cases in panels of three . . .”).

79. Cf. Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 354 (invoking “a substantial body of evidence demonstrating that appellate judges are in important ways less competent factfinders than ordinary jurors”).

80. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (“With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.”); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1202 (2013) (discussing how, relative to appellate courts, trial courts possess “superior factfinding competence”); cf. Caminker, *supra* note 78, at 41 (“The structure of and tasks assigned to trial courts encourage their relative proficiency at factfinding, and appellate courts are designed and situated to encourage a relative proficiency at legal reasoning.”).

81. Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1109, 1192 (2012) (“Centralized appellate review . . . promotes fairness by ensuring that like cases are treated alike, increases predictability for stakeholders, and strengthens the external credibility of the decision-making institution.”).

82. Cover, *supra* note 12, at 653–54.

83. Shapiro, *supra* note 6, at 127.

redundancy⁸⁴—indeed, levels of redundancy that help make lawyers, legal academics, and their work product notorious.⁸⁵ Shapiro diagnosed the high level of redundancy in legal discourse as “the standard solution predicted by communications theory for any acute noise problem”—for instance, in situations in which “state supreme courts, the U.S. Supreme Court, and the British courts” rule on matters of tort law,⁸⁶ “the noise problem of a non-hierarchical organization” that engages in incremental decision making.⁸⁷

Shapiro’s thesis is consistent with the notion that U.S. society and the U.S. legal system have come to accept or even embrace substantial forms of redundancy as a matter of process and institutional design, and have commonly done so for reasons quite similar to those for accepting or embracing redundancy in engineering or communication. As in engineering or communication, this acceptance or embrace must also have limits because redundancy imposes costs. The stylists who condemn redundancy in legal writing might thus be best understood as condemning excess redundancy—redundancy that in some instances might rise to the level of obsessive-compulsive disorder as opposed to practically useful insurance of effective communication.

Of course, the tolerance of procedural and institutional redundancy in U.S. law is far from absolute. U.S. legal systems exhibit many tendencies to promote closure in legal proceedings and judgments. Principles of claim and issue preclusion and of *stare decisis* all facilitate final—or relatively final—resolution of legal disputes, issues, or arguments.⁸⁸ Limitations on collateral review of legal judgments, including limitations on habeas review despite its constitutional status, similarly reflect a desire to cut off argument at some point and prevent a potentially endless, resource-consuming loop of litigation and relitigation.⁸⁹ Likewise, concerns about parallel litigation in

84. *Id.* at 127–28; *cf.* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) (“No one would suggest that judicial opinions or academic articles contain no surplusage; are these documents less carefully prepared than statutes?”).

85. *Cf.* *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) (noting “the obvious instances of iteration to which lawyers, alas, are particularly addicted—such as ‘give, grant, bargain, sell, and convey’”).

86. Shapiro, *supra* note 6, at 130.

87. *Id.* at 134.

88. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542 (1991) (“Public policy dictates that there be an end of litigation . . .” (internal quotation marks omitted)).

89. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 154 (2009) (“It is just as important that there should be a place to end as that there should be a place to begin litigation, and the need for finality forbids a court called upon to enforce a final order to tunnel back . . . for the purpose of reassessing prior jurisdiction *de novo*.” (omission in original) (citations omitted) (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938)) (internal quotation marks omitted)); *Shea v. Louisiana*, 470 U.S. 51, 59–60 (1985) (distinguishing between direct appeal and collateral review based on

state and federal courts have supported at least a limited allowance for federal court abstention “out of deference to pending state court proceedings.”⁹⁰ Even aside from concerns of duplicative or piecemeal litigation, a substantial degree of streamlining of legal process is often tolerated: the courts have shown great tolerance for limitations on review of results from arbitration.⁹¹

Nonetheless, in institutional and procedural contexts, limitations to redundancy seem commonly to reflect not as much a knee-jerk hostility to redundancy as a sense that, although redundancy can generate advantages such as error reduction, a functional society needs to impose some end to institutional review and process in order to move forward productively. In short, in institutional and procedural contexts, there seems more of a general acceptance of a relatively balanced, engineering perspective on redundancy, a perspective that recognizes redundancy’s value but also recognizes that, at some point, redundancy’s costs can exceed its benefits.

2. *Documents and Interpretation.*—Anti-redundancy in law is perhaps most visible in terms of anti-redundancy canons of interpretation. Rules against interpreting a legal document in a way that renders language within the document redundant or otherwise superfluous are commonly cited as canons of construction for legal documents ranging from constitutions and statutes to patents and contracts.⁹² Indeed, electronic searches in Westlaw’s database of all federal court opinions suggest that, in recent years, federal courts have cited anti-redundancy or antisurplusage concerns at least about half as often as the principle of *Chevron*⁹³ deference to administrative-agency determinations,⁹⁴ a principle that is perhaps the dominant

“considerations of finality in the judicial process” and the sense that “[s]omewhere, the closing must come”).

90. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 14.2, at 903 (6th ed. 2012).

91. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (observing that “arbitration’s finality (near absence of appellate review) saves businesses the costs of appeals”).

92. See, e.g., Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 243 & n.100 (2010) (reporting that “[o]ne frequently referenced subpart [of the ‘whole act rule’ for statutory interpretation] is the rule against superfluities”).

93. *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

94. A search of Westlaw’s database of all federal court opinions yielded the following numbers of hits for opinions issued from January 1, 2000, to September 29, 2015: (1) 7,637 hits for opinions that gave facial evidence of citing *Chevron* in association with statutory interpretation; and (2) 4,291 hits for opinions that gave facial evidence of invoking anti-redundancy or antisurplusage concerns in association with statutory interpretation. The specific Westlaw search codes that yielded these results for searches run on September 29, 2015, were as follows: (1) (statute! /s (interpret! or constru!)) & (chevron /p (interpret! or constru! or canon)) and DA(after 1999); and (2) (statute! /s (interpret! or constru!)) & ((redundant or redundancy or redundancies or surplusage or superflu!) /s (interpret! or constru! or canon)) and DA(after 1999).

interpretive principle of federal statutory law⁹⁵ and that has been the subject of mountains of law-review articles.⁹⁶ At least in terms of invocations by their Latin names, express references to other principles of statutory interpretation, such as those of *eiusdem generis* or *noscitur a sociis*, lag far behind.⁹⁷

In constitutional law, the canon against superfluity received one of its most prominent articulations in *Marbury v. Madison*.⁹⁸ In this case, Chief Justice Marshall's opinion for the Court contended that failure to reject the proposition that Congress could add to the Court's original jurisdiction would render the U.S. Constitution's provisions on cases within the Court's original and appellate jurisdictions "mere surplusage . . . entirely without meaning."⁹⁹ He then enunciated the general rule against interpretations that render part of the Constitution superfluous: "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."¹⁰⁰

As Akhil Amar has noted, multiple commentators have pointed out that Marshall's use of the antisurplusage rule in *Marbury* is flawed.¹⁰¹ Even if the Constitution's provision for the Court's original jurisdiction did not specify a ceiling for that jurisdiction, it could still have meaningful effect by specifying a floor, giving the Court original jurisdiction that Congress could

More detailed study by a research assistant of a random sample of 100 of the results from the latter search indicated that over 90% in fact involved relevant invocation of anti-redundancy or antisurplusage concerns, with 85 of the 100 involving anti-redundancy specifically.

95. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 399 (Peter L. Strauss ed., 2006) (noting that *Chevron* is "the most frequently cited case in administrative law").

96. *Id.* at 400 (observing that *Chevron* has been "a magnet for commentators," "debated, analyzed, and measured in countless articles").

97. A search of Westlaw's database of all federal court opinions yielded the following numbers of hits for opinions issued from January 1, 2000, to September 29, 2015: (1) 991 hits for opinions that gave facial evidence of specific invocation of the *expressio unius* canon in association with statutory interpretation; (2) 458 hits for opinions that gave facial evidence of specific invocation of the *eiusdem generis* canon in association with statutory interpretation; and (3) 296 hits for opinions that gave facial evidence of specific invocation of the *noscitur a sociis* canon in association with statutory interpretation. The specific Westlaw search codes that yielded these results for searches run on September 29, 2015, were as follows: (1) (statute! /s (interpret! or constru!)) & (("expressio unius" or "inclusio unius") /p (interpret! or constru! or canon)) and DA(after 1999); (2) (statute! /s (interpret! or constru!)) & ("ejusdem generis" /s (interpret! or constru! or canon)) and DA(after 1999); and (3) (statute! /s (interpret! or constru!)) & ("noscitur a sociis" /s (interpret! or constru! or canon)) and DA(after 1999).

98. 5 U.S. (1 Cranch) 137 (1803).

99. *Id.* at 174.

100. *Id.*

101. Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 5 (1998) ("[M]odern scholars have ridiculed Marshall's logic here, labeling his argument 'clearly overstated' and 'surely wrong.'").

not take away.¹⁰² Nonetheless, the canon against superfluity is a generally acknowledged part of U.S. constitutional law, and judges have commonly cited *Marbury* as support for its use.¹⁰³

Judges similarly cite antipurplusage canons in opinions interpreting statutes, patent claims, and contracts. The Supreme Court has stated that “[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”¹⁰⁴ Likewise, courts, including the U.S. Court of Appeals for the Federal Circuit, have asserted that “[i]t is the usual (though not invariable) rule that, in patent claims as elsewhere, the construction of a clause as a whole requires construction of the parts, with meaning to be given to each part so as to avoid rendering any part superfluous.”¹⁰⁵ In accordance with this principle, patent law’s much-invoked doctrine of claim differentiation acts “as an anti-redundancy canon”¹⁰⁶ by implementing “a rebuttable presumption that each claim in a patent has a different scope.”¹⁰⁷ Likewise, in interpreting contracts, courts regularly invoke an anti-redundancy canon, stating, for example, that “[a] basic [tenet] of contract law is that each word in the agreement should be interpreted to have a meaning, rather than to be redundant and superfluous.”¹⁰⁸ In short, courts seem to have generally

102. *Id.* (“As a matter of logic, perhaps the clause could be read as setting forth a constitutional minimum rather than maximum quantum of original jurisdiction.”).

103. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 490–91 (1965) (Goldberg, J., concurring) (“While this Court has had little occasion to interpret the Ninth Amendment, ‘[i]t cannot be presumed that any clause in the constitution is intended to be without effect.’” (alteration in original) (quoting *Marbury*, 5 U.S. (1 Cranch) at 174)); *Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013) (concluding that a proposed interpretation of the Recess Appointments Clause would “depriv[e] a specified] phrase of any force” and therefore “run[] afoul of the principle that every phrase of the Constitution must be given effect”).

104. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

105. *Frans Nooren Afdichtingssystemen B.V. v. Stopaq Amcorr Inc.*, 744 F.3d 715, 722 (Fed. Cir. 2014); *cf.* Peter S. Menell, Matthew D. Powers & Steven C. Carlson, *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 *BERKELEY TECH. L.J.* 711, 753 (2010) (“The doctrine of ‘claim differentiation’ provides that ‘each claim in a patent is presumptively different in scope.’” (quoting *RF Del., Inc. v. Pac. Keystone Techs., Inc.*, 326 F.3d 1255, 1263 (Fed. Cir. 2003))).

106. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 777 (6th ed. 2013).

107. *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1341 (Fed. Cir. 2000); *see also* Lemley, *supra* note 7, at 1392 (observing that “[c]ourts rely heavily on the doctrine of claim differentiation”).

108. *Wintermute v. Kan. Bankers Sur. Co.*, 630 F.3d 1063, 1068 (8th Cir. 2011) (second alteration in original) (quoting *Jones v. Sun Carriers, Inc.*, 856 F.2d 1091, 1095 (8th Cir. 1988)); *see also* *Foskett v. Great Wolf Resorts, Inc.*, 518 F.3d 518, 522 (7th Cir. 2008) (“A contract must be construed so as to give a reasonable meaning to each provision of the contract and so as to avoid render[ing] portions of a contract meaningless, inexplicable or mere surplusage.” (alteration in original) (internal quotation marks omitted)); E. ALLAN FARNSWORTH, *CONTRACTS* § 7.11, at

adopted a presumption that, no matter the form of document, a “written instrument [is] to be interpreted so as not to render some language mere surplusage.”¹⁰⁹

3. *Doctrinal Structure*.—Another form of anti-redundancy presumes that different legal doctrines are intended to occupy distinct spaces of application or analysis that are not to overlap in very substantial ways. This presumption can be used to limit the potential scope of general provisions, such as the constitutional requirement of “due process,”¹¹⁰ when such general provisions might otherwise overlap or blend with the scope of a more specific provision, such as the Fourth Amendment’s prohibition of “unreasonable searches and seizures.”¹¹¹ In such situations, the general rule laid down by the U.S. Supreme Court is that the more specific provision governs, and the limitations of this more specific provision are not to be overridden by reliance on the more general provision, which is to be viewed as essentially displaced and inapplicable.¹¹² Likewise, the economic-loss doctrine forbidding bringing certain sorts of claims in tort, rather than contract, is championed for “protect[ing] contract doctrines” from being overridden by tort doctrines and “prevent[ing] the piling on of duplicative remedies.”¹¹³ In like vein, in patent law, the Supreme Court once famously emphasized that examination of the subject-matter eligibility of a patent claim—i.e., whether the claim covers only types of things, such as machines, that are eligible for patenting—should be considered to be entirely distinct from questions about “[t]he ‘novelty’ of any element or

458 (4th ed. 2004) (“[A]n interpretation that gives effect to every part of the agreement is favored over one that makes some part of it mere surplusage.”).

109. MERGES & DUFFY, *supra* note 106, at 777.

110. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

111. *Id.* amend. IV.

112. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (“Because we have ‘always been reluctant to expand the concept of substantive due process,’ we held in *Graham v. Connor*, 490 U.S. 386 (1989), that ‘[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.’” (alteration in original) (citations omitted) (first quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); then quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.)); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1734 (2004) (describing a “specificity canon” that can prevent a more general statute from rendering redundant a more specific statute by “presuppos[ing] that when a statute prescribes either a carefully drawn method of exercising a given power or a well-delineated set of restrictions on such power, an interpreter may read that specification to displace more general sources of potential authority”).

113. *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 869 (7th Cir. 1999); see also *Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652, 659 (Wis. 2003) (“[T]he economic loss doctrine requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim, in order to preserve the distinction between contract and tort law.”).

steps in a process, or even of the process itself,” novelty being a separate requirement for patentability.¹¹⁴ The Federal Circuit’s predecessor appellate court for patent law, the Court of Customs and Patent Appeals (CCPA), quickly picked up on the Supreme Court’s apparent rejection of “‘point of novelty’ analysis” for subject-matter eligibility,¹¹⁵ and the Federal Circuit, which adopted CCPA precedent as its own,¹¹⁶ appears to have turned this separation between analyses under § 101 and § 102 of the U.S. Patent Act into a model for strongly compartmentalized analysis under various other statutory provisions.¹¹⁷

With respect to the structure of legal doctrine, anti-redundancy can serve significant functional interests. In addition to focusing a decision maker’s attention on a single legal inquiry, anti-redundancy as a principle for structuring legal doctrine can help cut off analytically repetitive legal argument. Courts can experience frustration when a ruling against a party on a hard-fought legal question seemingly only serves as a prelude to the assertion of fundamentally similar arguments under a different doctrinal heading. In patent law, such frustration can arise when a patentee first loses on a question of patent claim construction—a question about the literal scope of patent claims—and follows this defeat with argument that, despite not falling within the literal scope of the patent claim as construed, an accused product or process infringes under the doctrine of equivalents because it contains one or another element that is at least equivalent to each element of the claim.¹¹⁸ Arguments for infringement by equivalence can often closely track arguments about patent claims’ literal scope,¹¹⁹ and the result can be judicial complaint that equivalence arguments effectively amount to an effort to relitigate claim construction, a complaint likely to

114. *Diamond v. Diehr*, 450 U.S. 175, 188–89 (1981) (“The ‘novelty’ of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.”).

115. *In re Taner*, 681 F.2d 787, 791 (1982).

116. *S. Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc) (adopting as precedent for the newly formed Federal Circuit “[t]hat body of law represented by the holdings of the Court of Claims and the Court of Customs and Patent Appeals”).

117. *Cf. In re Nuijten*, 500 F.3d 1346, 1354 n.3 (Fed. Cir. 2007) (“Of course, a claim that is so unclear as to be ambiguous about whether it covers a process or a machine might be invalid for failure to ‘particularly point[] out and distinctly claim[] the subject matter which the applicant regards as his invention,’ 35 U.S.C. § 112 ¶ 2, but claim definiteness is a requirement separate from patentability under § 101.” (alterations in original)).

118. *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1016 (2006) (“Under the doctrine of equivalents, ‘a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is “equivalence” between the elements of the accused product or process and the claimed elements of the patented invention.’” (quoting *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997))).

119. See John R. Allison & Mark A. Lemley, *The (Unnoticed) Demise of the Doctrine of Equivalents*, 59 STAN. L. REV. 955, 977 (2007) (“[T]he patentee will use the doctrine of equivalents as a second bite at the apple.”).

presage rejection of the equivalence argument and a grant of summary judgment of no infringement.¹²⁰ The result can be an effective collapse of the “two bites at the apple,” that the doctrines of literal infringement and of infringement by equivalence seem fundamentally intended to provide.

C. *Redundancy and Anti-Redundancy as Design Principles*

Whatever the faults of anti-redundancy, the law has apparently long survived them. Why might anti-redundancy nonetheless be a matter of concern? First, anti-redundancy commonly runs contrary to actual norms of human communication and legal design.¹²¹ Consequently, unless one believes that anti-redundancy principles carry no real weight with courts and are at most only convenient means for post hoc rationalization,¹²² they might lead courts astray in interpreting and applying relevant law. Further, even if anti-redundancy principles typically only establish easily hurdled defaults, the cumulative cost of overcoming these defaults in case after case might entail substantial waste if redundancy is pervasive. Second, to the extent anti-redundancy leads to less redundancy either in original legal design or in legal doctrines as understood and applied, anti-redundancy might prevent law from realizing benefits of redundancy such as the relative clarity and reliability in cases of core concern that redundancy can help ensure.¹²³

In engineered systems, redundancy is commonly used to ensure safety or otherwise to protect against system failure.¹²⁴ Dual-braking systems in vehicles provide an example of useful partial redundancy, one that exists between a commonly pedal-operated “fluid braking subsystem” and a hand-operated, emergency “mechanical braking subsystem.”¹²⁵ These braking systems are redundant in the sense that they both provide a means of

120. *See id.* at 958 (“[A] court that has just rejected a literal infringement argument . . . is unlikely to undo the work of claim construction by sending the issue of infringement by equivalents to the jury.”).

121. *See supra* text accompanying notes 2–9; *see also* Bazzanella, *supra* note 44, at 251 (describing redundancy as a “pervasive” and “essential feature[] of language” as well as common in biological and complex systems).

122. *See* FARNSWORTH, *supra* note 108, § 7.11, at 456 (describing the use of maxims of interpretation in judicial opinions as “often more ceremonial . . . than persuasive”).

123. *Cf.* Amar, *supra* note 101, at 10 (identifying “a certain kind of good redundancy represented by various clauses that are clarity-enhancing and doubt-removing”).

124. *See, e.g.*, ISRAEL KOREN & C. MANI KRISHNA, *FAULT-TOLERANT SYSTEMS* 3 (2007) (“All of fault tolerance is an exercise in exploiting and managing *redundancy*.”); Landau, *supra* note 58, at 349 (noting that “the phenomenon of ‘duplication’” is not “overlooked in the design of automobiles, computers, and aircraft . . . , as with the dual braking system”); Victor P. Nelson, *Fault-Tolerant Computing: Fundamental Concepts*, *COMPUTER*, July 1990, at 19, 21 (“Fault tolerance in a digital system is achieved through redundancy in hardware, software, information, and/or computations.”).

125. EBELING, *supra* note 10, at 91.

stopping a moving vehicle. Their combination protects against total brake failure by requiring that “[b]oth . . . fail in order for the [overall braking] system to fail.”¹²⁶ But generally speaking, the braking systems are only partially redundant—indeed, feature only bidirectionally partial redundancy—because the fluid braking system allows for much finer control of the vehicle whereas the emergency braking system has its own distinctive capacity to act as a parking brake.¹²⁷

Mechanical redundancies can exhibit another aspect of redundancy commonly found in legal institutions and processes—namely, hierarchical or multipolar relationships. A “safety valve” can override and shut down the operation of other mechanical subsystems. Further, mechanical redundancies can be intertwined with relationships among people. My office has an automatically locking door that creates a constant risk of my locking myself out. But there is value in having an automatically locking door, and the risk generated by the automatic lock is mitigated by the fact that, in the event of a lock out, I might call on someone else—my faculty assistant, an administrator, or even the university police—to unlock the door.

Similarly, in biological systems, redundancy, often partial and sometimes hierarchical or multipolar, frequently helps ensure robustness—i.e., the capacity of “a system to maintain its functions despite external and internal perturbations.”¹²⁸ Biological redundancy can also serve a secondary purpose of fostering evolutionary capacity by providing organisms with a greater tolerance for mutations.¹²⁹ As maintaining key

126. *Id.*

127. Most car owners are presumably familiar with an even more mundane example of redundancy in the form of a spare tire kept in the car’s trunk to back up the tires currently in use. Apart from the need to remove a flat tire and install the spare, a spare tire and a tire originally installed on a car might be essentially completely redundant. But such a situation now tends to be the exception, rather than the norm: most cars today come with “a ‘temporary-use’ spare tire and wheel” that tends to be “physically shorter and narrower than the vehicle’s standard tires and wheels” and that should only be used over relatively short distances and at relatively low speeds. *Tire Tech: Spare Tire Use*, TIRERACK.COM, <http://www.tirerack.com/tires/tiretech/techpage.jsp?techid=141> [<http://perma.cc/D3AD-ZC7J>].

128. Hiroaki Kitano, *Biological Robustness*, 5 NATURE REVIEWS: GENETICS 826, 826 (2004); see also NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER 44 (2012) (“Layers of redundancy are the central risk management property of natural systems.”); David C. Krakauer & Joshua B. Plotkin, *Redundancy, Antiredundancy, and the Robustness of Genomes*, 99 PROC. NAT’L ACAD. SCI. 1405, 1405 (2002) (noting that biological redundancy among genes is thought to “promote[] robustness by ‘backing-up’ important functions”).

129. Lisa Schramm, Yaochu Jin & Bernhard Sendhoff, *Quantitative Analysis of Redundancy in Evolution of Developmental Systems*, in 2012 IEEE SYMPOSIUM ON COMPUTATIONAL INTELLIGENCE IN BIOINFORMATICS AND COMPUTATIONAL BIOLOGY 61, 61 (2012) (“In evolutionary biology, it has been argued that genetic redundancy is one of the main mechanisms that contribute substantially to mutational robustness, which in turn is a pre-requisite for evolutionary innovation.” (footnote omitted)); see also *Plant Evolution: Double or Quits*,

bodily functions is crucial for living, it is perhaps no surprise that many organisms contain “apparently redundant genes” that “perform[] the same function,” with the result “that inactivation of one of these genes has little or no effect” on the organism’s ability to survive.¹³⁰ Biological systems can also exhibit redundancy in more complex ways: in humans, for example, the possibility of communicating through sign language can operate as a backup or alternative to the possibility of communicating through speech.¹³¹ Engineered systems with audiovisual capabilities can likewise employ “between-channel redundancy” by presenting overlapping information through distinct audio and visual modes of communication¹³²—for example, a beeping sound and a flashing red light used together to provide a warning.¹³³

Language itself can be viewed as an engineered system in which redundancy helps ensure against communication failure by protecting against discrete errors or limitations in the transmission, reception, and comprehension of messages.¹³⁴ Stripping out redundancy can lead to greater possibilities of communicative failure. In ordinary writing, effective communication can often occur despite a missing letter or even a missing ___ of letters. But such errors might be substantially more likely to cause problems in the already-compressed expression of a short text message in which there is less context to supply meaning. Through reinforcing or clarifying effect, overlapping legal doctrines or linguistic redundancy in legal drafting can similarly help ensure that critical communicative or

ECONOMIST (June 28, 2014), <http://www.economist.com/news/science-and-technology/21605869-vegetable-kingdom-more-sets-chromosomes-are-often-better-double-or> [perma.cc/Y4L8-YAH9] (observing that genetic redundancy “allows the spares to mutate and evolve to do new jobs while the existing jobs are covered by the unchanged ‘heir’ genes”); cf. TALEB, *supra* note 128, at 3 (describing the concept of “antifragility” as one that exceeds “resilience or robustness” in the sense that, whereas “[t]he resilient resists shocks and stays the same[,] the antifragile gets better”).

130. Martin A. Nowak, Maarten C. Boerlijst, Jonathan Cooke & John Maynard Smith, *Evolution of Genetic Redundancy*, 388 NATURE 167, 167 (1997).

131. Martin Randles, David Lamb, E. Odat & A. Taleb-Bendiab, *Distributed Redundancy and Robustness in Complex Systems*, 77 J. COMPUTER & SYS. SCI. 293, 294 (2011) (“[I]n a biological system if communication through speech (say) becomes impossible[,] then other system attributes may be utilised, to accomplish the same outcome, such as sign language . . .”).

132. Gibson & Mendleson, *supra* note 38, at 50 (“Between-channel redundancy . . . occurs in dual- or multi-channel communication when information is shared or repeated among auditory, olfactory, tactile, gustatory, or visual channels.”).

133. Cf. *id.* at 54 (“Communicating by telegram, telephone, or many forms of teleconferencing presents more opportunities for error and equivocation and fewer checks on misinformation than does communicating face-to-face, when many channels are used and communication is commonly redundant.”).

134. *Id.* at 52 (“Redundancy can facilitate all forms of communication associated with humans since it counteracts noise—the ultimate limiter of effective communication.”); Landau, *supra* note 58, at 346 (“[I]t is precisely the liberal use of redundancy that provides linguistic expression with an extraordinary measure of ‘reliability.’”).

decisional errors are avoided.¹³⁵ In this sense, John Manning and Matthew Stephenson have noted that technically redundant language can serve a meaningful purpose: a text's inclusion of apparently unnecessary words can help clarify or reinforce the intended meaning of other language in the text.¹³⁶ The drafter of a legal document might consider such clarification or reinforcement to be particularly important if there is a substantial risk that a hostile party or court will naturally seek to twist the understanding of legal language to its liking.¹³⁷

More generally, as Henry Smith has highlighted, the need for law and legal documents to speak authoritatively to heterogeneous audiences across time and across "complex and loose organizations, like a court system," can place a premium not only on employment of conventional formalities but also on the use of redundancy as a way of overcoming noise.¹³⁸ Of course, substantial consignment of the direct reading and interpretation of legal texts to lawyers could reduce the effective heterogeneity of the relevant audience. But the members of the legal profession themselves tend to be intellectually diverse, encompassing a variety of different forms of legal specialists as well as people who, even if sharing a specialty, have distinct modes of thought informed by their different nonlegal backgrounds. In any event, a common commitment to government in which generalist judges and policy makers have the ultimate say naturally places limits on the degree to which the law can be viewed as speaking only to a very specialized and largely homogeneous audience.¹³⁹

135. Cf. Randy E. Barnett, *The Virtues of Redundancy in Legal Thought*, 38 CLEV. ST. L. REV. 153, 154 (1990) (contending "that the degree of confidence we have in any of our beliefs largely depends upon the degree to which the different methods we use to critically assess our beliefs converge on the same conclusion").

136. MANNING & STEPHENSON, *supra* note 5, at 248 (noting that, although rendered technically redundant by the U.S. Supreme Court's construction of "communication," statutory words such as "'notice,' 'circular,' 'advertisement,' or 'letter'" were "not at all superfluous"); cf. Shapiro, *supra* note 6, at 132 (recalling "the argument that redundancies at the syntactic level are not redundant at the semantic level, because they transmit the knowledge that the sender is repeating or patterning his message").

137. Lawrence M. Friedman, *Law and Its Language*, 33 GEO. WASH. L. REV. 563, 574 (1964) (hypothesizing that the common use of strings of synonyms in "Anglo-American statutes" reflects a history in which statutes "have sometimes been treated by courts with something akin to contempt").

138. Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1157–61 (2003) (discussing benefits of "[r]edundancy in legal communication"); see also ROGERS & AGARWALA-ROGERS, *supra* note 32, at 14 (observing that "[h]eterophilous communication"—i.e., communication between a source and receiver who are different along relevant dimensions—"often leads to message distortion, delayed transmission (because of longer reaction time), restricted channels, and cognitive dissonance" and that redundancy "reduces the disturbing influence of [such] noise on communication effectiveness").

139. See Smith, *supra* note 138, at 1159 (expressing skepticism about the general ability of "potential information intermediaries" such as "lawyers and journalists" to compensate fully for

As discussed earlier, redundancy in language can serve additional, more independently affirmative communicative purposes than error correction or prevention, such as facilitating communication of nuance.¹⁴⁰ In this respect, Lawrence Friedman cited the example of the phrase “the truth, the whole truth, and nothing but the truth” in an oath commonly taken by witnesses.¹⁴¹ Friedman viewed the phrase as an example of “[r]itual phraseology . . . designed to convey, not information, but emotion”—“the magic and majesty of the oath.”¹⁴² One might also suspect that the redundancy here is designed for greater clarity and emphasis, with the additional variants on “truth” securing assurance not only that, despite the vagaries of auditory communication, the recipient of the message will absorb its basic import¹⁴³ but also that the recipient will appreciate finer points—namely, that sworn testimony is to feature neither partial truths nor whole truths obscured by extraneous matter.¹⁴⁴

Law’s robustness can also be improved through the deployment of legal doctrines or bodies of legal doctrine that have overlapping concern or effect. In certain situations, doctrinal overlaps can reduce uncertainty about legal outcomes by helping ensure that a variety of closely related factual situations will lead to a similar outcome. Thus, for example, if a claimed invention differs at best by only a “hairsbreadth” from a previously publicly available device,¹⁴⁵ there might be cause for debate over whether, under one

the inaccessibility of primary legal materials “such as statutes, cases, and regulations” to the general public).

140. See *supra* text accompanying notes 44–53.

141. Friedman, *supra* note 137, at 571 (internal quotation marks omitted).

142. *Id.*

143. Cf. LINGUISTICS, *supra* note 38, at 38 (“The spoken utterances come in one long sound stream, and the individual words, and even individual sounds, are often hard to distinguish.”); TERRENCE W. DEACON, *THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN* 363 (1997) (noting that “the best way to compensate for noise or error-proneness in communication is redundancy” and that “[w]e tend to repeat things, spell out important words, say the same thing in different ways, or add gestures and exaggerated tonality and volume in order to overcome the vicissitudes imposed by noisy rooms, distractions, inept listeners, or otherwise difficult-to-convey messages”); Oliver-Lalana, *supra* note 48, at 146 (“[A] tautological addition makes sense whenever the information sender is afraid that the meaning of his message cannot be properly understood by the recipient, which may be caused by deficient comprehension abilities, contextual information, lack of attention or motivation, or by any other form of pragmatic or semantic noise.”).

144. Here I implicitly contest to some degree Friedman’s assertion that there is no known “substantive reason for distinguishing between a truth and a whole truth.” Friedman, *supra* note 137, at 571; cf. George C. Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885, 891 (1964) (contending “that through the skillful combination of vague terms a draftsman can often achieve better results than he can by stringing together—or, if one prefers, fitting together—precise technical terms”).

145. *Sibia Neurosciences, Inc. v. Cadus Pharm. Corp.*, 225 F.3d 1349, 1359 (Fed. Cir. 2000) (holding a claim obvious after determining that “the undisputed teaching of the Stumpo paper leads one to within a hairsbreadth of anticipation”—i.e., lack of novelty).

claim construction or another, the claimed invention survives patent law's novelty requirement because all one needs for novelty is a hairsbreadth of distinction.¹⁴⁶ But there might be no real debate over whether the claimed invention is in fact patentable: although the hairsbreadth suffices to establish novelty, it might be entirely clear that it does not suffice to satisfy patent law's partially redundant "super-novelty" requirement of non-obviousness,¹⁴⁷ the requirement that a claimed invention not only be at least somewhat distinct from what is disclosed or embodied in a single piece of prior art, but also be beyond what, in view of all the prior art, a person of ordinary skill in the relevant technological art would have found to be obvious.¹⁴⁸ An example of reinforcing doctrinal overlaps can also be derived from a famous fact pattern in contract law—namely, the famous *Peerless*¹⁴⁹ case and close variants, under which doctrines of misunderstanding and mistake have been offered as alternate grounds for finding an apparent agreement to have been tellingly defective.¹⁵⁰ More generally,

146. See *Oakley, Inc. v. Sunglass Hut Int'l*, 316 F.3d 1331, 1339 (Fed. Cir. 2003) ("A determination that a claim is invalid as being anticipated or lacking novelty under 35 U.S.C. § 102 requires a finding that each and every limitation is found either expressly or inherently in a single prior art reference." (internal quotation marks omitted)); JANICE M. MUELLER, *PATENT LAW* 273 (4th ed. 2013) ("[T]he test for anticipation under 35 U.S.C. § 102 is one of 'strict identity' . . .").

147. MUELLER, *supra* note 146, at 273 (describing the nonobviousness requirement as a "requirement for something more than novelty"). *But cf.* *Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1364 (Fed. Cir. 2008) ("While it is commonly understood that prior art references that anticipate a claim will usually render that claim obvious, it is not necessarily true that a verdict of nonobviousness forecloses anticipation.").

148. See 35 U.S.C. § 103 (2012) (stating the nonobviousness requirement for patentability); *Cohesive Techs.*, 543 F.3d at 1364 ("Obviousness can be proven by combining existing prior art references, while anticipation requires all elements of a claim to be disclosed within a single reference."); *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986) ("The person of ordinary skill is a hypothetical person who is presumed to be aware of all the pertinent prior art.").

149. *Raffles v. Wichelhaus* (*Peerless*), (1864) 159 Eng. Rep. 375; 2 Hurl. & C. 906.

150. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 20 cmt. d, illus. 1-4 (AM. LAW INST. 1981) (presenting variants of the *Peerless* case fact pattern under a discussion of mutual misunderstanding but describing at least some variants as also governed by the rules on mistake); Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 427-28 (1964) (describing the *Peerless* case as "involving latent ambiguity, frequently called 'mutual misunderstanding' or 'mutual mistake'" (footnote omitted)); A. W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 323 (1989) (pointing in passing to arguable aspects of misunderstanding and mistake in speaking of an assumed "genuine misunderstanding, neither side initially realizing that there were two vessels of the same name loading cotton in Bombay"). *But cf.* Benjamin Alarie, *Mutual Misunderstanding in Contract*, 46 AM. BUS. L.J. 531, 533 (2009) (contrasting "mutual misunderstanding cases," in which "the parties understand the terms of the contract differently," with "mistake cases," in which "the terms are clearly understood but the underlying factual beliefs about the world of one or both of the parties are . . . mistaken"); Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook That Never Was*, 72 FORDHAM L. REV. 595, 621 (2003) (quoting a letter from Lon Fuller to Arthur

whenever there are overlapping legal doctrines that can provide support for an identical legal result, they can act together to provide greater assurance that this result will be achieved. Litigants and even judges can use this aspect of overlapping legal provisions or principles to their advantage, providing alternate grounds for their arguments or judgments to protect against the failure of one or another.¹⁵¹

The relationship between patent law's novelty and nonobviousness requirements points to a further, subtler, but perhaps more profound way in which overlapping legal doctrines can have clarifying effect. Redundancy can have clarifying effect by enabling one "front-end" doctrine to do substantial work while remaining relatively simple, with a more complicated or more hazily defined doctrine providing either the basic background standard or acting as a backstop to secure the overall legal system against anomalies, loopholes, or abuse. In patent law, the test for lack of novelty of a patent claim can enjoy a quite simple formulation—a single prior art reference must disclose all aspects of the claimed invention¹⁵²—because the novelty requirement is reinforced by the further, more complicated requirement of nonobviousness to a person of ordinary skill in the relevant art, a requirement whose application can require considering combinations of the disclosures of different prior art references,¹⁵³ determination of whether such references should be considered to be "analogous art,"¹⁵⁴ and assessment of the capacities of the ordinary artisan.¹⁵⁵ As Smith has suggested, a similar relationship between simpler, front-end rules and more complex or hazier standards appears in relationships between law and equity, with equitable safety valves giving

Corbin mentioning "three cases on mutual mistake of fact (as contrasted with 'misunderstanding' as in the Peerless case)").

151. Cf. Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 628–29 (1984) (noting "widespread speculation that some circuit court decisions have been deliberately made 'certproof'—insulated from Supreme Court review by combining a humdrum alternative ground with a controversial new judicial rule"). But see Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 431 ("While some commentators see argument in the alternative as a valid persuasive strategy, others caution that the strategy can make both arguments appear weak.").

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

153. See *supra* note 148 and accompanying text.

154. *Innovation Toys, LLC v. MGA Entm't, Inc.*, 637 F.3d 1314, 1321 (Fed. Cir. 2011) ("A reference qualifies as prior art for a determination under § 103 when it is analogous to the claimed invention.").

155. See *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007) (instructing that, in addressing the question of nonobviousness, "a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ").

backstopping support to more straightforward legal rules that can provide substantial clarity in at least a subset of real-world situations.¹⁵⁶

Another advantage of overlapping legal doctrines is that, like two-dimensional maps that cover different but overlapping regions of the globe,¹⁵⁷ they can help prevent undesired gaps in legal coverage while also avoiding a need for the excessive warping of one or another doctrine to prevent this or that particular case from falling through doctrinal cracks. The use of a combination of overlapping legal doctrines can thus enable a brokered peace between conflicting demands for simplicity and complexity,¹⁵⁸ allowing the deployment of a set of rules that are locally relatively simple but that together form a relatively complex and adaptive whole.¹⁵⁹ The somewhat different perspective that a distinct but at least partially overlapping doctrine embodies might improve the law's self-correcting and adaptive potential as well as its facial breadth of coverage. The Uniform Commercial Code suggests that contract law's unconscionability doctrine plays such a role in relation to overlapping doctrines of public policy or contract interpretation.¹⁶⁰ Aspects of patent law's restrictions on subject-matter eligibility, including doctrines regulating when a claimed invention should be viewed as representing an attempt to patent an "abstract idea," "natural phenomenon," or "law of nature,"¹⁶¹

156. Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2124–25 (2012) (“[I]t is easier to describe—and to navigate—a system of simple rules backed up by a no-misuse principle than it would be to specify the methods of misuse (or even its outer contours) and then treat non-misuse as an exception.”); *id.* at 2127 (“Law can afford to be simple as long as it is backed up by equitable anti-opportunism principles.”). *But see* Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53, 53 (“We should stop thinking of equity as separate and marginal, as consisting of extraordinary remedies, supplemental doctrines, and occasional exceptions . . .”).

157. *Cf.* STEPHEN HAWKING & LEONARD MLODINOW, *A BRIEFER HISTORY OF TIME* 14–18 (2005) (describing the possibility of a unified theory of physics that uses multiple formulas having distinct but overlapping coverage).

158. *See* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 8 (1992) (noting that “complexity is both a weakness and a strength”); *cf.* RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 33 (1995) (observing that “simplicity is not the sole goal of any sensible legal system” because “it seeks to minimize . . . administrative [costs] without regard to the impact . . . [on] incentives to human action”).

159. *Cf.* Caryn Devins, Roger Koppl, Stuart Kauffman & Teppo Felin, *Against Design*, 47 ARIZ. ST. L.J. 609, 673 (2015) (“The complexity theory literature demonstrates that attributes such as redundancy, degeneracy, adaptivity, diversity, and resilience often predict performance in unforeseen situations.”).

160. U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1987) (stating that policing against “unconscionable” contractual language had previously “been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract”).

161. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1293 (2012) (“[L]aws of nature, natural phenomena, and abstract ideas’ are not patentable.” (alteration in original) (citations omitted)).

currently appear to play a similar role in relation to doctrines requiring that a claimed invention meet patentability requirements of utility, novelty, and nonobviousness.¹⁶² A somewhat flexible subject-matter analysis that overlaps with other patentability analyses can help prevent avoidance of the intended force of the separate patentability requirements through artful claim drafting.¹⁶³

More generally, overlapping coverage between more settled or crisply defined doctrines and more plastic doctrines might make it easier for courts and society to tolerate or even encourage the evolutionary potential of the latter. Evolution of a relatively plastic doctrine might be easier to stomach if more crisply defined doctrines ensure that key interests are secure. Such a combination of relatively rule-like cores plus less settled peripheries might be viewed as characteristic of common law developed through case-by-case precedent and might constitute one of the traditional common law's evolutionary advantages.

In light of the above advantages of redundancy, why has anti-redundancy remained so strong? Courts continue to invoke anti-redundancy principles regularly across legal contexts, and even Karl Llewellyn, a great skeptic of canons,¹⁶⁴ offered only a relatively weak countercanon to the anti-redundancy canon for statutory construction—namely, the countercanon that, “[i]f inadvertently inserted or if repugnant to the rest of the statute, [words in a statute] may be rejected as surplusage.”¹⁶⁵ Randy Barnett has suggested that “[a]t least three reasons explain why [in legal contexts] the virtues of redundancy are so commonly overlooked”:

162. See *id.* at 1304 (rejecting the Government's invitation to disregard “the novelty of a component law of nature . . . when evaluating the novelty of the whole [of a claimed invention]”).

163. See John M. Golden, *Flook Says One Thing, Diehr Says Another: A Need for Housecleaning in the Law of Patentable Subject Matter*, 82 GEO. WASH. L. REV. 1765, 1793 (2014) (noting the U.S. Supreme Court's concern with “abusively artful claim drafting” as a way of avoiding the force of “subject-matter exclusions”); cf. *Mayo*, 132 S. Ct. at 1297 (“If a law of nature is not patentable, then neither is a process reciting a law of nature, unless that process has additional features that provide practical assurance that the process is more than a drafting effort designed to monopolize the law of nature itself.”).

164. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (contending that “there are two opposing canons on almost every point” and that “to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by [other] means”).

165. *Id.* at 404 (providing this prosurplusage canon as a counter to an antisurplusage canon); cf. EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 188 (2008) (observing that the conflict between canons and “counter-canon[s] . . . was overstated, because many of Llewellyn's counter-canons merely” limited associated canons); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 27 (1997) (contending that, “[m]ostly, . . . Llewellyn's ‘Parries’ do not contradict the corresponding canon but rather merely show that it is not absolute”).

(1) “[M]oral philosophers and legal intellectuals do not spend much time worrying about easy cases where differing modes of analysis converge.”¹⁶⁶

(2) “[M]odern intellectuals are trained to accept the principle of parsimony—or ‘Ockham’s razor’—leading them to seek the minimally sufficient account of any conclusion.”¹⁶⁷

(3) “Intellectuals in many disciplines, from law to philosophy to economics, are often oblivious to the serious practical problems of knowledge and interest that pervade actual decisionmaking.”¹⁶⁸

David Gibson and Barbara Mendleson suggest another possibility.¹⁶⁹ Recorded forms of communication, such as writing or audio recordings, frequently enable effective communication with less redundancy than would commonly be required to ensure accurate and reliable communication through verbal speech.¹⁷⁰ Repetition or near repetition is less necessary in recorded communication because an audience member can, for example, read or reread the relevant text to avoid missing a point or to substitute for committing content to memory. Further, reception of the recorded communication might be more readily arranged to occur in a relatively controlled and noise-free environment such as a library reading room.¹⁷¹ Finally, the potentially greater likelihood of repeated and widespread use of the original form of a recorded message can place a greater premium on limiting redundancy than would be typical for unrecorded verbal remarks. With each repeated use, the cumulative cost that needless redundancy imposes increases, thereby increasing the potential savings from a single edit to remove redundancy. In short, means for recording messages can render redundancy that was generally helpful for unrecorded verbal communication essentially wasteful in new communicative contexts. In adapting verbal speech patterns to recorded

166. Barnett, *supra* note 135, at 157.

167. *Id.* at 158; cf. Tun-Jen Chiang, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353, 1396–97 (“[I]f the abstract-idea doctrine [for subject-matter eligibility] is understood as being functionally redundant with [patent law’s] enablement [requirement], the logical argument would be to fold the doctrine into enablement so as to simplify patent law.”).

168. Barnett, *supra* note 135, at 158.

169. See Gibson & Mendleson, *supra* note 38, at 53 (discussing a potential explanation for the fact that, “[i]n business communication, the message sender often has the predisposition—if not the mandate—to be as succinct as possible”).

170. See *id.* (noting that emphasis on eliminating redundancy “often prevails with . . . recorded forms of communication”).

171. *Id.* (“Error and equivocation are more likely to occur within noise-congested channels (e.g., the telephone . . .) than when using other more ‘efficient’ channels (e.g., the computer . . .).”).

media, people might become used to seeking to strip out redundancy, and the resulting mindset might morph into an overly simplified general effort to eliminate redundancy across the board.

This posited psychoanalysis of anti-redundancy is not meant to deny anti-redundancy's functional bases for appeal. As the explanation itself suggests, anti-redundancy has a fundamental association with relative efficiency or elegance,¹⁷² an association that substantially tracks engineers' concern with the cost of introducing and maintaining redundant systems. In many situations, anti-redundancy might also be argued to advance four additional ends: (1) tracking the intent of relevant actors such as document drafters; (2) improving the behavior of such drafters or other potential generators of redundancy;¹⁷³ (3) increasing the predictability and functional quality of official interpretations and applications of law; and (4) supplying courts with transubstantive decision rules that can make their work more manageable across a variety of contexts. In a variant of Llewellyn's account of canons and counter-canons, however, each of these justifications has problems.

First, there is a substantial argument that the fourth itemized justification is really no justification at all. Anti-redundancy might make judges' "jobs easier" by permitting them to decide or at least to appear "to decide cases that involve increasingly technical legal issues on the basis of familiar, if content-free, generic legal rules that can be transported from case to case and from legal problem to legal problem like a set of handy,

172. Cf. Amar, *supra* note 101, at 6 ("[T]he anti-redundancy maxim, sensibly understood, is merely one aspect of a general preference in favor of grace over awkwardness . . ."). Costs associated with redundancy can include the additional information costs of producing and processing longer legal documents, H. J. Hsia, *Redundancy: Is It the Lost Key to Better Communication?*, 25 AV COMM. REV. 63, 79 (1977) (observing that redundancy "usually exists at the expense of information" and "invariably brings about . . . an increase in the cost of information processing"); see also JACK P. HAILMAN, CODING AND REDUNDANCY: MAN-MADE AND ANIMAL-EVOLVED SIGNALS 176 (2008) ("[R]edundancy always reduces the efficiency or parsimony of a code."), the suspicion that such longer documents might inspire, cf. Smith, *supra* note 138, at 1149 ("In the absence of common knowledge, longer locutions can be used, but then the nonwriting party has to search through them for possible traps."), and possible increases in problematic ambiguity if additional words are not chosen carefully or the effort to provide clarity through reinforcement on one front leads to confusion on another, perhaps because each reinforcement brings with it some additional fuzzy periphery, see THOMAS HOBBS, LEVIATHAN 240 (Richard Tuck ed., 1991) ("[A]ll words, are subject to ambiguity; and therefore multiplication of words in the body of the Law, is multiplication of ambiguity . . ."); Oliver-Lalana, *supra* note 48, at 148 (observing that redundancy might "increas[e] legal uncertainty and therefore opaqueness" by "increas[ing] the complexity that the information user has to deal with" and by "conceal[ing] the authentic legal norm by communicating something that does not correspond exactly to it").

173. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 198 (2006) ("As default rules, the canons are conventionally justified either (1) as rules that track legislators' preferences . . . or else (2) as democracy-forcing rules that courts might use to provoke desirable legislative responses.").

all-purpose tools.”¹⁷⁴ But making judges’ jobs easier hardly seems a primary purpose for law, without which judges presumably would have no work at all. In any event, even if the “anti-redundancy makes judges’ jobs easier” argument were normatively sound as a matter of principle, it would seem a weak reed on which to rely. There are dozens of other canons and interpretive tools that judges can deploy to ease their labor.¹⁷⁵ In this context, removing an anti-redundancy presumption from judges’ arsenal seems unlikely to substantially impair judges’ ability to generate a decision with a plausibly legal-sounding justification even when judges’ competence to decide the merits might be doubted.

The remaining three beyond-efficiency justifications for anti-redundancy seem stronger but also substantially mitigated by significant counterpossibilities that the relevant anti-redundancy principle will lead to negative effects along the same axis of concern that the candidate justification invokes. Take, for example, the classic justification for anti-redundancy canons of interpretation as well as canons of interpretation more generally—namely, that such canons increase the odds that judicial interpretations will track the intent of relevant actors such as legislators, contracting parties, or patent applicants.¹⁷⁶ A canon might do this directly because the relevant actors’ intent tends to track the canon’s assumptions¹⁷⁷ or because, as suggested by James Landis, contemplation or recitation of such canons helps generate a proper judicial state of mind.¹⁷⁸ Landis’s suggestion seems likely to fail as a justification if the first argument fails: if documents are commonly drafted to contain redundancy, it is hard to believe that adopting a presumption of anti-redundancy is the best way to prepare for a faithful reading of legal text. Thus, the fundamental argument for anti-redundancy as means to foster faithful interpretations appears to be

174. Macey & Miller, *supra* note 18, at 671; *cf.* FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 91 (2009) (“Some have argued that the canons are useful precisely because they are nonideological and provide a neutral tool in cases where the judiciary is relatively indifferent to outcome.”).

175. William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 *COLUM. L. REV.* 531, 536 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (“Updated through 2012, my casebook coauthors and I found 187 different canons of statutory construction in the opinions of the Supreme Court under Chief Justices Rehnquist and Roberts.”).

176. *See, e.g.*, Gluck & Bressman, *supra* note 7, at 935 (describing as a “primary justification” of the antisurplusage canon the proposition that “the rule helps faithful-agent judges effectuate congressional intent”).

177. *See* HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 208 (1967) (“Frankfurter rarely relied on canons of construction which, he followed Holmes in emphasizing, ‘are not in any true sense rules of law’ and have worth only to the extent that they are ‘generalizations of experience.’”).

178. James M. Landis, *A Note on “Statutory Interpretation,”* 43 *HARV. L. REV.* 886, 892 (1930) (suggesting that canons of interpretation can help foster a state “of mind more likely to . . . give effect accurately to the real legislative purpose”).

that they in fact track legal drafting practice. This argument has commonsense appeal. Why would drafters of legal documents engage in the apparently wasteful, often affirmatively costly¹⁷⁹ activity of repeating the substance of what a legal document already says?¹⁸⁰ Further, given frequent condemnation of redundancy as a matter of style, shouldn't we, if only as a form of "interpretive charity," champion anti-redundancy in interpretation as part of a presumption that legal drafters were not "truly terrible writers"?¹⁸¹

Despite such commonsense appeal, the increased-fidelity justification for anti-redundancy in interpretation has received wide and well-justified criticism. As noted above, redundancy is rife in ordinary human communication,¹⁸² and there are ample reasons—often even especially intense reasons—to expect the use of redundancy in the drafting of legal documents. Generally speaking, any drafter of a legal document faces uncertainty with respect to where, when, by whom, and under what potentially changed circumstances a legal document will be interpreted. The separation between the drafter and the relevant audience can predictably complicate the achievement of accurate and effective communication, in effect requiring the sacrifice of parsimony in pursuit of that end.

In situations where a drafter of a legal document has reason for concern that an unknown audience might misunderstand or misapply the message, the drafter might predictably use both linguistic redundancy (redundant language) and substantive redundancy (overlapping substantive provisions) to try to ensure that the document will ultimately be interpreted and applied as desired, at least with respect to the most critical interests of concern.¹⁸³ In accordance with this postulate, drafters of patent claims are trained to write multiple claims to cover the same invention.¹⁸⁴ Likewise, judges have observed that contracts often include not only "truly redundant

179. See Menell, Powers & Carlson, *supra* note 105, at 753 (contending that the patent law doctrine of claim differentiation "reflects the economic reality that patent fees depend on the number of claims in the patent").

180. See SCALIA, *supra* note 165, at 25–26 (observing that "canons of construction . . . have been widely criticized, indeed even mocked, by modern legal commentators" but that at least a number of them are "commonsensical"); Menell, Powers & Carlson, *supra* note 105, at 753 (describing the doctrine of claim differentiation as having roots in common sense).

181. Amar, *supra* note 101, at 6 (describing "the anti-redundancy maxim" with respect to the U.S. Constitution as reflecting "interpretive charity").

182. See *supra* notes 134–36 and accompanying text.

183. *Spectrum Health—Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 346 (D.C. Cir. 2011) ("As is true of drafters of legislation, drafters of contracts do sometimes take a belt-and-suspenders approach in order 'to make assurance doubly sure.'").

184. See *infra* notes 213–19 and accompanying text.

phrases”¹⁸⁵ but also belt-and-suspenders provisions that provide overlapping coverage of key points.¹⁸⁶ Moreover, a recent survey of congressional staffers by Abbe Gluck and Lisa Bressman provides evidence that legislators “intentionally err on the side of redundancy” both to ensure coverage of “the intended terrain” when the law is applied and to satisfy the more immediate demands of an audience of political actors whose individual players often want to see their own favored language in the statute.¹⁸⁷ In short, anti-redundancy principles appear to be frequently discarded in the writing of texts addressed to audiences of heterogeneous or uncertain content.

Further, the fact that anti-redundancy principles are commonly violated in practice suggests that they commonly fail to fulfill the goal set forth by yet another candidate justification—namely, that they can productively encourage the drafters of legal documents to conform to their presumptions. A fundamental problem is that this goal of encouraging lack of redundancy in legal writing tends to reflect an implicit presumption that redundancy is unproductive and wasteful, whereas, as we have seen, redundancy can often add value. Positive aspects of redundancy help explain why anti-redundancy often seems to fail to have much visible effect on the drafting practices it targets. Gluck and Bressman’s survey indicates that, although legislative drafters know of the antisurplusage canon of construction, they deliberately disregard it.¹⁸⁸

Among the candidate justifications for anti-redundancy, there remains the notion that anti-redundancy can increase the predictability and quality of the law’s understanding and application. With respect to the interpretation of legal documents per se, this justification seems questionable, in large part because the antisurplusage canon cuts against so much actual drafting

185. *Ardente v. Standard Fire Ins. Co.*, 744 F.3d 815, 819 (1st Cir. 2014) (noting the commonness of “redundancy in insurance policies”); *TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 577 (6th Cir. 2010) (observing that “redundancies abound” in “insurance contracts”).

186. *See Certain Interested Underwriters at Lloyd’s, London v. Stolberg*, 680 F.3d 61, 68 (1st Cir. 2012) (rejecting an invitation to narrow an insurance-coverage exclusion to avoid overlap with other exclusions in part because “insurance policies are notorious for their simultaneous use of both belts and suspenders”); *TMW*, 619 F.3d at 577 (noting the potential utility of “contract drafting that involves belts (certain damages are excluded) and suspenders (all damages not excluded are covered)”; *In re SRC Holding Corp.*, 545 F.3d 661, 670 (8th Cir. 2008) (stating that “[n]othing prevents the parties from using a ‘belt and suspenders’ approach in drafting the exclusions [from coverage], in order to be ‘doubly sure’”).

187. Gluck & Bressman, *supra* note 7, at 934 (reporting that surveyed congressional staffers said that legislative drafters “intentionally err on the side of redundancy” to ensure intended coverage to satisfy diverse players’ interests in favored language); *cf.* Posner, *supra* note 84, at 812 (noting that a statute “may contain redundant language as a by-product of the strains of the negotiating process”).

188. Gluck & Bressman, *supra* note 7, at 954 (concluding that canons such as the antisurplusage canon “cannot be justified as draft-teaching tools because our respondents already know that courts apply the rules but still disregard them” (emphasis omitted)).

practice. Indeed, disjunction between the canon and reality might support a vicious cycle: courts find frequent cause to rebut the antisurplusage canon, and such rebuttals further erode drafters' confidence (or worry) that an antisurplusage rule will in fact be applied, with the result being continued or even enhanced departures from the canon in actual drafting practice.¹⁸⁹ In any event, given the disjunction between anti-redundancy canons' presumption, general realities of human communication, and more specific traits of common drafting practice—never mind the existence of alternative canons pointing in different directions¹⁹⁰—the notion that the antisurplusage canon generally increases the predictability of legal interpretations seems somewhat Panglossian.¹⁹¹

On the other hand, anti-redundancy as an approach to doctrinal design—a principle favoring separation in doctrinal coverage or in forms of analysis—might enjoy more widespread practical justification. The capacity for anti-redundancy in doctrinal design to foster greater predictability and perhaps even accuracy in legal judgments could provide justification for the Supreme Court's instruction that, "[w]here a particular [constitutional] Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing [those] claims."¹⁹² Consistent channeling of legal claims into a relatively thick body of jurisprudence under one specific amendment might provide a better basis for predicting the outcome of judicial deliberation than would exist if there were a substantial chance of claims being diverted to decision making under hazier notions of broader fundamental rights, notions that might not have been so frequently deployed in relation to the particular type of fact patterns at issue.¹⁹³

189. *Id.* at 954–55 (“An overwhelming number of our respondents told us that more predictable judicial application of the canons would change the way that drafters treat them.”).

190. CROSS, *supra* note 174, at 101 (“The canons are too often indeterminate in direction, making them vulnerable to easy manipulation . . .”); Eskridge, *supra* note 175, at 545 (“In most cases involving any interpretive difficulty, . . . the problem will be that there are a dozen or more canons that are applicable to the issue and they will push the interpreter in cross-cutting ways.”).

191. *Cf.* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 280 (1990) (“[T]he canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved.”).

192. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (first alteration in original) (internal quotation marks omitted) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.)).

193. *Cf. id.* at 850 (“Rules of due process are not . . . subject to mechanical application in unfamiliar territory.”).

To the extent one believes that, in areas substantially governed by precedent, the process and results of judicial decision making tend to “work themselves pure,”¹⁹⁴ one might conjecture that the more specific provision, by attracting a thicker body of case law, is more likely to generate better social results. This might be particularly true when the more specific provision already includes relatively nonspecific hedge words invoking broad standards of “reasonableness,” “fairness,” or “substantiality” that can help ensure that the provision allows consideration of most major social concerns. Thus, for example, one might hope that the notion of protection “against unreasonable searches and seizures” under the Fourth Amendment¹⁹⁵ would largely cover the ground encompassed by concerns of “due process” under the Fifth or Fourteenth Amendments.¹⁹⁶

In short, there might be something to the notion that concerns of predictability, administrability, and substantive effectiveness are in fact advanced when anti-redundancy encourages courts to distinguish and analytically separate different legal doctrines, perhaps even displacing coverage by one in favor of coverage by another. But it is worth noting that this potential justification does not support anti-redundancy canons of interpretation. By comparison, these seem particularly ripe for removal or truncation because of their apparent conflict with ordinary communicative practices, courts’ existing willingness to find exceptions, and explicit indications by drafters or their associates that they do not act in accordance with anti-redundancy canons’ presumptions.

II. Redundancy and Anti-Redundancy in Patent Law

To better understand the operation of redundancy and anti-redundancy in law, it might be helpful to focus on a specific area of law, its doctrinal structure, and some of its recent challenges. Patent law is a good candidate for such an area because it has provided particularly fertile ground for the operation and conflict of redundancy and anti-redundancy in at least four ways:

- (1) the centrality of issues of interpretation, in particular the interpretation of patent claims;¹⁹⁷
- (2) a long-term, historical trend toward increased subdivision and separation of legal questions, such as those regulating patentability;

194. Cf. Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL’Y 263, 269 (1996) (noting but criticizing “John Mansfield’s famous statement about the common law ‘working itself pure’”).

195. U.S. CONST. amend. IV.

196. *Id.* amends. V, XIV.

197. See Golden, *supra* note 19, at 322 (“Determination of the scope of a patented invention is one of the most contentious and difficult tasks of modern patent law.”); Lemley, *supra* note 7, at 1389 (“The process of claim construction is the most important part of patent litigation.”).

- (3) centralization of appeals in the Federal Circuit, which has contributed to the long-term, historical trend; and
- (4) relentless pressure for institutional and procedural developments to reduce system costs, delays, and errors.

The first factor means that patent law constantly features interpretive situations in which anti-redundancy concerns can arise. The second and third have combined to generate a situation in which a great variety of patent law doctrines have been discretely defined either by statute or through a deep and centralized body of appellate case law. The relatively well-defined nature of many doctrines has brought potential overlaps into sharper relief, and the multiplicity of such doctrines increases the possibilities for arguably unseemly redundancy. Finally, continuing institutional developments have predictably manifested tension between the upfront advantages of streamlined procedure and the value of at least partially redundant institutions and processes.

A. Claim Construction and Differentiation

As discussed in Part I, a commonly stated principle for the interpretation of a legal document is that it should, to the extent reasonable, be interpreted in a way that prevents language therein from being redundant or otherwise superfluous. Some form of this principle is commonly cited when courts interpret patent claims. Indeed, electronic searches in Westlaw's federal opinions database suggest that express invocation of concerns with redundancy or surplusage occurs nearly as frequently in claim construction as express invocation of the basic standard for claim construction¹⁹⁸—namely, that claims are to be interpreted according to the understanding of a person having ordinary skill in the relevant technological art.¹⁹⁹ Deployments of anti-redundancy in the context of

198. Search of Westlaw's databases of district court and Federal Circuit opinions yielded the following numbers of hits for opinions issued from January 1, 2000, to September 29, 2015: (1) 1,958 hits for opinions that gave facial evidence of invoking the ordinary artisan standard in the context of patent claim construction; (2) 1,534 hits for opinions that gave facial evidence of invoking anti-redundancy or antisurplusage concerns in the context of patent claim construction; and (3) 1,030 hits for opinions that gave facial evidence of invoking the specific anti-redundancy canon of claim differentiation in the context of patent claim construction. The specific Westlaw search codes that yielded these results for searches run on September 29, 2015, were as follows: (1) ((patent!) /s (interpret! or constru!)) & "35 U.S.C." & ((canon or interpret! or constru!) /s ("ordinary skill" or "ordinary artisan" or PHOSITA or POSITA) and DA(after 1999)); (2) ((patent!) /s (interpret! or constru!)) & "35 U.S.C." & (((canon or interpret! or constru!) /s (redundant or redundancy or redundancies or surplusage or superflu!)) or "claim differentiation") and DA(after 1999); and (3) ((patent!) /s (interpret! or constru!)) & "35 U.S.C." & "claim differentiation" and DA(after 1999).

199. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc) ("We have made clear . . . that the ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention . . .").

claim construction partake of many of the defects and weaknesses, as well as the advantages, of anti-redundancy principles for interpretation generally. But in at least a subset of situations involving claim construction, anti-redundancy might have an additional advantage or justification tracing to the process by which patent claims are drafted. In this subset of situations, courts invoke anti-redundancy as a basis for rejecting arguments by patentees that a portion of a claim's language is superfluous or redundant and thus does not serve to limit claim's scope.²⁰⁰

This use of anti-redundancy to reject a patentee's favored claim interpretation and to favor a narrower interpretation corresponds to another common principle for construing legal documents—namely, the principle of construing the document against the drafter.²⁰¹ Aside from a limited amount of relatively technical matter, patents and the claim language within them are generally drafted and amended by the patent applicant and any patent attorney or agent the applicant employs.²⁰² Outside certain post-grant proceedings, the process of examination by the U.S. Patent and Trademark Office (USPTO) is generally conducted *ex parte*, with a patentee or patent applicant able to respond to examiner office actions through argument and amendment but with other members of the public not directly involved.²⁰³ Thus, whereas a later accused infringer typically has played no direct role in the drafting of a patent document, a patentee or the patentee's

200. See, e.g., *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 781 (Fed. Cir. 2010) (rejecting a patentee's argument that certain language was merely preambular and nonlimiting); *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 951 (Fed. Cir. 2006) (rejecting a patentee's proposed construction where "the effect of adopting [that] claim construction would be to read limitations [a], [b], [e], and [h] out of the claim").

201. See, e.g., *Contra Proferentem*, BLACK'S LAW DICTIONARY (10th ed. 2004) ("The doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter."); FARNSWORTH, *supra* note 108, § 7.11, at 459 (discussing "the rule that if language supplied by one party is reasonably susceptible to two interpretations, . . . the one that is less favorable to the party that supplied the language is preferred").

202. MERGES & DUFFY, *supra* note 106, at 13 ("While the Patent and Trademark Office (PTO) is responsible for adding a few technical portions to the final patent . . . , the predominant function of the PTO during the application process is to determine whether the draft patent . . . would constitute a valid patent.").

203. See Bryan Blumenkopf, *Exposing Latent Patent Infringement*, 19 RICH. J.L. & TECH., no. 2, 2013, at 1, 53 ("Unlike the patent examiner who examines patent claims *a priori*, *ex parte*, in bulk, and on a compressed schedule, the district courts generally have the luxuries of hindsight . . . and the adversarial process . . ."). See generally Robert A. Armitage, *Understanding the America Invents Act and Its Implications for Patenting*, 40 AIPLA Q.J. 1, 4–5 (2012) (commenting on the tradition of patentability being determined through "a secret, non-public dialogue between the patent applicant and the patent examiner"). Although third parties are generally unable to participate directly in the interchanges between a patent applicant and patent examiner, they may, during a statutorily delimited time window, submit "for consideration and inclusion in the record of a patent application, any patent, published patent application, or other printed publication of potential relevance to the examination of the application." 35 U.S.C. § 122(e)(1) (2012).

predecessor in interest has had an opportunity to draft claim language that has the scope that the patentee later asserts. In particular, if a patentee is now asserting that certain claim language is superfluous, the patentee or patentee's predecessor in interest has had the opportunity to avoid any limitation from that language through a more straightforward approach—namely, omitting that language from the claim. Given the notice purpose of patent claims²⁰⁴ and the corresponding statutory injunction that claims “particularly poin[t] out and distinctly clai[m] the subject matter which the inventor or a joint inventor regards as the invention,”²⁰⁵ reading a claim comparatively narrowly by reasonably rejecting a patentee's argument that certain claim language is nonlimiting and therefore superfluous can be particularly well justified.²⁰⁶

In claim construction, however, the most prominent anti-redundancy principle is the doctrine of claim differentiation.²⁰⁷ This doctrine imposes a presumption that different patent claims are to be construed to have different scope.²⁰⁸ In other words, the doctrine of claim differentiation embodies an anti-redundancy principle that presumes against complete redundancy but allows for partial redundancy: claims are presumptively to be construed so that the coverage provided by one claim is not precisely the same as—entirely overlapping and coextensive with—that of another.

The doctrine of claim differentiation seems highly questionable both from the standpoint of likely drafter's intent and the standpoint of functional doctrinal design. The USPTO is authorized by statute to require the narrowing of an application that originally claims “two or more independent and distinct inventions” so that the application covers only “one of the inventions.”²⁰⁹ Further, the USPTO has strong incentive to use this power of “restriction” because it protects the revenue expected from the agency's per-application fee structure and “ensures the integrity of the

204. See *Haemonetics*, 607 F.3d at 781 (stating that patent claims “notice function would be undermined . . . if courts construed claims so as to render physical structures and characteristics specifically described in those claims superfluous”); *Bicon*, 441 F.3d at 950–51 (providing a notice-serving rationale for the principle of interpreting claims “with an eye toward giving effect to all terms in the claim”).

205. 35 U.S.C. § 112(b) (2012).

206. As indicated by the use of the terms “reasonably rejecting” in the text, courts have generally recognized that anti-redundancy principles in claim construction are not absolute and can be overridden by other considerations. See *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004) (“[W]here neither the plain meaning nor the patent itself commands a difference in scope between two terms, they may be construed identically.”).

207. See Lemley, *supra* note 7, at 1391 (“The doctrine of claim differentiation is the canon [of patent claim construction] that has arguably had the most significant impact on claim construction.”).

208. See *supra* text accompanying notes 106–07.

209. 35 U.S.C. § 121 (2012).

[USPTO's] classification system."²¹⁰ Moreover, robust imposition of restriction requirements can "defend against an applicant overwhelming an examiner by dividing the examiner's time for search and examination among inventions with separate features even when both inventions are obvious over the prior art."²¹¹ In fact, the USPTO does appear to have used its restriction powers quite vigorously, to the apparent chagrin of U.S. practitioners who can point abroad to foreign countries' apparently looser standards for joining multiple inventions within a single application.²¹²

In a context in which patent applicants expect themselves to be relatively strictly limited to one invention per patent, significant redundancy of claim coverage within a single patent becomes especially natural.²¹³ In this context, inclusion of multiple patent claims within a single patent—i.e., the practice of claiming an alleged invention through multiple linguistic formulations—tends to serve the purpose of helping to ensure desired coverage of the invention by protecting against the possibility that certain claims will later be understood to be narrower than hoped²¹⁴ or that certain claims, most likely among the broader claims, will later be found invalid.²¹⁵ In accordance with this insurance purpose for multiple claims, some claims are deliberately drafted to be narrower than other claims (i.e., to generate no more than partial redundancy), but some distinct claims use different language not as much to distinguish them but instead to try to increase the chances that at least one claim, whether redundant with other claims or not, will have a desired level of coverage.²¹⁶ In short, claim drafters are

210. *Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, 98 F.3d 1563, 1576 (Fed. Cir. 1996).

211. Jon W. Henry, *Ten Misconceptions of Division of Inventions for Examination Purposes*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 581, 582 (2004).

212. See, e.g., MERGES & DUFFY, *supra* note 106, at 1170 ("In general, European standards on which inventions may be claimed together are quite liberal, and the same is true of Japan."); Etienne de Villers, *The Patent Prosecution Highway: Canada as Office of First Filing*, LANDSLIDE, Jan.–Feb. 2010, at 30, 32 ("Generally, USPTO examiners seem to issue restriction requirements more often than Canadian examiners, and, when a restriction is issued, require a narrower election of claim sets."); Edwin S. Flores Troy, *The Development of Modern Frameworks for Patent Protection: Mexico, A Model for Reform*, 6 TEX. INTELL. PROP. L.J. 133, 159–60 (1998) (describing as "a recurrent problem in United States practice . . . the PTO's use of restriction requirements to limit inventors to one invention per patent").

213. Cf. Dennis Crouch & Robert P. Merges, *Operating Efficiently Post-Bilski by Ordering Patent Doctrine Decision-Making*, 25 BERKELEY TECH. L.J. 1673, 1688 (2010) ("[P]atent applicants typically protect an invention with multiple, overlapping claims . . .").

214. See Lemley, *supra* note 7, at 1394 ("[P]atent applicants draft multiple claims because . . . taking multiple bites at the apple gives patentees a greater chance of successfully capturing their single invention in words.")

215. See MERGES & DUFFY, *supra* note 106, at 31 (describing "narrower claims" in a patent as "a form of insurance" against the possibility that a broader claim will later be found invalid).

216. See DAVID PRESSMAN, *PATENT IT YOURSELF* 245 (Richard Stim ed., 13th ed. 2008) (suggesting to patent claim drafters that after writing a first set of claims they should "consider

commonly engaged in an engineering exercise that deliberately introduces redundancy in order to try to protect against any of a number of “stresses” or “failures”—invalidity challenges, relatively narrow claim constructions, etc.—that can later afflict the language that they use.²¹⁷ The imposition of additional patent fees for the inclusion of claims exceeding numerical thresholds of three independent claims and twenty claims overall has a limiting influence on this practice. But even within the numerical thresholds, there is significant room for redundant drafting. Moreover, in light of patent attorney billing rates of hundreds of dollars per hour, the standard fees of \$80 for each claim beyond twenty and \$420 for each independent claim beyond three seem unlikely to be generally preclusive.²¹⁸ In this context, the doctrine of claim differentiation, which instructs courts to presume that differently worded claims have different scope, can push courts toward interpretations that artificially twist the interpretation of claims in ways contrary to common drafting practices.²¹⁹

The doctrine of claim differentiation seems particularly problematic when operating “horizontally”—i.e., between claims that are independent claims or that derive from different independent claims—as opposed to “vertically”—i.e., between a first claim and a second claim that incorporates the requirements of the first claim. At least one claim in a patent document is an “independent claim,” a claim that stands on its own and does not incorporate the limitations of another claim by reference.²²⁰ Other claims can be “dependent claims,” which are claims that refer to another claim, incorporate its limitations by reference, and then add some additional claim language.²²¹ The relationship between a dependent claim and the parent claim from which it depends supports an expectation that the

writing another set of claims” because, even though such claims “will not always give your invention broader coverage,” they “will provide alternative weapons”).

217. See SLUSKY, *supra* note 54, at 243 (advocating protection against uncertainty through a “diverse claim suite [that] presents the invention in different ways, for example, by organizing the limitations differently, using different terminology, or employing different combinations of functional and structural recitations”).

218. See 37 C.F.R. § 1.492(d)–(e) (2015) (listing claim fees).

219. See Lemley, *supra* note 7, at 1394 (“If the patentee is using different words to mean the same thing, a rule that requires each set of words to have its own unique meaning creates artificial distinctions not intended by the patentee . . .”).

220. MUELLER, *supra* note 146, at 98 (“[A]n independent claim stands alone without referring to any other claim.”).

221. *Id.* (“A dependent claim includes (i.e., incorporates by reference) all limitations of the claim from which it depends, and also adds some further limitation(s).”). For example, a hypothetical independent claim could read as follows: “1. A stool comprising a top seat portion and a first leg connected to the seat portion and extending substantially downward from the seat portion.” A dependent claim could then read: “2. The stool of claim 1 further comprising a second leg connected to the seat portion and extending substantially downward from the seat portion.”

dependent claim will generally be narrower than the parent.²²² This expectation is commonly further fortified by language in the dependent claim that indicates that it “further compris[es]” the matter separately specified in the dependent claim.²²³ Thus, with respect to vertically related claims, the presumption generated by the doctrine of claim differentiation—that claims have different scope and, in this particular context, that the dependent claim has narrower scope²²⁴—seems likely to accord with both common drafting intent and likely reader expectations.

In contrast, with respect to claims that are only horizontally related, there seems no general reason to expect that the breadth of the claims will have any specific relation. Given the purposes of claim drafters to try to ensure coverage of at least a core subset of subject matter despite the vagaries of claim construction and validity analysis, they might reasonably intend for independent claims to have essentially or identically the same scope.²²⁵ On the other hand, in part because of validity concerns, one can envision a claim drafting strategy under which even independent claims have a portfolio of intended scopes, with one independent claim being intended to be broader than another or to have a scope that has no simply described relation to the other—perhaps because the claim is intended to be narrower along one dimension but broader along another. For an example of a situation in which a claim seems broader along a first axis but narrower along a second axis, consider a hypothetical patent with one independent claim specifying that a particular process will run at a pH of 5.0 or above, and another independent claim specifying that the otherwise identical process will run at a pH of between 4.0 and 7.0. The first claim is narrower than the second in that the first claim’s literal scope does not reach below a pH of 5.0. But the first claim is broader than the second in that the first claim’s literal scope encompasses processes running at pH levels above 7.0.

222. Cf. MERGES & DUFFY, *supra* note 106, at 31 (“Often the claims in a patent begin with the broadest claim which is then ‘qualified’ in a series of dependent claims.”).

223. See, e.g., U.S. Patent No. 7,173,416 col. 10 ll. 27–29 (filed Mar. 4, 2002) (“8. Magnetic measurement probe according to claim 1, further comprising a sample support made of non-magnetic material of low electric conductivity.” (emphasis omitted)); U.S. Patent No. 6,521,030 col. 15 ll. 38–42 (filed June 20, 2000) (“15. The set of inkjet inks according to claim 11, further comprising: a magenta ink comprising a magenta dye; and a yellow ink comprising a yellow dye.” (emphasis omitted)).

224. *AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1242 (Fed. Cir. 2003) (“Under the doctrine of claim differentiation, dependent claims are presumed to be of narrower scope than the independent claims from which they depend.”).

225. See Lemley, *supra* note 7, at 1394 (“The doctrine [of claim differentiation] leads to a fruitless search for gradations in meaning that simply may not exist.”).

Appropriately, the Federal Circuit has characterized the doctrine of claim differentiation as only establishing a rebuttable presumption,²²⁶ and the Federal Circuit has indicated that this presumption is somewhat weaker between horizontally related claims.²²⁷ But at least between horizontally related claims, it is not clear that it makes sense to have any presumption at all.

Moreover, a common effect of the presumption, even when operating vertically, is the relative inflation of patent claims' overall scope.²²⁸ This effect of the rebuttable presumption under the doctrine of claim differentiation is especially perverse for two reasons. First, the inflationary effect can undermine patent claims' notice function by rewarding patentees who are responsible for the inclusion of ambiguous claim language that courts later use the presumption to inflate. Second, the prospect of an inflationary effect can provide extra reason for patent applicants to pepper their applications with a multiplicity of claims with potentially inflationary language.²²⁹ Indeed, the leading treatise on claim drafting explicitly instructs that:

In order to enhance the scope of a broader scope claim, it may be useful to also provide a narrower scope claim that is dependent on the broader scope claim, so that by claim differentiation, the broader scope claim may encompass more than the narrow claim or the embodiment illustrated in the specification.²³⁰

A further manual on claim drafting testifies:

The doctrine of claim differentiation is usually invoked in litigation when the patent owner needs a claim term to be interpreted expansively to make it read on the accused product or process.

226. *E.g.*, *Regents of the Univ. of Cal. v. Dakocytomation Cal., Inc.*, 517 F.3d 1364, 1375 (Fed. Cir. 2008) (observing that “[p]resumptions are rebuttable” and that “the prosecution history overcame] the presumption” generated by the doctrine of claim differentiation in the instant case).

227. *Cf.* *Interdigital Commc'ns, LLC v. ITC*, 690 F.3d 1318, 1324 (Fed. Cir. 2012) (“The doctrine of claim differentiation is at its strongest in this type of case, where the limitation that is sought to be ‘read into’ an independent claim already appears in a dependent claim.” (some internal quotation marks omitted)); *Sunrace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1303 (Fed. Cir. 2003) (noting that the presumption generated by the doctrine of claim differentiation “is especially strong when the limitation in dispute is the only meaningful difference between an independent and dependent claim”).

228. *See* SLUSKY, *supra* note 54, at 124 (describing the doctrine of claim differentiation, somewhat loosely, as “provid[ing] that when an independent claim is limited by recitations in a dependent claim, the first claim must be regarded as being broader”).

229. *Cf.* Lemley, *supra* note 7, at 1395 (“Patent prosecutors often differentiate claims not because they have a different scope in mind . . . but because they know that the courts will apply the claim differentiation doctrine . . .”).

230. ROBERT C. FABER, *FABER ON MECHANICS OF PATENT CLAIM DRAFTING* § 8.2, at 8–4 (7th ed. 2015).

Anticipating the day when their claims may be litigated, attorneys sometimes include claim differentiation claims in their applications as a way of bolstering the case for a broad interpretation of the claims from which they depend. Such a claim might not otherwise be included in the claim suite²³¹

In sum, an anti-redundancy principle, rooted in an assumption about the undesirability of redundant or otherwise inefficient use of language, can in fact encourage greater redundancy in the form of claim multiplication and increased use of arguably ambiguous language.

To understand better why a common effect of the doctrine of claim differentiation might be the relative inflation of patent claims' overall scope, consider a hypothetical situation, designed for simplicity, in which two claims differ only in that the first claim recites a requirement for a "nail" and the second claim recites a requirement for a "metal nail." In the absence of the second claim, the term "nail" in the first claim might be understood, in accordance with a dictionary definition, to mean "a small metal spike."²³² In the presence of the second claim and the doctrine of claim differentiation, however, the addition of the term "metal" in the second claim generates a presumption that the "nail" of the first claim is not necessarily metal because otherwise the two claims will have identical scope. As a result of this presumption, one might more likely conclude that the nail of the first claim might be made of wood, ceramic, or a semiconductor as an alternative to metal. In short, the presence of the second claim and the doctrine of claim differentiation together make it more likely that the first claim will be read more broadly.²³³

The fact that this hypothetical example is not a passing fancy is illustrated by what is now the leading decision on how to perform claim construction, the en banc decision of the Federal Circuit in *Phillips v. AWH Corp.*²³⁴ In this case, the key dispute was over the meaning of the term "baffles" in claim 1 of the patent.²³⁵ After reciting an apparently dictionary-derived definition of "baffles" as "objects that check, impede, or obstruct

231. SLUSKY, *supra* note 54, at 125.

232. *Nail*, PAPERBACK OXFORD ENGLISH DICTIONARY (7th ed. 2012) (first listed definition of "nail").

233. *Cf.* *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004) ("As this court has frequently stated, the presence of a dependent claim that adds a particular limitation raises a presumption that the limitation in question is not found in the independent claim."); *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1341 (Fed. Cir. 2000) ("The doctrine of claim differentiation can support a broader construction of step (c) of claim 1 because the doctrine creates a rebuttable presumption that each claim in a patent has a different scope.").

234. 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

235. *Id.* at 1309–11 (concluding that the circuit had to "determine the correct construction of the structural term 'baffles'").

the flow of something,”²³⁶ the Circuit addressed the critical question of whether the baffles in question had to be oriented nonperpendicularly to walls with which they were associated. The Circuit’s first step after providing the dictionary-derived definition for “baffles” involved the doctrine of claim differentiation. The Circuit observed:

[D]ependent claim 2 states that the baffles may be “oriented with the panel sections disposed at angles for deflecting projectiles such as bullets” The inclusion of such a specific limitation on the term “baffles” in claim 2 makes it likely that the patentee did not contemplate that the term “baffles” already contained that limitation.²³⁷

The Circuit followed this anti-redundancy salvo with two additional claim-based shots along anti-redundancy lines.²³⁸ Only after this did the Circuit turn to consideration of what was said by the remainder of the patent document, the specification that the Circuit had described, about ten pages earlier, as the “[u]sually . . . dispositive[,] . . . single best guide to the meaning of a disputed term.”²³⁹ Here, the Circuit acknowledged that the specification made “clear the invention envisions baffles that serve [the] function” of “deflect[ing] projectiles” such as bullets and, to serve this function, must presumably be nonperpendicular.²⁴⁰ But the Circuit countered this evidence from the specification by arguing that, because the patent contemplated other objectives the baffles could serve, baffles appearing in the claims could serve objectives other than deflecting projectiles and thus might be perpendicular.²⁴¹

Although the Circuit’s opinion ultimately relied on more than claim differentiation and other anti-redundancy principles to support its conclusion,²⁴² the prime place accorded to concerns of claim differentiation and redundancy seems telling. Even if not entirely decisive, claim

236. *Id.* at 1324.

237. *Id.*

238. The Circuit contended that language in another claim, independent claim 17, would be redundant with that claim’s own use of the term “baffles” if such baffles were independently required not to be perpendicular to associated walls. *Id.* at 1324–25. The Circuit closed its round of anti-redundancy salvos by asserting that, “[i]f the baffles recited in claim 1 were inherently placed at specific angles, or interlocked to form an intermediate barrier, claim 6 would be redundant.” *Id.* at 1325.

239. *Id.* at 1315 (internal quotation marks omitted).

240. *Id.* at 1325.

241. *Id.* at 1327 (“Although deflecting projectiles is one of the advantages of the baffles of the ’798 patent, the patent does not require that the inward extending structures always be capable of performing that function.”).

242. *Id.* at 1326–27 (“The fact that the written description of the ’798 patent sets forth multiple objectives to be served by the baffles recited in the claims confirms that the term ‘baffles’ should not be read restrictively to require that the baffles in each case serve all of the recited functions.”).

differentiation operated to favor the claim inflation described earlier. In *Phillips*, the Circuit deploys the doctrine to support a conclusion that an independent claim should be construed broadly so that it has distinct scope from presumptively narrower dependent claims.

The inflationary effect of claim differentiation and the perverse incentives that it provides for claim multiplication and imprecision might not be a great concern if the process of assessing claim scope were costless and there were no other worries about how the patent system operates. But claim construction is far from costless and is in fact notoriously difficult.²⁴³ Moreover, the inflationary effect of the doctrine of claim differentiation exacerbates separately existing concerns about the patent system. There has been great concern about the extent to which the public is properly on notice of patent scope.²⁴⁴ Further, the sometimes subtle way in which claim differentiation can inflate claim scope can reduce already low confidence that time-strained patent examiners will avoid having the wool drawn over their eyes. In the hypothetical example involving the term “nail,” a time-strained examiner, who sensibly tends to pay less heed to dependent claims in assessing questions of patentability,²⁴⁵ might easily overlook the fact that, because of claim differentiation’s interaction with a dependent claim specifying that the nail is made of metal, the word “nail” will likely not be construed by courts to have its common meaning of “small metal spike.” The examiner might examine the independent claim for validity based on an incorrect assumption that the word “nail” is to be construed more narrowly than the doctrine of claim differentiation makes likely.²⁴⁶

In sum, the doctrine of claim differentiation can have an inflationary effect on claim scope and can lay traps for unwary examiners and thereby the public. Despite constituting an anti-redundancy principle, the doctrine of claim differentiation can even have the perverse effect of encouraging the drafting of additional and at least partially redundant claims. Because of these pathological aspects of the doctrine’s operation, there are strong arguments for its abolition or more substantial limitation.

243. See Golden, *supra* note 19, at 324 (“[C]laim construction jurisprudence continues to bear hallmarks of unpredictability.”).

244. See JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 8–9 (2008) (discussing how patents can fail to provide notice of their boundaries).

245. MERGES & DUFFY, *supra* note 106, at 31 (noting that the use of dependent claims “simplifies examination” because “a dependent claim must be novel if the claim on which it depends is novel”).

246. Cf. Lemley, *supra* note 7, at 1395 (“If patent lawyers are . . . using the claim differentiation doctrine to game the claim construction process, rote application of the canon simply plays into their hands.”).

B. *Doctrinal Compartmentalization*

Concerns of redundancy and anti-redundancy appear not only with respect to questions of patent claim construction but also with respect to questions of the structure of patent law doctrine. Amidst the shifting sands of patent law, there is continual debate over whether one or another argument properly fits under one doctrinal rubric or another. For example, recent stirrings in the law of subject-matter eligibility have led to questions about whether certain arguments should be viewed either exclusively or primarily as arguments about novelty, nonobviousness, enablement, or indefiniteness, rather than as arguments about subject-matter eligibility. Underlying such questions often seems to be either an assumption or a conclusion that policy makers would ideally identify a single doctrinal rubric through which the arguments at issue are to be channeled. A long-term trend toward increased doctrinal compartmentalization has facilitated these questions in at least two ways: (1) by providing more distinctly defined doctrinal rubrics whose domains might plausibly be argued to be exclusive and (2) by providing momentum for efforts to further distinguish and separate these rubrics' domains.

1. *Long-Term Trend Toward Compartmentalization.*—Since 1790, there has been significant change and refinement of the structure and institutions of patent law. The requirement of a specification providing a written description of an alleged invention became a generally recognized requirement in England in the late eighteenth century.²⁴⁷ The United States introduced “a formal system of examination, with professional examiners” in 1836.²⁴⁸ Likewise, patent claims, specific portions of the patent document meant to delineate the scope of an alleged invention and associated patent rights, first began to play a prominent role in patent law in the nineteenth century.²⁴⁹ The nonobviousness requirement for patentability arose relatively slowly and was not codified in the U.S. Patent Act until 1952.²⁵⁰

Moreover, from the late eighteenth century to the late twentieth century, U.S. patent law not only developed new legal doctrine but also generated a greater sense of the distinctions between its growing variety of legal doctrines. A prominent example of such a development was a noticeable shift in the 1970s toward stronger judicial distinctions between

247. MERGES & DUFFY, *supra* note 106, at 6 (describing as “[a]n important change . . . the increasingly stringent requirement that the applicant for a patent describe his or her invention clearly and completely”).

248. *Id.* at 8.

249. *See id.* at 750 (discussing the history of patent claims).

250. *See id.* at 610 (discussing the nonobviousness “doctrine’s relative youth”).

questions of patent-claim validity and questions of patent scope, with the courts tending to marginalize a previously central canon that patent claims should be construed so as to preserve their validity.²⁵¹

More recent refinements have reflected pressure to distinguish issues in ways that facilitate allocation of responsibilities between judge and jury, a more strongly felt need after a norm of bench trials gave way to a norm of jury trials in the last decades of the twentieth century.²⁵² Probably the most prominent of such developments is the Supreme Court-sanctioned holding that claim construction is a process to be carried out by judges²⁵³ and therefore, implicitly, necessarily to be distinguished from the determination of a patent claim's infringing equivalents, a separate issue of patent scope that, at least so far, has been generally left (at least in principle)²⁵⁴ to juries, rather than judges.²⁵⁵ In contrast, at least into the third quarter of the twentieth century, judicial decisions, which previously had come predominantly in cases involving bench trials,²⁵⁶ could mix questions of claim construction and equivalents much more freely, thereby almost necessarily leaving questions of literal claim scope and of the scope of equivalents on a relatively even level.²⁵⁷

The refinements and distinctions that have emerged in patent law have in many respects been improvements, helping to bring greater clarity, reproducibility, and comprehensibility to legal analysis and argument. But in part because patent law's individual doctrines tend to be no more than

251. Golden, *supra* note 19, at 360–61 (“The 1970s may mark a true breakpoint, with courts finally developing strong tendencies to distinguish questions of equivalence, assessment of an invention’s merit, and claim construction in both patentee-favorable and patentee-unfavorable opinions.” (footnotes omitted)).

252. See Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673, 1705 fig.1 (2013) (showing a shift toward the majority of patent trials being jury trials in the last quarter of the twentieth century).

253. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (holding “that the construction of a patent, including terms of art within its claim, is exclusively within the province of [a] court” and is not subject to the Seventh Amendment right to a jury trial).

254. The “at least in principle” qualification reflects in part an increased tendency for judges to grant summary judgments of noninfringement that prevent the issue of equivalence from being resolved by a jury. See Lee Petherbridge, *On the Decline of the Doctrine of Equivalents*, 31 CARDOZO L. REV. 1371, 1396 (2010) (predicting “that the future of the doctrine of equivalents will be trial court summary judgments adverse to the patentee”).

255. See *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1522 (Fed. Cir. 1995) (en banc) (“[I]nfringement under the doctrine of equivalents is an issue of fact to be submitted to the jury in a jury trial with proper instructions, and to be decided by the judge in a bench trial.”), *rev’d on other grounds*, 520 U.S. 17, 38 (1997).

256. See *supra* text accompanying note 252.

257. Golden, *supra* note 19, at 360 (“[U]ntil the last few decades of the twentieth century, courts and commentators portrayed the primary test for infringement as one of whether the accused product or process was at least equivalent to what was literally claimed.” (emphasis omitted)).

rough proxies for desirable social goals,²⁵⁸ the compartmentalization of legal doctrines has also raised the risk of losing perspective on what the law is meant to accomplish as a whole.²⁵⁹ In this way, the refinement and distinction of patent law doctrines might have contributed to a current widespread sense that, from a policy perspective, the current patent regime is broken or, alternatively stated, not close to functioning as it should.²⁶⁰ An associated backlash has featured a shift toward more “holistic” analysis²⁶¹ of questions relating to patent rights’ validity and effective power—perhaps most prominently in the evaluation of subject-matter eligibility and judicial assessments of remedies for patent infringement.

A quick way to gain some appreciation for the historical trend toward refinement and compartmentalization is to compare the 1790 Patent Act²⁶² with the Patent Act of the present day.²⁶³ The 1790 Act occupied about two pages of single-column text and contained seven sections, each only one-paragraph long and lacking separately identified subsections.²⁶⁴ Section 1 of the 1790 Act laid out both the basic procedures for obtaining a patent and the basic patentability requirements—namely, that the alleged invention be either a “useful art, manufacture, engine, machine, or device” that the applicant had “invented or discovered” or “any improvement therein not before known or used.”²⁶⁵ Section 1 also indicated that the grant of a patent

258. See John M. Golden, *Patentable Subject Matter and Institutional Choice*, 89 TEXAS L. REV. 1041, 1065 (2011) (contending that, generally speaking, patentability requirements “are no more than crude proxies for the question of whether any individualized patent grant will further overall social goals”); cf. John M. Golden, *Principles for Patent Remedies*, 88 TEXAS L. REV. 505, 551 (2010) (“[C]onflicting goals, an ill-defined sense of what patent owners should receive, economic and technological contingency, and a relative scarcity of good empirical data combine to create deep uncertainty about how the patent system is performing and even what it should seek to accomplish.”).

259. Cf. Devins, Koppl, Kauffman & Felin, *supra* note 159, at 665 (“In many respects, the judicial process emphasizes the segmentation of legal issues without considering that their aggregate impact may transcend the sum of the parts.”).

260. See John M. Golden, *Proliferating Patents and Patent Law’s “Cost Disease,”* 51 HOUS. L. REV. 455, 456 (2013) (“Since at least 1999, the exact words ‘The patent system is in crisis’ have appeared so often in academic literature that they might be considered a meme.”).

261. Use of the term “holistic” here resonates with its usage by Polk Wagner and Lee Petherbridge to describe an approach to claim construction that is relatively “free-form[.] . . . seeking the correct meaning according to the particular circumstances presented.” R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1133–34 (2004).

262. Patent Act of 1790, ch. 7, §§ 1–7, 1 Stat. 109, 109–12 (repealed 1793).

263. 35 U.S.C. §§ 1–390 (2012) (embodying the present U.S. Patent Act); see also Herbert H. Jervis, *Seduced by the Sequence: An Analysis of the U.S. Supreme Court’s Opinion in Association of Molecular Pathology v. Myriad Genetics, Inc.*, 16 FLA. COASTAL L. REV. 65, 112 (2014) (noting “the simplicity of the early statutes (the Patent Act of 1790 was roughly four pages with seven sections, whereas today’s statute is about 141 pages with approximately 390 sections)”).

264. Patent Act of 1790 §§ 1–7, 1 Stat. at 109–12.

265. *Id.* § 1, 1 Stat. at 109–10.

contained an additional discretionary aspect that has dropped out of U.S. patent statutes—namely, whether the “Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, . . . deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out.”²⁶⁶ Section 2 of the 1790 Act then recited the basic disclosure requirements, specifically the need for an applicant to:

deliver to the Secretary of State a specification in writing, containing a description, accompanied with drafts or models, and explanations and models (if the nature of the invention or discovery will admit of a model) of the thing or things . . . invented or discovered . . . which specification shall be so particular, and said models so exact, as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman or other person skilled in the art or manufacture . . . to make, construct, or use the same²⁶⁷

Sections 3 through 7 added provisions on the public availability of specifications and models,²⁶⁸ on remedies for patent infringement,²⁶⁹ on challenges to patent rights,²⁷⁰ and on fees for patent issuance.²⁷¹

In contrast, the modern Patent Act spans dozens of pages and has dozens of sections.²⁷² These sections are, in turn, often broken down into itemized subsections.²⁷³ The present-day Patent Act’s table of contents alone spans over four pages of double-column text in the *Manual of Patent Examining Procedure*.²⁷⁴

More significantly, the current Patent Act reflects a significant amount of separation, refinement, and supplementation of the basic provisions appearing in the 1790 Act. For example, unlike the 1790 Act, the modern Patent Act generally presents the main patentability requirements separately from provisions on administrative procedure such as the processes of patent application and grant. Further, analogs to the patentability requirements appearing in § 1 of the 1790 Act are spread among three separate sections

266. *Id.* § 1, 1 Stat. at 110.

267. *Id.* § 2, 1 Stat. at 110.

268. *Id.* § 3, 1 Stat. at 111 (imposing on the Secretary of State a “duty” to make available copies of specifications and opportunities to copy models on request).

269. *Id.* § 4, 1 Stat. at 111 (providing for damages and for forfeiture of infringing articles).

270. *Id.* §§ 5–6, 1 Stat. at 111–12 (enabling challenges to patent rights).

271. *Id.* § 7, 1 Stat. at 112 (specifying fees to be paid “to the several officers employed in making out and perfecting” a patent).

272. *See generally* 35 U.S.C. §§ 1–390 (2012).

273. *See generally id.*

274. U.S. PATENT & TRADEMARK OFFICE, MPEP app. L, at L-1 to L-5 (9th ed. Mar. 2014). Even if one excludes listings of repealed sections or repetition due to the continuing force of provisions under pre-America Invents Act (AIA) law, the table of contents would span about three pages of double-column text. *See id.*

of the modern Patent Act: § 101 requiring “invent[ion] or discov[ery] of a] new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”;²⁷⁵ § 102 specifying, through multiple itemized subsections, a variety of details relating to the determination of novelty and, more generally, the classification of material as prior art for purposes of assessing novelty or nonobviousness;²⁷⁶ and § 103 setting forth the nonobviousness requirement for patentability.²⁷⁷

Courts and commentators have frequently ascribed legal significance to the spinning off of § 102 and § 103 from § 101. Despite the current § 101’s retention of “invent[ion] or discov[ery]” language and its use of the adjective “new,” questions about whether an alleged invention is sufficiently new or inventive to be patentable are now commonly viewed as the virtually exclusive domains of § 102 and § 103 on novelty and nonobviousness, respectively. Indeed, one of the primary authors of the 1952 Patent Act described § 103’s initial codification of the nonobviousness requirement²⁷⁸ as having been intended “to substitute . . . for the requirement of ‘invention’ and for all prior case law” on that requirement.²⁷⁹ In 1981, the U.S. Supreme Court came to a parallel conclusion when examining the legislative history behind the development of § 102 as a freestanding novelty section.²⁸⁰ The Court stated in strong language that, in accordance with the history, questions of subject-matter eligibility under § 101 and questions of novelty under § 102 and nonobviousness under § 103 are fundamentally separate:²⁸¹ in the Court’s words, “[a] rejection on either [novelty or nonobviousness] grounds does not affect the determination that respondents’ claims recited subject matter which was eligible for patent protection under § 101.”²⁸² By explaining at length the distinction of § 101 questions from § 102 questions and § 103

275. 35 U.S.C. § 101.

276. *Id.* § 102 (including multiple sections in both its pre-AIA and post-AIA forms). The pre-AIA version of § 102 includes provisions relating to so-called “statutory bars” to patentability that are often distinguished from true questions of novelty. See MERGES & DUFFY, *supra* note 106, at 493 (distinguishing between novelty and statutory bars under pre-AIA law).

277. 35 U.S.C. § 103.

278. MERGES & DUFFY, *supra* note 106, at 624 (“Section 103 of the 1952 Act was the first legislative attempt to structure judicial thinking about obviousness.”).

279. Giles S. Rich, *Laying the Ghost of the “Invention” Requirement*, 1 APLA Q.J. 26, 36 (1972). See generally John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEXAS L. REV. 1, 43 (2007) (“In the midst of general unhappiness with the Court’s invention standard . . . Congress stepped in . . .”).

280. *Diamond v. Diehr*, 450 U.S. 175, 190–91 (1981) (discussing “[t]he legislative history of the 1952 Patent Act”).

281. *Cf. id.* at 190 (“The question therefore of whether a particular invention is novel is wholly apart from whether the invention falls into a category of statutory subject matter.” (internal quotation marks omitted)).

282. *Id.* at 191.

questions, the Supreme Court's 1981 opinion thus exemplifies—and perhaps also helped promote—the tendency of members of the patent community to “bin” certain issues by statutory section or subsection.

Just as provisions on the nature of advances that may be patented are now spread across multiple statutory sections, modern analogs of the adequate disclosure provisions of section 2 of the 1790 Act now appear in three separately numbered sections of the current Patent Act: § 112, which has multiple subsections that separately require both “one or more claims particularly pointing out and distinctly claiming the subject matter . . . regard[ed] as the invention” and also “a written description of the invention” that enables its reproduction and use by one of skill in the art and that “set[s] forth the best mode contemplated” for implementing the invention;²⁸³ § 113 requiring the provision of “a drawing where necessary for the understanding of the subject matter sought to be patented”;²⁸⁴ and § 114 authorizing the USPTO to “require the applicant to furnish a model of convenient size” or “specimens or ingredients” for an “invention relat[ing] to a composition of matter.”²⁸⁵ Moreover, the first subsection of § 112 itself imposes three distinct requirements: (1) a requirement of a “written description” sufficient to “reasonably convey[] to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date” of the relevant patent application;²⁸⁶ (2) a further requirement that the written description enable one of skill in the art “to make and use” the invention;²⁸⁷ and (3) the now significantly less enforceable requirement²⁸⁸ that the written description disclose the “best mode.”²⁸⁹

One could go on describing ways in which the U.S. Patent Act's substantive provisions have been expanded, multiplied, and more strictly distinguished over time. For example, the Patent Act now has an entire section, 35 U.S.C. § 271, that defines, through separately itemized subsections, different ways that patent claims may be infringed. As a result,

283. 35 U.S.C. § 112 (2012). In the post-AIA version of § 112, its subsections are fully itemized as subsections (a) through (f). In the pre-AIA version, corresponding subsections appeared as separate paragraphs that the patent community came to refer to as paragraphs one through six.

284. *Id.* § 113.

285. *Id.* § 114.

286. *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

287. *See id.* at 1344 (holding that the written description and enablement requirements are “two separate description requirements”).

288. *See* 35 U.S.C. § 282(b)(3)(A) (excluding “failure to disclose the best mode” from bases for patent claim invalidity that provide potential defenses to a charge of patent infringement).

289. MUELLER, *supra* note 146, at 117–18 (observing that the first subsection of § 112 is understood to impose “three separate [disclosure] requirements . . . : (1) enablement, (2) best mode, and (3) written description of the invention” (emphasis omitted)); *see also Ariad*, 598 F.3d at 1344 (agreeing that the first subsection of § 112 imposes “three separate requirements”).

a recent decision of the Supreme Court could and did confine itself to reviewing whether, under certain assumptions, there was infringement under subsection (b) of § 271, even though the petitioner sought to have the Court address whether there was infringement under § 271(a).²⁹⁰ Another example of a portion of the Patent Act where there has been a multiplication and distinction of provisions comes in the form of the current Act's provisions for patent-infringement remedies, which now span five different statutory sections.²⁹¹ In another example of textual separation likely contributing to doctrinal compartmentalization, the different wording of the Act's separate sections on injunctive relief "to *prevent* the violation of any right secured by [the] patent"²⁹² and on damages "adequate to *compensate* for the infringement"²⁹³ has led the Federal Circuit to determine that the Act only authorizes forward-looking injunctions, rather than injunctions that help mitigate or correct for past harm.²⁹⁴ Indeed, as suggested earlier, the Federal Circuit's relatively thick jurisprudence and efforts to clarify the state of patent law have arguably accelerated the historical trend toward increased compartmentalization.²⁹⁵

Without multiplying examples further, the point seems reasonably well established. U.S. patent law has experienced a long-term trend of doctrinal growth and refinement that has supported greater compartmentalization of legal issues, greater tendencies to argue that certain questions are exclusively or at least overwhelmingly the province of one legal doctrine instead of a combination of doctrines, and greater opportunities for the proliferation of arguments for such compartmentalization and associated anti-redundancy principles.

2. *No Vitiating Doctrine and the Doctrine of Equivalents.*—The splitting of the determination of patent scope into claim construction by a judge and assessment of alleged infringement by equivalents, commonly by a jury,²⁹⁶ has generated one of the more interesting fronts between redundancy and anti-redundancy in patent law. The doctrine of equivalents

290. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014) (noting that "the question presented is clearly focused on § 271(b), not § 271(a)").

291. 35 U.S.C. §§ 283–87 (providing for injunctions, damages, shifting of attorney fees, time and notice limitations on damages, and certain exemptions from remedies).

292. *Id.* § 283 (emphasis added).

293. *Id.* § 284 (emphasis added).

294. See John M. Golden, *Injunctions as More (or Less) than "Off Switches": Patent-Infringement Injunctions' Scope*, 90 TEXAS L. REV. 1399, 1424 (2012) ("The Federal Circuit has held that district courts lack authority to issue purely reparative injunctions that appear to be directly concerned only with correcting for harm caused by past infringement." (footnote omitted)).

295. See *supra* text accompanying notes 20–24.

296. See *supra* text accompanying notes 252–54.

enables courts to find infringement of patent claims even when an accused product or process does not fall within the literal scope of the claims.²⁹⁷ As the U.S. Supreme Court has explained, “[u]nder this doctrine, a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is ‘equivalence’ between the elements of the accused product or process and the claimed elements of the patented invention.”²⁹⁸ Consequently, the doctrine acts as a sort of fail-safe mechanism in patent law, protecting the patentee’s side of the disclosure-for-exclusive-rights bargain by helping to close loopholes in patent scope that can result from practical limitations of patent drafting or from deliberate efforts to design around patent claims in a way that gains all the substantive benefits of the patentee’s invention while avoiding the patent’s literal scope.²⁹⁹

But the doctrine of equivalents has invited criticism because of its fuzziness—a predictable result of the doctrine’s resting on notions of insubstantial difference or substantial similarity³⁰⁰ as well as a recent Supreme Court pronouncement that the doctrine should not be reduced to a more precise formula.³⁰¹ The doctrine’s fuzziness raises notice concerns for a public that would like to plan ahead based on an accurate understanding of what patent law does and does not allow.³⁰²

Moreover, as discussed in section I(B)(3), the doctrine of equivalents can draw judicial fire for yet another reason more pertinent here. The doctrine invites arguments that are in many respects repetitious of arguments already made—and presumably already lost—in a patentee’s efforts to win a broader claim construction, an understanding of the literal scope of the claims that would have encompassed an accused product or process without resort to the doctrine of equivalents. The patentee’s

297. MUELLER, *supra* note 146, at 468 (“United States patent law also recognizes the possibility of ‘nonliteral’ or ‘nontextual’ infringement under the doctrine of equivalents.”).

298. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997).

299. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002) (“If patents were always interpreted by their literal terms, . . . [u]nimportant and insubstantial substitutes for certain [patent claim] elements could defeat the patent, and its value to inventors could be destroyed by simple acts of copying.”); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950) (contending that limiting patent scope to claims’ literal terms “would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions”).

300. *See* MUELLER, *supra* note 146, at 475 (describing tests for infringement by equivalence).

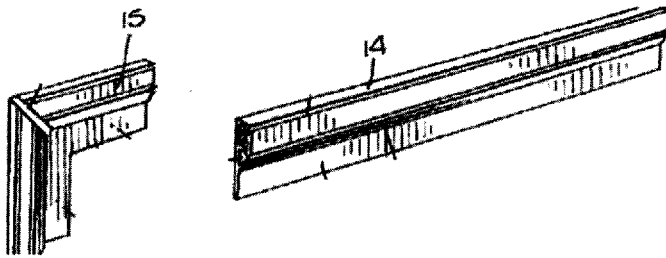
301. *See Warner-Jenkinson*, 520 U.S. at 39–40 (indicating that “[d]ifferent linguistic frameworks [for infringement by equivalence] may be more suitable to different cases”).

302. *See* Michael J. Meurer & Craig Allen Nard, *Invention, Refinement and Patent Claim Scope: A New Perspective on the Doctrine of Equivalents*, 93 GEO. L.J. 1947, 1978 (2005) (“One of the most common objections to the [doctrine of equivalents] is the doctrine’s negative effect on the notice function of patent claims.”); Petherbridge, *supra* note 254, at 1374 (describing the doctrine of equivalents as “foster[ing] uncertainty”).

somewhat repetitious equivalence arguments can trigger an adverse reaction from judges, who might perceive these arguments as an attempt effectively to relitigate claim construction and who might therefore incline toward a relatively curt rejection of the equivalence arguments—without their being allowed to go to a jury—on grounds that they seek to “vitiate” claim language that the court has just construed.³⁰³

The case of *Unique Concepts, Inc. v. Brown*³⁰⁴ offers an example of how the doctrine of equivalents can invite arguments for infringement that largely reiterate prior claim construction arguments. As a bonus, the case provides a further example of the invocation of anti-redundancy concerns within claim construction itself.

Figure 2



This excerpt from Figure 2 of U.S. Patent No. 4,018,260 (filed Apr. 27, 1976) shows a “right-angle border piec[e]” labeled as item 15 and a “linear border piec[e]” labeled as item 14.³⁰⁵

Unique Concepts involved a patent directed “to an ‘assembly of border pieces’ used to attach a fabric wall covering to a wall.”³⁰⁶ The patentee argued that the claim term “right angle corner border pieces” should be construed to encompass not only single-unit right-angle structures like that in Figure 2 above but also multiple-unit right-angle structures formed by arranging two separate linear structures at a right angle.³⁰⁷ A divided Federal Circuit rejected the patentee’s argument, partly because the panel majority felt that construing “right angle corner border pieces” to encompass structures made of separate linear elements would insufficiently

303. See *Packless Metal Hose, Inc. v. Extex Energy Equip. (Zhejiang) Co.*, No. 2:09-CV-265-JRG, 2013 WL 682845, at *7 (E.D. Tex. Feb. 22, 2013) (concluding, where a party’s equivalence arguments, “in essence, repeat[ed] its arguments with respect to literal infringement,” that application of the doctrine of equivalents “would vitiate [relevant] claim elements”).

304. 939 F.2d 1558 (Fed. Cir. 1991).

305. U.S. Patent No. 4,018,260 fig.2, col. 4, li. 59–61 (filed. Apr. 27, 1976).

306. *Unique Concepts*, 939 F.2d at 1559.

307. *Id.* at 1561 (internal quotation marks omitted).

distinguish “linear border pieces” that the claims separately required.³⁰⁸ The Federal Circuit explicitly invoked anti-redundancy concerns in support of its conclusion, saying:

If, as Unique argues, linear border pieces of framing material, whose ends are mitered, are the same as linear border pieces and a right angle corner piece, the recitation of both types of pieces is redundant.³⁰⁹

Even aside from general doubts about the advisability of anti-redundancy canons of interpretation, the reasoning here seems questionable—at least if the concern was redundancy—because one can readily conceive of “linear border pieces” that are far from any corner and thus could not plausibly be considered part of even a multi-part “right angle corner piece.” Thus, as with *Marbury v. Madison*,³¹⁰ this case might give support to the notion that an additional reason to oppose anti-redundancy canons is their liability to arguable misapplication that short-circuits careful consideration.

More to the present point, however, the patentee in *Unique Concepts* followed its failed claim construction argument with a contention that, even if a multi-part “right angle corner border piece[]” was not within the literal scope of the claim language, such a multi-part piece was nonetheless equivalent to a single-part “right angle corner border piece” that the claim language had been held to literally require.³¹¹ A key inquiry for assessing equivalence was whether a multi-part “right angle corner border piece” performed substantially the same function in substantially the same way with substantially the same result as a single-part “right angle corner border piece.”³¹² Determination of whether such objects were “substantially the same” in relevant respects involved assessment of arguments and materials that were the same or substantially the same as much of those already considered in construing the claims. In both contexts, the court’s opinion pointed to what it viewed as key language in the patent’s specification, language that distinguished between multi-part “improvis[e]d corner

308. See *id.* at 1562 (“The fact that mitered linear border pieces meet to form a right angle corner does not make them right angle corner pieces, when the claim separately recites both linear border pieces and right angle corner border pieces.”).

309. *Id.*

310. See *supra* text accompanying notes 98–103.

311. *Unique Concepts*, 939 F.2d at 1563–64 (discussing equivalence arguments and their resolution by the district court).

312. *Id.* at 1564 (discussing the function-way-result test for infringement by equivalence).

pieces” and single-part “preformed corner piece[s]” by indicating that “a preformed corner piece is somewhat easier for a do-it-yourselfer to work with.”³¹³

In short, *Unique Concepts* shows how arguments in relation to the doctrine of equivalents can substantially involve a rehash of arguments already made in relation to claim construction—i.e., to determination of claims’ literal scope. Although the Federal Circuit’s *Unique Concepts* opinion avoided invoking the doctrine against the vitiation of claim limitations through the doctrine of equivalents, the case suggests how courts might easily be driven by the substantially redundant nature of claim construction and equivalence arguments to assert that arguments of equivalence seek to vitiate claim language. It is perhaps no wonder therefore that the Federal Circuit needs to periodically admonish lower courts that the “no vitiation” doctrine should not be invoked lightly³¹⁴ lest it improperly vitiate the doctrine of equivalents itself.³¹⁵

3. *Recent Pushback on Subject Matter and Remedies.*—As discussed above, U.S. patent law has experienced a long-term trend of doctrinal refinement and compartmentalization that has both fed off and fed the deployment of anti-redundancy. But there has been significant pushback against this trend in the last decade, at least in part because of a perception that doctrinal compartmentalization has enabled patent law to slip loose from its social-welfare-promoting purpose. There have been at least two major fronts in this pushback: (1) revitalization of subject-matter eligibility doctrine, accompanied by recognition that subject-matter eligibility analysis can overlap with other patentability or claim validity analyses,³¹⁶ and (2) revisitation of remedies doctrines, with renewed emphasis on a variety of issues that implicate wide-ranging policy concerns as well as more focused concern with assessing an invention’s actual value.³¹⁷

313. *Id.* at 1562 (first alteration in original) (emphasis omitted) (internal quotation marks omitted); *see also id.* at 1564 (discussing and affirming district court’s resolution of arguments on infringement by equivalence).

314. *E.g.*, *Charles Mach. Works, Inc. v. Vermeer Mfg. Co.*, 723 F.3d 1376, 1381 (Fed. Cir. 2013) (holding that “a reasonable jury could have found equivalence, and the [district] court erred by making a contrary legal determination”); *Deere & Co. v. Bush Hog, LLC*, 703 F.3d 1349, 1356 (Fed. Cir. 2012) (stating that “[c]ourts should be cautious not to shortcut this inquiry by identifying a ‘binary’ choice in which an element is either present or ‘not present’”); *see also Ring & Pinion Serv. Inc. v. ARB Corp.*, 743 F.3d 831, 836 (Fed. Cir. 2014) (quoting *Deere* and reversing a failure to grant summary judgment of infringement by equivalence).

315. *Deere*, 703 F.3d at 1356 (“Of course, in every case applying the doctrine of equivalents, at least one claimed element is not literally present in the accused product.”).

316. *See infra* text accompanying notes 318–23.

317. *See* John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 605 & n.406 (2013) (noting that, in recent years, “[t]he Supreme Court and Federal Circuit have together limited the availability or value of patent-infringement

The Supreme Court has issued four decisions on subject-matter eligibility since 2010.³¹⁸ In each one, the Court has found at least some of the patent claims at issue to be invalid or unpatentable because they encompassed ineligible subject matter.³¹⁹ In so doing, the Court's opinions have overruled the apparently sharp distinction between questions of subject-matter eligibility and questions of novelty or nonobviousness that language from a 1981 Court opinion had embraced.³²⁰ Instead, questions of the conventionality or unconventionality of various aspects of a claimed invention have been found to be relevant to subject-matter eligibility analysis.³²¹ Apparently, a key motivation for the Court has been the concern that more compartmentalized, less overlapping analysis might make it too easy for a clever drafter of patent claims to skirt the exclusions from subject-matter eligibility of "[l]aws of nature, natural phenomena, and abstract ideas"³²² while also satisfying other, more refined tests for patentability such as novelty and nonobviousness.³²³

The Court's concerns can be illustrated by the case of *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*³²⁴ In that case, the Court confronted a patent claim for a "method of optimizing" treatment of certain gastrointestinal diseases.³²⁵ This claim involved three basic parts.

remedies"). Compartmentalization concerns have been raised in relation to other intellectual property regimes as well. See Mark A. Lemley & Mark P. McKenna, *The Scope of IP Rights 1* (Stanford Public Law Working Paper No. 2660951), <http://ssrn.com/abstract=2660951> [<https://perma.cc/A7FC-3782>] (critiquing the tendency of copyright, patent, and trademark laws "to enforce a more or less strict separation" between questions about the validity of legal rights, about their infringement or non-infringement, and about various defenses to infringement).

318. See Golden, *supra* note 163, at 1768–69.

319. *Id.*

320. See *supra* text accompanying notes 280–82282.

321. See, e.g., *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2359 (2014) (noting, in analyzing subject-matter eligibility, that "all of [a number of listed] computer functions are 'well-understood, routine, conventional activit[ies]'" (second alteration in original) (quoting *Mayo Collaborative Servs. v. Prometheus Labs.*, 132 S. Ct. 1289, 1294 (2012))); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013) (describing the Court as "determin[ing] whether Myriad's patents claim any 'new and useful . . . composition of matter'"); *Mayo*, 132 S. Ct. at 1294 (stating, in analyzing subject-matter eligibility, that "the steps in the claimed processes (apart from the natural laws themselves) involve well-understood, routine, conventional activity previously engaged in by researchers"); *Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (explaining the lack of subject-matter eligibility of claims for methods of hedging risk partly because "[h]edging is a fundamental economic practice long prevalent in our system of commerce and taught in any introductory finance class" (internal quotation marks omitted)).

322. *Alice*, 134 S. Ct. at 2354.

323. See *id.* at 2360 ("This Court has long 'warn[ed] . . . against' interpreting § 101 'in ways that make patent eligibility depend simply on the draftsman's art.'" (alterations in original) (quoting *Mayo*, 132 S. Ct. at 1294) (some internal quotation marks omitted)).

324. 132 S. Ct. 1289 (2012).

325. *Id.* at 1295 (internal quotation marks omitted). A representative claim on the method recited in full:

The first two were “well-understood, routine, conventional” steps that had previously been performed by physicians or others—namely, (1) the administration of a known drug to a patient and (2) subsequent determination of the level of a particular metabolite of that drug in the patient.³²⁶ The third part reflected the actual advance made by the inventors: their discovery of a particular relevant ceiling and a particular relevant floor for metabolite levels, with a measured metabolite level above the ceiling indicating that the existing drug dosage was likely to be toxic for the patient and therefore should be reduced, and with a measured metabolite level below the floor indicating that the existing drug dosage was likely to be ineffective for treating the patient and therefore should be increased.³²⁷

The discovery of the relevant ceiling and floor values for the associated metabolite was an apparently novel and socially valuable discovery³²⁸—the sort of discovery that one might imagine a patent system should be happy to reward. But the Supreme Court quite defensibly viewed this discovery as a discovery of laws of nature that by themselves are not patent eligible.³²⁹ Further, although conceding that one may patent an “application” of laws of nature,³³⁰ the Court rejected the notion that the patent claim escaped the bar against patenting laws of nature by attaching to the recitation of the natural laws the drug-administration and metabolite-measurement steps.³³¹ The Court explained that “simply appending conventional steps, specified at a high level of generality,”³³² is not

A method of optimizing therapeutic efficacy for treatment of an immune-mediated gastrointestinal disorder, comprising:

- (a) administering a drug providing 6-thioguanine to a subject having said immune-mediated gastrointestinal disorder; and
- (b) determining the level of 6-thioguanine in said subject having said immune-mediated gastrointestinal disorder,

wherein the level of 6-thioguanine less than about 230 pmol per 8×10^8 red blood cells indicates a need to increase the amount of said drug subsequently administered to said subject and

wherein the level of 6-thioguanine greater than about 400 pmol per 8×10^8 red blood cells indicates a need to decrease the amount of said drug subsequently administered to said subject.

U.S. Patent No. 6,355,623 col. 20 ll. 9–25 (filed Apr. 8, 1999).

326. *Mayo*, 132 S. Ct. at 1294.

327. *Id.* at 1297–98; *id.* at 1295.

328. *See id.* at 1295 (observing that it had “been difficult for doctors to determine whether for a particular patient a given dose is too high, risking harmful side effects, or too low, and so likely ineffective”).

329. *Id.* at 1296 (“Prometheus’ patents set forth laws of nature—namely, relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause harm.”).

330. *Id.* at 1294 (“We must determine whether the claimed processes have transformed these unpatentable natural laws into patent-eligible applications of those laws.”).

331. *Id.* at 1297–98.

332. *Id.* at 1300.

“enough”³³³ to supply an inventive concept necessary to distinguish the claimed invention from an effort to patent laws of nature.³³⁴ The Court’s use of the conventionality of these steps as a factor in subject-matter eligibility analysis necessarily intertwined that analysis with some of the concerns of patent law’s novelty and nonobviousness requirements. The Court effectively acknowledged this and the associated doctrinal redundancy by “recogniz[ing] that, in evaluating the significance of additional steps, the § 101 patent-eligibility inquiry and, say, the § 102 novelty inquiry might sometimes overlap.”³³⁵

The “new” remedies analysis can also be viewed as chafing at the compartmentalization of patent law doctrine. Over the past decade, courts have moved toward assessing patent-infringement remedies through cross-cutting analysis that can require detailed attention to the precise nature of an invention as bounded by prior art. After the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*,³³⁶ patentees who have succeeded in showing a continuing course of patent infringement can no longer generally assume that they will obtain injunctions against further violations.³³⁷ Instead, there are real hurdles to obtaining such relief that enable courts to focus attention on concerns such as the “public interest” and “balance of hardships” that are quite practical but also can require revitalized focus on the precise nature of the claimed invention and its delineation through the patent document.³³⁸ Likewise, stricter demands for proof of damages can lead courts to consider questions of real-world value, the viability of alternative design options, and the prospects for real-world harm—questions that interact with patent law’s doctrinal rubrics for patentability and infringement while also reaching beyond them.³³⁹ In sum, cross-cutting and at least partially redundant analysis of legal and practical concerns has

333. *Id.* at 1297 (emphasis omitted).

334. *See also* *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2355 (2014) (describing the required “inventive concept” as “an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept]” (alteration in original) (internal quotation marks omitted)).

335. *Mayo*, 132 S. Ct. at 1304.

336. 547 U.S. 388 (2006).

337. *See id.* at 391 (setting forth “a four-factor test” that a patentee must satisfy before obtaining a permanent injunction).

338. *Id.* (listing factors involving consideration of “the balance of hardships” and “the public interest”).

339. *Cf.* Roy J. Epstein & Paul Malherbe, *Reasonable Royalty Patent Infringement Damages After Uniloc*, 39 *AIPLA Q.J.* 3, 4 (2011) (noting that recent Federal Circuit decisions “point to a higher standard of economic analysis in patent damages cases”); *id.* at 8 (detailing factors in assessing damages).

emerged on multiple fronts in contrast to a longer-term historical trend toward compartmentalization of patent law doctrines in ways frequently operating to limit redundancy.

C. *Alternative Institutions and Procedures*

A further area in which redundancy has grown has been in the realm of institutions and procedure. Here, the U.S. Supreme Court's resumption of a serious role in reviewing questions of substantive patent law, after a decade or so of substantial absence,³⁴⁰ can be viewed as an example of revitalization of a preexisting redundancy—the U.S. legal system's allowance for second-level appellate review even after review by a circuit court having centralized jurisdiction over patent appeals. Additional institutional and procedural innovations that have increased redundancy have mostly involved the USPTO. The USPTO has implemented some forms of error-checking redundancy on its own, perhaps most prominently through the institution of “second pair of eyes” review of applications for patents on business methods.³⁴¹ Other reforms enacted by Congress have generated new post-grant proceedings at the USPTO that offer opportunities to revisit an initial decision to issue a patent. In the 1980s, Congress adopted provisions for the USPTO to engage in *ex parte* reexamination of issued patents.³⁴² Nearly two decades later, Congress added an option of *inter partes* reexamination.³⁴³ Finally, in the America Invents Act of 2011, Congress replaced *inter partes* reexamination with so-called *inter partes* review and introduced two additional forms of post-grant proceedings.³⁴⁴ These various proceedings not only permit checks on the USPTO's earlier work but also can act as alternatives to expensive litigation in district courts or before the International Trade Commission, thus highlighting how some forms of redundancy might actually promote speed of action and the lowering of direct costs by offering cheaper alternatives to other institutions or processes. The comparatively uncontroversial nature of the growth in patent law's institutional procedural redundancies would seem to provide

340. Golden, *supra* note 22, at 670 (noting that a rise in Supreme Court review of patent cases after the early 1990s “is almost wholly attributable to the advent of its involvement in core questions of substantive patent law”).

341. Michael J. Meurer, *Patent Examination Priorities*, 51 WM. & MARY L. REV. 675, 696 (2009) (discussing the USPTO's “Second Pair of Eyes Review (SPER) program” that “required a second review of business method patents” and reflected concerns about patent quality).

342. MERGES & DUFFY, *supra* note 106, at 1039 (discussing the enactment of provisions for *ex parte* reexamination in 1980).

343. *Id.* (discussing the enactment of provisions for *inter partes* reexamination in 1999).

344. *Id.* at 1046 (noting that the America Invents Act of 2011 “accelerate[d] the trend toward administrative review of patent validity decisions”).

another example of how redundancy seems to achieve facial acceptance more easily in procedural or institutional contexts than with respect to matters of interpretation or doctrinal design.

III. Reconciling Redundancy and Anti-Redundancy

Part II has shown how, with respect to redundancy and anti-redundancy, modern patent law embodies a number of traits of U.S. law more generally. In particular, modern patent law exhibits relatively uncontroversial use of redundancy in institutional and process design, but much more contested or even hostile views of redundancy in the interpretation of legal language, as well as in often substantially atextual reasoning about the scope and interaction of different substantive legal doctrines. As Part II observes, U.S. patent law has exhibited a long-term trend toward increased distinction and compartmentalization of doctrines regulating patentability. Likewise, with the emergence of separate patent claims within the patent document, patent law has come to recognize two distinct forms of infringement, literal infringement and infringement by equivalence, and courts have chafed at relitigation of issues due to continuing overlaps between the arguments and evidence evoked by attempts to prove each of these forms of infringement.³⁴⁵ On the other hand, to the frustration of some commentators and many members of the patent law community, recent developments have swung against compartmentalization and the anti-redundancy tendencies it commonly embodies. As in much of U.S. law, the field seems open for a new synthesis that respects the legitimate concerns that inform anti-redundancy while facilitating intelligent use of redundancy as a principle of legal design. This Part looks to develop a framework for such a synthesis.

One could argue that there is no need to seek a new synthesis because anti-redundancy tends to involve no more than rebuttable presumptions and is therefore substantially self-correcting to the extent it diverges from facts on the ground.³⁴⁶ Part II has anticipated this argument by showing how, in U.S. patent law, anti-redundancy appears to have proven costly. The doctrine of claim differentiation has arguably run amuck, not only by seeming dramatically contrary to the actual practices and fundamental motivations of claim drafters, but also by perversely providing positive encouragement for redundant claim drafting in hopes of thereby obtaining subtly expanded patent scope.³⁴⁷ Somewhat similarly, the compart-

345. See *supra* text accompanying note 303.

346. See, e.g., CROSS, *supra* note 174, at 100–01 (concluding that, although “linguistic canons” of statutory interpretation likely make unrealistic presumptions and “may yield erroneous results[,] . . . [t]hey may provide a useful aid to interpretation, so long as they may be rebutted”).

347. See *supra* notes 227–46 and accompanying text.

mentalization of various patent law doctrines had, at least until recently, left them vulnerable to manipulation, circumvention, or extreme outcomes that could seem excessively disconnected from the significance of the underlying invention.³⁴⁸ At least in the context of patent law, these experiences with anti-redundancy provide grounds for suggesting that anti-redundancy concerns of claim differentiation and doctrinal distinctiveness might be better demoted to mere factors for consideration, rather than principles having presumptive force. But particularly with respect to questions of doctrinal design, there remain questions of when anti-redundancy concerns are likely to weigh most heavily, and how and whether those concerns might be effectively answered.

Here, an important point is that anti-redundancy might help optimize legal performance along relevant lines of accuracy and predictability when legal doctrine looks to strike an appropriate balance between competing concerns. A need to balance such opposing concerns can make unavailable a straightforward engineering approach to using redundancy to increase the security of expectations. Use of partially overlapping legal doctrines to better secure the interests of one side of the competing-concerns divide—for example, recognizing the availability of due process as a protection against search and seizure despite the Fourth Amendment’s separate protection—can cause individuals to feel better secured in their liberty and privacy interests. But this same legal step can leave law enforcement officers not only more confined but also less certain about what they can properly do in performing their jobs. In short, the designers of substantive legal doctrine often cannot engage in relatively straightforward engineering trade-offs between the cost of adding redundancy and the benefits of increased security or error avoidance that redundancy can provide. Instead, legal designers commonly face a more complicated, three-sided problem that involves interests in providing assurance to those on opposite sides of doctrinal boundaries, as well as costs of articulating and administering legal doctrines that can mediate the divide. In the context of such three-sided problems, compartmentalization of certain legal analysis in accordance with anti-redundancy might make substantial sense.

Take, for example, the relationship between the legal requirements of subject-matter eligibility and of novelty and nonobviousness in patent law. Here, the revival of a more robust approach to policing subject-matter eligibility that overlaps with novelty and nonobviousness might predictably be celebrated by those primarily concerned with the possibility of infringing others’ patent rights. The newly revived subject-matter eligibility doctrine promises to tighten restrictions on what can be validly patented, thereby opening up greater “freedom to operate” without a patent license.

348. See *supra* notes 318–39 and accompanying text.

Moreover, to the extent novelty-and-nonobviousness-infused subject-matter eligibility doctrine introduces new uncertainty that extends beyond the already-uncertain peripheries of existing novelty and nonobviousness doctrine, possible infringers are, at least at a first cut,³⁴⁹ no worse off than before. As the reinforcement to patentability requirements provided by a revived subject-matter eligibility doctrine cuts in their favor, they can simply choose to remain within earlier bounds, rather than take their chances with the new opportunities that revitalized subject-matter eligibility doctrine provides. On the other hand, existing and would-be patentees and their financial backers cannot so simply hide from the broad-reaching uncertainty that a revitalized subject-matter eligibility doctrine introduces. Even at a first cut, they cannot be content with simply continuing as before: if a key point of novelty for their claimed or hoped-for inventions lies in some form of excluded matter—a law of nature, physical phenomenon, or abstract idea—they must reassess whether the odds of validity and availability of patent rights have fallen so sharply that they can no longer rationally proceed in accordance with previous plans. For them, the uncertainty introduced by the vague boundaries of novelty-and-nonobviousness-infused subject-matter eligibility can have a chilling effect that extends beyond the revitalized eligibility exclusions' actual scope.

Such concerns of uncertainty and the potential chilling of legitimate and even socially desirable behavior seem reasonably likely whenever a new standard with less-than-crisp boundaries backs up the work of another, often more clearly articulated legal doctrine. Further, these concerns seem likely to be particularly acute in a category of situations in which the subject-matter eligibility example falls. In this category of situations, an existing, relatively vague standard like patent law's nonobviousness requirement, which Learned Hand characterized as summoning "as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts,"³⁵⁰ is backed up by a second relatively vague standard like patent law's revived subject-matter eligibility requirement, which I have elsewhere described as having fostered a "maelstrom of uncertainty."³⁵¹ Although I generally agree with the Supreme Court's move to revive subject-matter eligibility doctrine and to

349. For certain possible infringers, this might only be true at a first cut because other possible infringers might gain a competitive advantage from increased legal uncertainty—for example, because these possible infringers are better at assessing questions of patentability under the new conditions of uncertainty or are better equipped to deal with the risks that this increased uncertainty entails.

350. *Harries v. Air King Prods. Co.*, 183 F.2d 158, 162 (2d Cir. 1950); *see also* *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415, 418 (2007) (emphasizing that courts must assess that day's analog of nonobviousness through "an expansive and flexible approach").

351. *Golden*, *supra* note 163, at 1770.

do so in a way that involves doctrinal overlaps, the Court's move has predictably generated short-term uncertainty and has also threatened to become a platform for relatively unguided—and thus potentially sloppy and degraded—analysis of issues relating to novelty and nonobviousness. Moreover, by potentially diverting analytical effort from freestanding novelty or nonobviousness analyses, new subject-matter eligibility doctrine could lead to a degradation of the quality of case law on the freestanding novelty and nonobviousness requirements themselves.³⁵² In such a context, one predictably finds expressions of concern about the mixing of subject-matter eligibility analysis and novelty or nonobviousness analysis,³⁵³ and one can anticipate calls for return to a more strictly compartmentalized doctrinal structure.³⁵⁴

One can generalize from the above. Across legal contexts, demands for simplification and compartmentalization might tend to be strongest when overlapping standards are involved, particularly if one of the standards—call it the “primary standard”—seems sufficient to perform the bulk of desired doctrinal work. In such a situation, there might be reasonable cause to suspect that the secondary standard adds uncertainty without adding much value in terms of better substantive results. In patent law, for example, a common view is that nonobviousness is “the ultimate condition of patentability.”³⁵⁵ Thus, to the extent one worries that a revived subject-matter eligibility analysis will effectively degrade analysis under this primary standard, one would likely lean toward arguing that subject-matter eligibility analysis should be more strictly confined. Further, critics of expansive subject-matter eligibility analysis argue that the substantive outcomes that advocates of revived subject-matter eligibility analysis seek can be almost entirely, if not entirely, obtained through nonobviousness analysis and other patentability doctrines that lack the notice problems that

352. Cf. Crouch & Merges, *supra* note 213, at 1691 (arguing for decision makers to seek to decide patentability questions on other grounds before entering “the swampy terrain of [subject-matter eligibility analysis]”).

353. Mark A. Lemley, *Point of Novelty*, 105 NW. U. L. REV. 1253, 1278 (2011) (critiquing “point of novelty” analysis in the subject-matter eligibility analysis of a 1978 Supreme Court decision); Mark A. Lemley, Michael Risch, Ted Sichelman & R. Polk Wagner, *Life After Bilski*, 63 STAN. L. REV. 1315, 1335 (2011) (describing “[t]he problematic aspect of [the same 1978 Supreme Court decision on subject-matter eligibility as] its apparent reliance on ‘point of novelty’ analysis”).

354. See, e.g., Michael Risch, *Everything Is Patentable*, 75 TENN. L. REV. 591, 607 (2008) (advocating “rigorous patentability” analysis under which subject-matter eligibility requires only that a claimed invention “fit into one of the statutory categories”).

355. MUELLER, *supra* note 146, at 271; see also MERGES & DUFFY, *supra* note 106, at 605 (“Many patent lawyers consider nonobviousness the most important of the basic patent requirements; it has been called ‘the ultimate condition of patentability.’”).

expansive subject-matter eligibility analysis creates.³⁵⁶ If the critics are right, emergence of a subject-matter eligibility standard that overlaps analytically with requirements of novelty and nonobviousness offers (1) little, if anything, in the way of improved accuracy (i.e., improved line drawing with respect to what should and should not be patentable); (2) much in the way of reduced predictability; and (3) relatedly and at least presumptively, much increased dispute-resolution cost.³⁵⁷

A similar form of argument could be made with respect to the question of whether due process concerns should play a role in the constitutional regulation of searches and seizures. If, for example, one views the Fourth Amendment's prohibition of "unreasonable searches and seizures"³⁵⁸ as formulated broadly enough to encompass all principal social concerns with searches and seizures that are of plausible constitutional import, one might hope that the courts, in working out the detailed legal and practical meaning of this prohibition over the course of decades, will foster a substantially optimal balance of competing social interests or, alternatively but less optimistically, will do about as well as can reasonably be expected in fostering an appropriate balance.³⁵⁹ With the Fourth Amendment's general rubric of "reasonableness" already in place, the opening of a new line of inquiry under the rubric of due process might be thought likely to add relatively little substantive value, while simultaneously introducing—or increasing—uncertainty that could have an undesirably chilling effect on law enforcement.³⁶⁰

Indeed, although dismissal of the possibility of dynamic improvement through the opening of a second line of inquiry might tend to come too rapidly, degradations of accuracy, predictability, and dispute-resolution efficiency seem to be generally plausible possibilities when a system encompasses two overlapping standards that mediate between competing concerns of comparable social weight. Just as specialization of the functions of institutions and individuals can generate improved

356. See Crouch & Merges, *supra* note 213, at 1686 (describing empirical studies suggesting that "a substantial number of patent claims lacking subject matter eligibility . . . also fail to satisfy at least one other validity test"); Risch, *supra* note 353, at 595 (claiming to "demonstrate that abandoning subject matter restrictions in favor of rigorous application of [other] patentability requirements will not necessarily lead to more patents in controversial areas").

357. Cf. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 622–23 (1992) (noting that, "[w]hen legislators leave the details of law to courts (or to agencies that do not promptly issue regulations), individuals may be left with little guidance for years or decades, while substantial legal costs are incurred" (footnote omitted)).

358. U.S. CONST. amend. IV.

359. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994) (describing the Fourth Amendment as "an embarrassment" under which the Supreme Court has provided "ultimately misguided" instruction and "a vast jumble of judicial pronouncements").

360. See *supra* note 112 and accompanying text.

performance, specialization of legal doctrines to answer specific, discrete concerns might help focus judicial minds, foster comparatively well-ordered bodies of case law, and facilitate at least the local optimization of doctrinal boundaries. It might seem presumptive folly to give up these potential advantages in favor of launching a new project of mapping the boundaries of a distinct but overlapping legal doctrine, one perhaps not so historically attuned to the specific concerns or fact patterns in question. Moreover, if there is uncertainty about the desirability of protecting even supposedly core interests or legal positions, redundancy that fortifies those interests or positions might impede socially beneficial legal development, rather than aid it. Under such circumstances, an anti-redundancy principle forbidding recognition of overlapping coverage and thus leaving the field to the more specialized doctrine might seem a course of wisdom as well as of convenience.

Quite generally, the likelihood of positive or negative effects from redundancy might be estimated by envisioning redundancy as having a net effect on social welfare ΔW equal to the sum of (1) the “primary value” ΔP of redundancy generated by its direct roles in achieving such social ends as the efficient and effective communication of legal rules or, particularly in the cases of doctrinal or institutional redundancy, the effective protection of relevant social interests; (2) the “administrative value” ΔA of redundancy calculated by netting administrative benefits and costs of redundancy with respect to processes of law development and application; and (3) the “evolutionary value” ΔE of redundancy generated by its ability to foster or retard developments in legal doctrine. In symbols:

$$\Delta W = \Delta P + \Delta A + \Delta E \quad [\text{Eq. 1}]$$

Each of the addends ΔP , ΔA , and ΔE can be positive or negative. Thus, the overall social value ΔW of redundancy likewise can be positive or negative. This Article has already discussed many of the potential sources of positive or negative social contributions from redundancy that inform the values of ΔP , ΔA , and ΔE . But a brief listing seems worthwhile here. Contributions to error correction or prevention are iconic components of the primary value ΔP , but they are not exclusive factors in its ultimate value. Redundancy can contribute positively to the achievement of a primary social end by, for example, (1) directly protecting against errors or other breakdowns of system components designed to help achieve those ends; or, as Andrew Hessick points out, (2) sending a strong signal of law’s “intent” to further that end and thereby encouraging individuals to act in a manner consistent with achievement of the end.³⁶¹ On the other hand, when the law

361. Hessick, *supra* note 1 (manuscript at 22) (“Redundancies in legal doctrine amplify the message expressed through those doctrines.”).

mediates between conflicting interests, redundancy might promote achievement of a first social end but impede achievement of a second social end, thus giving rise to a negative as well as a positive contribution to ΔP . Further, redundancy could undermine pursuit of the very social end it is intended to serve by (1) enabling obfuscation and promoting confusion, rather than clarity,³⁶² or (2) fostering shirking or ill-developed law because efforts at legal development become divided across a number of redundant fronts.³⁶³

With respect to the administrative value ΔA , administrative costs are the most obvious contributors. There can be further costs or savings, however—for example, to processes of drafting redundant language, generating redundant legal doctrines, or creating and maintaining redundant institutions or processes. Policy makers and commentators have long condemned the bureaucratic costs of redundant institutions and procedures.³⁶⁴ Moreover, redundancy in the language and doctrinal substance of legal documents can make them longer and thereby increase costs of drafting and proofing, recordation, transmission, and reception.³⁶⁵ But avoiding redundancy can be costly as well, perhaps particularly at the stage of generating and designing legal documents, doctrines, processes, or institutions.³⁶⁶ As suggested in discussing redundancy's provenance,³⁶⁷ the existence of redundancy is not always clear in advance, and the very pervasiveness of redundancy suggests that there can be savings in refraining from trying to eliminate it root and branch.

362. See *id.* (manuscript at 29) (“[T]he very existence of two doctrinal tests may create pressure on courts to conclude that the two tests are, or at least should be[,] different.”); *id.* (manuscript at 35–36) (discussing ways that judges might use doctrinal redundancies to avoid “public criticism” by obscuring the significance of their decisions); Rick Cazier & Ray Pfeiffer, *Say Again? Assessing Redundancy in 10-K Disclosures 7* (Jan. 2015) (unpublished manuscript), <http://ssrn.com/abstract=2487259> [<http://perma.cc/AAG8-LV6R>] (reporting evidence that “10-K disclosure redundancy is associated with less efficient price discovery following 10-K filings, consistent with disclosure redundancy obfuscating the relevant content of the 10-K”).

363. See Gable & Meier, *supra* note 58, at 229 (“Under . . . a ‘regulatory commons problem,’ regulatory agencies evade responsibility by assuming that other agencies with overlapping jurisdiction will address a specific mandate.”); Hessick, *supra* note 1 (manuscript at 31) (“[D]ecisions developing redundant doctrines may be split between those doctrines.”).

364. Gable & Meier, *supra* note 58, at 228 (“Traditional examinations of public administration have been skeptical of redundancy in system design and institutional structure, suggesting the elimination or minimization of redundancies.”).

365. See Cazier & Pfeiffer, *supra* note 362, at 4 (“[R]edundant information directly affects document length and thus increases the costs of reading through the entire 10-K.”).

366. Legislators’ apparent penchant for redundancy, see *supra* note 187 and accompanying text, might partly reflect the fact that they relatively directly confront the drafting (and potential political) costs of avoiding redundancy but might not internalize many of the later administrative costs that redundancy imposes.

367. See *supra* text accompanying notes 54–56.

Redundancy's effects on allocation of power might also be viewed as generating positive or negative process values not captured by ΔP or ΔE . As indicated in section II(B)(1), pressure to allocate responsibilities between judges and juries has apparently intensified a long-term trend toward compartmentalization of patent law doctrines.³⁶⁸ Another way of explaining resulting anti-redundant shifts in the law might be to characterize them as parts of a general effort at jury control, an effort in which courts have effectively taken issues such as claim construction for themselves³⁶⁹ while denigrating and limiting the role of issues, such as infringement under the doctrine of equivalents, that remain more centrally within the province of juries.³⁷⁰ In the opposite direction, numerous overlaps between criminal statutes tend to enhance the power of public prosecutors, giving them enormous discretion in choosing what crimes to charge.³⁷¹ To the extent one believes that redundancy's effects on allocations of power are positive or negative in ways independent of contributions to ΔP or ΔE , one can find that these effects make a positive or negative contribution to ΔA .

Finally, the evolutionary value ΔE of redundancy can reflect positive and negative effects springing from redundancy's capacities to promote adaptability and evolution on the one hand and to generate lock-in on the other. Assessment of the likely sign or size of ΔE can also be complicated by the fact that the relationship between evolutionary capacity and evolutionary value might have an inverted-U shape. Zero evolutionary capacity is frequently less than ideal, but too little stickiness in law can undermine predictability, harm perceptions of a meaningful rule of law, and leave the law overly susceptible to fads or fancies. In any event, whether viewing evolutionary potential as a positive or a negative, various authors have recognized that redundant language, legal doctrines, or institutions can lead to greater possibilities for creativity, adaptation, and experimenta-

368. See *supra* text accompanying note 252.

369. See Jerry A. Riedinger, *Markman Twenty Years Later: Twenty Years of Unintended Consequences*, 10 WASH. J.L. TECH. & ARTS 249, 262 (2015) (reporting that judicial adoption of the rule that patent claim construction is the sole province of judges "arose from severe hostility to juries").

370. See James Farrand et al., "*Reform*" Arrives in Patent Enforcement: *The Big Picture*, 51 IDEA 357, 445 (2011) (observing that, as with other "Federal Circuit initiatives [that] have ratcheted back jury power in patent cases," "heavier legal limitations on the [doctrine of equivalents] have decimated juries' powers").

371. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 681–82 (2014) (noting that the "ever-increasing prosecutorial discretion" reflecting the fact that "[f]ederal statutes . . . often prohibit the same (or closely similar) crimes many times over, allowing punishment of a single transaction under multiple overlapping or lesser-included prohibitions"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1528 (1981) ("[A] criminal act typically involves the possible application of several criminal statutes.").

tion.³⁷² Of course, however, one would also expect that redundancy makes more difficult the substantial erosion of the core interests that redundancy is designed to protect. In short, as with ΔP and ΔA , a mix of positive and negative contributions can enter into the value ΔE .

Having examined the general nature of the addends ΔP , ΔA , and ΔE , let us now consider how Equation 1, the formula for redundancy's overall social value ΔW , might help with understanding the distinctive nature of situations in which law mediates between competing interests of comparable social weight. Where there is essentially only one dominant interest to protect or advance, well-designed redundancy might commonly yield a strongly positive value for ΔP by providing security with respect to protection of that interest without excessively taxing information-processing capacities. This strongly positive value for ΔP might clearly dominate the administrative costs of redundancy embodied in the term ΔA . Moreover, if we are confident of the ongoing desirability of the core interest that redundancy protects, we might have good reason to expect that the evolutionary value ΔE of such redundancy is positive and at least not substantially negative. In short, where law is focused on one dominant interest and we are confident that we will want the law to retain this focus over time, redundancy might well be a good social strategy.

When there are competing interests of comparable social weight, however, using overlapping standards having fuzzy boundaries might be far more difficult to justify on grounds of a strongly positive ΔP . In such a situation, security and signaling with respect to one competing interest might come at the expense of security and signaling with respect to the other. Administrative costs ΔA might be especially high because of the pressure on fine points that strongly competing social interests can generate. Moreover, if one believes that the evolutionary value ΔE of redundancy is likely negligible—perhaps because one is generally hostile to evolution in the understanding of legal texts and doctrines or perhaps because the need to reduce conflict by settling legal issues looms large—the presence of ΔE on the right side of Equation 1 might provide little cause to believe redundancy's overall contribution to be positive. With the likelihood of a positive social welfare effect from redundancy in doubt, one might naturally opt for relative simplicity over relative complexity and declare the field to

372. See, e.g., Cover, *supra* note 12, at 673 (presenting “an argument that innovation in norm articulation is healthier in a federal system”); Gable & Meier, *supra* note 58, at 239 (“Complementarity across overlapping public health laws and systems also can spur innovation in policy and practice . . .”); Hessick, *supra* note 1 (manuscript at 24–28) (noting that doctrinal redundancy “facilitates doctrinal innovation”); Landau, *supra* note 58, at 356 (contending that redundancy “permits flexible responses to anomalous situations and provides a creative potential for those who are able to see it”).

be occupied by the more specific of two potentially applicable standards, the approach of the Supreme Court with respect to the constitutionality of searches and seizures.

But there are alternative approaches to doctrinal design that can answer the above concerns with overlapping standards. First, there is the possibility of turning one of two overlapping standards into a more rule-like doctrine that has comparatively sharply defined boundaries. This could render the contribution to uncertainty from the now more rule-like doctrine relatively negligible compared to the full-fledged standard. Combinations of overlapping rules and standards seem relatively common in law and are often seen as providing improved clarity and predictability relative to a legal system featuring the standard alone. Gideon Parchomovsky and Alex Stein have recently highlighted law's frequent use of "catalogs" in which the scope of a somewhat standard-like, catchall category such as "pets" is illustrated and clarified by the express provision of more specific covered examples such as "cats" and "dogs."³⁷³ Additionally, there is the common phenomenon of law overlaying a background standard with provisions for safe harbors or what Susan Morse calls "sure shipwrecks."³⁷⁴ Relative to patent law's nonobviousness requirement, patent law's novelty requirement might be viewed as instituting a sure shipwreck by making clear that, when a single prior art reference discloses all the limitations of a patent claim, that claim is invalid.³⁷⁵ The nonobviousness-overlapping demands of the novelty requirement can thereby facilitate efficient decision making by providing a comparatively straightforward rule for when a subcategory of patent claims should be held invalid.

The rule-as-overlay-to-fundamental-standard approach might not be a viable design for certain situations, however. With respect to patent law's requirement of subject-matter eligibility, for example, prior efforts to confine the requirement in a rule-like way led to concern that the doctrine had become too easily satisfied or evaded, concern that triggered the requirement's revival in a more robust, standard-like form. The result is a situation in which there are two overlapping and substantially standard-like

373. Gideon Parchomovsky & Alex Stein, *Catalogs*, 113 COLUM. L. REV. 165, 170 (2013); see also *id.* at 168 ("A catalog, as it is defined in this Essay, consists of an outright ban on a detailed, but incomplete, list of specific activities and a general prohibition of all activities falling into the same category.").

374. See Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. (forthcoming 2016) (manuscript at 4), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613543 [<http://perma.cc/N527-XPJ7>] ("A sure shipwreck describes conduct that will definitely violate the law, while other facts remain subject to a standard as applied by the ex post judgment of future decisionmakers.").

375. MUELLER, *supra* note 146, at 176 ("The strict identity rule states that to evidence anticipation . . . a single prior art reference must disclose every element of that invention, arranged as in the claim.").

requirements—subject-matter eligibility and nonobviousness—that play large roles in regulating the patentability of certain types of innovation. For such a situation in which neither of two overlapping doctrines seems a good candidate for rule-like precision, society might need a different strategy to address concerns about the unpredictability and doctrinal degradation that can result from doctrinal overlaps.

Here, instruction can be drawn from how contract law's unconscionability doctrine backstops a host of more specific doctrines on contract defects. In these situations, concerns about the uncertainty and doctrinal degradation threatened by the encroachment of a relatively vague standard appear commonly to be met—at least from the perspective of those who believe they are met—by confining the operation of the overlapping standard so that, at least in a state of relative legal equilibrium, the standard changes the practical results of legal analysis only in relatively exceptional circumstances. Hence, there is the frequent requirement for the deployment of the unconscionability doctrine of some combination of both substantive and procedural unconscionability,³⁷⁶ a demand supplemented by the Uniform Commercial Code's instruction that its doctrine of unconscionability is not meant generally to disturb "allocation of risks" established through "superior bargaining power."³⁷⁷ As long as such an overlapping vague standard can be reasonably characterized as a backstop or safety valve whose direct effect, under ordinary circumstances, is relatively limited in frequency or intensity, its damage to two-way concerns of predictability and accuracy can likewise be viewed as limited. Moreover, such limited damage might be viewed as plausibly counterbalanced by the additional assurance provided to at least some risk-averse parties that a backstopping standard will help prevent extreme outcomes.

In short, consideration of the general phenomena of redundancy and anti-redundancy provides cause for hope that legal policy makers and decision makers have ways to answer present concerns about the potentially destabilizing effects of overlapping standards, such as patent law's subject-matter eligibility and nonobviousness standards. Through the actions of

376. FARNSWORTH, *supra* note 108, § 4.28, at 301 (describing "'unreasonably favorable' terms" as "substantive" unconscionability and "absence of meaningful choice" as "procedural" unconscionability"); *id.* at 302 ("Most cases of unconscionability involve a combination of procedural and substantive unconscionability . . ."); *cf.* Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1416 (2009) (contending that "[c]ontracts made on competitive markets will rarely be unconscionable" and that, "[r]egardless of the nature of the market on which a contract is made, a contract will not be unconscionable without the element of moral fault").

377. U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW 1987).

courts and others, the legal system can re-equilibrate with one of the cross-cutting standards ultimately taking on only a relatively moderate and moderating role. If such re-equilibration can be achieved with respect to subject-matter eligibility in patent law, this result will add to the list of examples of how intelligent doctrinal design can rationally balance concerns of redundancy and anti-redundancy.

Conclusion

Analysis of legal redundancy and anti-redundancy suggests that anti-redundancy has commonly had excessive rhetorical sway. Although one can find examples of the application of anti-redundancy principles in virtually any major area of public or private law, U.S. patent law offers especially graphic examples through the doctrine of claim differentiation, complaints about “relitigation” under the doctrine of equivalents, and a long-term trend toward doctrinal compartmentalization. Moreover, patent law’s examples illustrate how anti-redundancy can generate negative practical results. The doctrine of claim differentiation can perversely inspire more, rather than less, redundancy in claim drafting and can lead to subtly inflated patent scope that escapes the notice of overburdened patent examiners. Meanwhile, the compartmentalization of doctrines regulating patentability can lead to too easily exploited gaps, loopholes that the Supreme Court’s revitalized case law on subject-matter eligibility has to some degree tried to fill.

To counter tendencies toward thoughtless and injurious anti-redundancy, legal policy makers and decision makers should openly recognize that redundancy is a justifiably frequent feature of law. Redundancy, which often appears in the form of partly, but not completely, overlapping and reinforcing language, legal doctrines, processes, and institutions, can enable the law to operate with complexity and nuance while retaining robustness and certainty on key points of concern. By ensuring that core concerns are secure while offering means for flexibility, redundancy can also promote the law’s evolutionary potential. By preventing realization of such benefits of redundancy, anti-redundancy can do social harm.

Redundancy does not come without cost, however, and there can be legitimate concerns about redundancy’s capacity to sow error and confusion. Anti-redundancy can be justifiably strong in situations involving analytically overlapping standards that attempt to mediate between competing interests of comparable social weight. In such situations, use of two analytically overlapping standards might be overkill, a step that at best generates only limited gains in the quality of legal outcomes while multiplying uncertainty and unpredictability that chill desirable behavior on one or another side of a social divide. But even in such situations, the example provided by unconscionability as a backstop

doctrine in contract law suggests that recognition of substantially overlapping coverage by a new or alternative standard need not introduce uncertainty or inaccuracy that outweighs likely gains. Similarly, one might hope that patent law's revived requirement of subject-matter eligibility can evolve into a reasonably defined but flexible standard that backstops multiple patentability doctrines and does not add intolerably to the uncertainties that innovators face.

More generally, the aim of legal decision makers and policy makers, as well as drafters of legal documents, should be not to eliminate or ignore redundancy but to optimize its recognition and use. Optimization requires balancing redundancy's advantages against its costs, the concerns of anti-redundancy. Appropriate balancing might involve the use of multipolar or layered structures of partly, but not completely, redundant procedures, institutions, language, and legal doctrine. Safe harbors, catalogs, checks and balances, and doctrinal safety valves are but a few of the ways in which properly restrained redundancy can improve, rather than degrade, legal performance in situations involving significantly competing social interests. Indeed, well-designed redundancy might be crucial to law's ability to serve as mediator and guide in modern plural societies. By considering possible forms of redundancy and exploring how to make them realities, we can hope to progress toward a more sophisticated and socially productive use of redundancy in law.

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Book Review

The Council and the Court: Law and Politics in the Rise of the International Criminal Court

ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS. By David Bosco. New York, NY: Oxford University Press, 2014. 312 pages. \$31.95.

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It is the rare international crisis today that does not receive the attention—or at least a demand for the attention—of the International Criminal Court (ICC). Name a conflict, and one is bound to find a coalition of states, nongovernmental organizations, and activists calling for ICC investigation, even where jurisdiction may be unavailing. From 2014 to early 2016, such conflicts have occurred in Afghanistan,¹ the Central African Republic,² Georgia,³ Iraq,⁴ Mali,⁵ North Korea,⁶ Palestine,⁷ Syria,⁸

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1. David Bosco, *The War Over U.S. War Crimes in Afghanistan is Heating Up*, FOREIGN POL'Y (Dec. 3, 2014), <http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/> [<http://perma.cc/Q58T-77LB>].

2. Press Release, Int'l Criminal Court, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Second Investigation in the Central African Republic (Sept. 24, 2014), https://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx [<http://perma.cc/U8HU-788D>].

3. Press Release, Int'l Criminal Court, Office of the Prosecutor, ICC Pre-Trial Chamber I Authorizes the Prosecutor to Open an Investigation into the Situation in Georgia (Jan. 27, 2016), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1183.aspx [<https://perma.cc/HDU7-B2JM>].

4. Press Release, Int'l Criminal Court, Office of the Prosecutor, Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq (May 13, 2014), https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx [<http://perma.cc/F38H-B4A8>].

5. Press Release, Int'l Criminal Court, Office of the Prosecutor, Al Mahdi Case: Confirmation of Charges Hearing to Open on 1 March 2016 (Jan. 13, 2016), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1182.aspx [<https://perma.cc/7P2J-WQBU>].

6. Human Rights Council, Rep. of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/63, at 16 (Feb. 7, 2014).

and Ukraine,⁹ to name a handful among many others. Each situation presents a charged dynamic, in which the promoters of the rule of law seem pitted against the powers of global politics. The Syria situation in particular is marked by clear violations of international humanitarian law across the spectrum of participants during years in which hundreds of thousands have lost their lives, leading to competing calls for justice and rejections of such a process within the United Nations Security Council. President Omar al-Bashir of Sudan, subject to an ICC arrest warrant for his alleged role in atrocities in the Darfur region, escaped arrest with the assistance of authorities in South Africa in mid-2015. His assisted escape called attention to the refusal of some ICC member-states to support the Court in a case the Security Council referred to it years earlier.¹⁰ The ICC, in a historically short period of time, has become the central player in a contemporary battle over the place of justice in international politics.

In *Rough Justice: The International Criminal Court in a World of Power Politics*, David Bosco ably documents both the long history of international justice efforts and the surprisingly rapid rise of the ICC.¹¹ At its heart, *Rough Justice* tells a story suffused with the deep tensions between peace and justice, politics and law, and power and norms. The push and pull between these antinomies is of course not new. And it is not uncommon for power, politics, and the desire for peace to override law, norms, and the quest for justice—especially on the international plane, where mechanisms of justice have for decades, if not centuries, been more aspiration than reality.¹² Yet the long and uncertain search for international justice and accountability for terrible crimes has taken on an entirely new

7. *Palestine*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx [http://perma.cc/5MAY-268P]; *The Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation-ICC-01-13/Pages/default.aspx [http://perma.cc/5JMR-W68T].

8. Colum Lynch, *Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria*, FOREIGN POL'Y (May 17, 2014, 6:45 PM), <http://foreignpolicy.com/2014/05/07/exclusive-u-s-to-support-icc-war-crimes-prosecution-in-syria/> [http://perma.cc/QA4B-VFME].

9. *Ukraine*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx [http://perma.cc/4YAZ-8C7L].

10. Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html> [http://perma.cc/BW24-SHU5].

11. DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 1–10 (2014).

12. See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

tenor in the era of the ICC. Bosco notes that, as the first standing international criminal court in history, the ICC “represents a remarkable transfer of authority from sovereign states to an international institution.”¹³

The birth of the ICC represents the climax of the groundbreaking development of international criminal law that began after the end of the Cold War, about which we say more below.¹⁴ The ICC is, for some at least, a stirring symbol of justice and law. But the Court was not born, nor does it reside, in a political vacuum. Its most important political interlocutor is the United Nations Security Council. The Council has long been seen as the apex of the international order, but it is also a body in which politics and power are paramount. The Council has the authority to compel or authorize everything from economic sanctions (as in the case of Iran’s nuclear program) to outright invasions of sovereign states (as in Iraq over two decades ago).¹⁵ Its ambit is the peace and security of the entire world. And it has been continuously operating, sometimes more and sometimes less effectively, since 1945. The fledgling ICC has consequently had to find a way to live and partner with the Council, acknowledging and leveraging the Council’s power while charting its own independent course. This is an innately challenging task. And it has been made even harder by the fact that three of the five permanent members of the Security Council—Russia, China, and the United States—have declined to join the ICC and at various times have expressed views ranging from benign neglect to active hostility.

The ICC has nonetheless survived and, as Bosco shows in *Rough Justice*, even thrived in the thirteen years since its establishment. “Rough justice” may indeed be what results when the process of criminal adjudication is deeply permeated by politics. And some would argue that there has been precious little justice, rough or otherwise. Yet in the years since the 1998 Rome Conference that gave birth to the ICC, the Court has developed an impressive record of activity: thirty-six individuals indicted, nine investigations opened, and proceedings against ten accused completed.¹⁶ With 123 member states—though, as noted, some very significant omissions—the ICC has also drawn considerable, if uneven, political support from around the world.¹⁷

13. BOSCO, *supra* note 11, at 2.

14. See *About the Court*, INT’L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx [http://perma.cc/PFC2-QAC5] (describing the creation of the Court). See generally ANTONIO CASSESE ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW (3d ed. 2013).

15. U.N. Charter arts. 33–51.

16. As of October 15, 2015. *Situations and Cases*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [http://perma.cc/MHT7-284Q].

17. See *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20

The time is ripe for a careful and accessible analysis of the ICC, its evolving role in international law, and its relationship to power politics. *Rough Justice*, a strikingly well-written and engaging book, does exactly that. As Bosco argues, “The letter and spirit of the court’s governing statute reject the idea that power or political influence should influence the course of justice. But the new court operates in a turbulent world where power matters.”¹⁸ Exactly how power matters and what power means for the quest for international justice are at the heart of this excellent work of scholarship and history.

I. The Pursuit of Peace in the Postwar Order

At Dumbarton Oaks in the fall of 1944, as the Second World War still raged, the Allied powers laid down the basic structure of the postwar legal order.¹⁹ By installing the “Big Five”—the United States, the United Kingdom, France, the Soviet Union, and China—at the very core of the new United Nations (UN) organization, the major powers sought to rectify one of the main ills of the visionary but flawed League of Nations: its lack of effective enforcement.²⁰ The newly created Security Council would be the executive committee of the postwar world, its members armed with an array of military forces and, as agreed at the Yalta conference, a veto for the five permanent members of the Council.²¹ The veto—which would go on to deeply vex observers and participants throughout the twentieth century and which continues to stymie efforts to address atrocities in places such as Syria today—was created for one extremely important reason: to protect the most vital interests of the most powerful states in the system.²² The veto, it

statute.aspx [http://perma.cc/4PJE-KMHC] (listing the 123 states that are party to the Rome Statute of the International Criminal Court as of October 15, 2015).

18. BOSCO, *supra* note 11, at 1.

19. *See generally* ROBERT C. HILDERBRAND, DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY 85–107 (1990).

20. PAUL KENNEDY, THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS 26–32 (2006).

21. *Id.*

22. Scott Sheeran, *The U.N. Security Council Veto is Literally Killing People*, WASH. POST (Aug. 11, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/11/the-un-security-council-veto-is-literally-killing-people/> [http://perma.cc/69VC-ZJGQ] (noting that the veto was agreed upon as a “quid pro quo for [those] powerful states which had carried the heavy burden in World War II” and describing the ways in which the veto has frustrated international efforts to address conflicts); *see also* DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 30–31 (2009) (describing how the veto power given to the Security Council made the UN an institution that great powers could use to work together, rather than an institution for global governance); KENNEDY, *supra* note 20, at 26–27, 36 (explaining that the veto power was added to the UN Charter to give the United States and the Soviet Union sufficient power to convince the two to join the organization).

was believed, would keep these key players active within the new UN order, rather than outside it.²³

The Security Council's architecture functioned in some ways as designed. The United States not only joined the new UN (unlike the original League); it remains committed to it and even serves as host nation for its headquarters.²⁴ With some minor exceptions, the Soviets, the British, the French, and the Chinese all stayed in too, and occasionally found the Council useful and important.²⁵ But as is well-known, in other ways the Security Council was a failure. With the onset of the Cold War, the Council quickly became a forum for superpower rivalry, deadlocked on almost any issue of paramount geopolitical importance.²⁶ Many newly independent states saw the design of the body as an illegitimate expression of Great Power dominance and resented the fact that the only permanent member from what would come to be called the "Global South" was China.²⁷

Yet the Security Council remained at the center of the UN Charter system, and it had occasional successes when Soviet and American interests aligned or were weak.²⁸ And when the world emerged from the Cold War in the early 1990s, new life flowed into the Council.²⁹ As the dramatic rescue of Kuwait via the Gulf War demonstrated in 1991, the Council—when cooperative—has the power to unleash effective and legitimate

23. See, e.g., BOSCO, *supra* note 22, at 36–37 ("In the end, the great powers fended off the challenge [to the veto] in the only way they could: by making clear that, without the veto, there would be no United Nations."); KENNEDY, *supra* note 20, at 26–27, 36.

24. Elisabeth Zoller, *The National Security of the United States as the Host State for the United Nations*, 1 PACE Y.B. INT'L L. 127, 127–28 (1989).

25. See KENNEDY, *supra* note 18, at 53, 56–57 (describing the Great Powers' use of vetos or the threat of vetos to advance security interests and lesser issues of national preference and discussing times of fissure, such as Russia's one-time withdrawal from the Security Council over the exclusion of the People's Republic of China or the power imbalance among the Great Powers that the Suez Crisis revealed).

26. *Id.* at 55–56 (observing that lack of agreement among the Big Five dashed the larger ambitions for the Security Council and that unanimity was difficult to obtain except on issues of small import).

27. This view continued and arguably accelerated after the end of the Cold War. See, e.g., Non-Aligned Movement, *12th Summit Conference of Heads of State or Government of the Non-Aligned Movement: Final Document—Global Issues—Disarmament and International Security*, ¶ 66(b) (Sept. 3, 1998), http://cns.miis.edu/nam/documents/Official_Document/12th_Summit_FD_Durban_Declaration_1998.pdf [<https://perma.cc/GY2C-VDJ5>] ("The Non-Aligned Countries are grossly under-represented in the Council. This under-representation should, therefore, be corrected by enlargement of the Security Council . . . to reflect the universal character of the world body, and to correct existing imbalances in the composition of the Security Council in a comprehensive manner . . .").

28. See KENNEDY, *supra* note 20, at 58–59 (noting the impact on the Security Council of the general distrust between the Soviets and Americans but referencing less divisive issues that provided opportunities for agreement among the permanent council members).

29. See *id.* at 63–64 (discussing the unprecedented cooperation among the permanent council members resulting from the thawing of the Cold War).

coercive authority.³⁰ When hamstrung or inattentive, it can—as designed—remain impotent, even in the face of massive and horrific threats to global order and human life.³¹

The framers of the United Nations also created a legislature in the General Assembly, a judiciary in the International Court of Justice, and a bureaucracy led by a Secretary-General, giving the new system the rough outlines of a constitutional order.³² The Charter gave the United Nations (via the Council) the power to make rules and decisions that would be binding on states.³³ In doing so, it ushered in a new era in international law and order. Security Council resolutions, many of them legally binding, flowed out of Turtle Bay, ranging from mild sanctions to the ultimate punishment: the authorization to use military force against a state.³⁴ But for all its detail, the Charter did not create any mechanism for applying criminal sanctions to those individuals who control the actions of states (and other armed groups) and who thus bear ultimate responsibility for the grave crimes and atrocities that made the twentieth century the bloodiest in history.³⁵

Indeed, the Charter is very much a Westphalian document. States, and their sovereignty, are central to its design.³⁶ Individuals appear but far less prominently.³⁷ Indeed, the Charter speaks only of the *rights* of individuals; individual criminal penalties arrived in international law later, in such ancillary instruments as the Genocide Convention of 1948 and the Geneva Conventions of 1949.³⁸ Yet states are abstractions, legal entities; indi-

30. See *id.* at 64–65 (describing the Council’s unified resolve regarding its actions in response to the Gulf War).

31. See *id.* at 52, 59 (quoting U.S. Senator Arthur Vandenberg as saying that “the system worked” after an early use of the veto by the U.S.S.R. in response to the 1946 crisis in Lebanon and Syria and referencing instances of Council divisiveness regarding matters that might lead to a major war and threaten the collapse of the international security system).

32. U.N. Charter art. 7, ¶ 1.

33. *Id.* art. 25.

34. See KENNEDY, *supra* note 20, at 99–100 (describing the variety of Security Council resolutions passed in response to the Balkan Wars).

35. See U.N. Charter, arts. 41–42 (making no mention of criminal penalties in the list of available sanctions).

36. *Id.* art. 2, ¶ 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

37. See *id.* (making few references to individuals throughout, with the notable exception of the preamble, which indicates its purpose “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women”).

38. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

viduals are beings of flesh and blood who, ultimately, are the motive and culpable force behind abuses of human rights and violations of international law. At the landmark postwar trials at Nuremberg, which took place within a year of the Charter's adoption, the judgments would recognize individual culpability.³⁹ The Charter itself did not.⁴⁰ While Nuremberg was an early high-water mark for international justice, it would take many decades for individual justice to become embedded in the global legal order.

II. The Turn to Justice

It was the end of the Cold War that allowed individualized justice to begin to take center stage. This shift was not only accompanied by a significant surge in Council cooperation and coercion; it was a direct result of it.⁴¹ After the fall of the Berlin Wall, an invigorated Council embraced individual accountability for heinous crimes by creating two criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and, shortly thereafter, for Rwanda (ICTR) in 1994.⁴² These Council-created courts broke new ground, and they have shaped international criminal law into a major field during their twenty years of existence. Ad hoc solutions to particular conflicts, the Yugoslavia and Rwanda tribunals nonetheless inspired governments and activists to believe that the international community could establish a permanent tribunal to address war crimes, crimes against humanity, and acts of genocide.⁴³ A permanent tribunal would not depend on Council cooperation (the creation of the ad hoc tribunals avoided a veto, but the threat was always present).⁴⁴ Moreover, a permanent court would stand as a deterrent to would-be *genocidaires* and war criminals.

39. Richard Overy, *Making Justice at Nuremberg, 1945–1946*, BBC (Feb. 17, 2011), http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml [<https://perma.cc/LT3U-LBR6>].

40. See U.N. Charter arts. 1–70 (lacking provisions to hold individuals accountable).

41. See KENNEDY, *supra* note 20, at 191–93 (describing the shift in focus to human rights following the fall of the Berlin Wall in 1989 and the end of the Cold War).

42. WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 3–4 (2006); Payam Akhavan, *Current Developments, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996).

43. See Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 128 (1995) (observing that the ad hoc tribunals created for the crimes in Yugoslavia and Rwanda “invigorated momentum for a permanent international criminal tribunal”).

44. See Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. (SUPP.) 381, 386–87 (2002) (noting that the proposed permanent tribunal could investigate matters “without a Security Council request” and that its independence would “deprive permanent members of their veto”).

The creation of the standing International Criminal Court in 2002 was thus a watershed moment, historic in its reach and its ambition. The ICC takes international justice out of the direct control of the most political of international bodies—the Council—and thus moves the needle decisively toward law and away from politics. *Rough Justice* documents the difficulty, diplomacy, and long effort that accompanied this triumph of legalism. But the book also frankly acknowledges the many challenges that remain, many of which are driven by the complex relationship between law and politics that continues to vex the fledgling Court.

Bosco demonstrates, with considerable detail, that the ICC was born with major infirmities. Principal among them is that it has no police force nor any reliably effective means by which to oblige states to cooperate to bring perpetrators it identifies to justice.⁴⁵ This structural weakness compels the ICC to seek assistance from partners that have coercive powers.⁴⁶ And there is no international institution better situated to assist the ICC than the Security Council. The Security Council's legitimacy—shaky during the Cold War, stretched to the breaking point today—makes it an undeniably imperfect partner for the ICC. Yet the Council remains the one entity in the global legal order with the power to compel states to assist the Court if it deems it in the interest of peace. Together, then, the Council and the Court can be a formidable force for accountability. Apart, their flaws are readily apparent. This is especially so for the still-novel ICC, which has yet to receive the sort of support—from its own member states let alone the three very powerful permanent members of the Council that remain nonparties—that its success requires.

III. The Council–Court Relationship

The preamble of the Rome Statute declares that the parties were determined “to establish an *independent* permanent International Criminal Court *in relationship with the [U]nited Nations system.*”⁴⁷ Yet exactly how to be both “independent” and “in relationship with” was left unstated: how can an institution that is formally outside the UN system yet intertwined with its network of political and logistical support be truly independent? The Relationship Agreement between the ICC and the UN, concluded in 2004, promises that the institutions will “respect each other’s status and

45. See BOSCO, *supra* note 11, at 4, 56–57 (explaining that the ICC was born with significant lack of support and even opposition from several powerful states—including the United States—and noting that the Court relies entirely on state police and military forces for success in apprehending suspects).

46. *Id.* at 187–88 (discussing how the ICC has, over time, “become an instrument in the toolkit of [the] major powers” upon which it is dependent).

47. Rome Statute of the International Criminal Court pmbl., *opened for signature* July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute] (emphasis added).

mandate.”⁴⁸ Yet it goes beyond respect to include an obligation of cooperation, as the parties agreed “they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest.”⁴⁹

In the years since the conclusion of the Relationship Agreement, the ICC has established working ties with the UN system as a whole.⁵⁰ Support for the Court, though often tinged with criticism, exists at all levels of the UN.⁵¹ The relationship with the UN that really matters to the ICC, however, is the one with the Security Council. Yet this relationship remains uneven and uncertain. Over the past decade, the Council’s attitude and posture toward the ICC have been variable and arguably even mercurial. When convenient, the Council has offered rhetorical support for the Court’s work and even has, as with Libya and Darfur, actively engaged with it.⁵² But that has not stopped the Council—largely driven by the agendas of its five permanent members—from ignoring or even damaging the ICC when that stance serves its particular interests.⁵³

The exercise of power is thus central to this story. Accordingly, in *Rough Justice* Bosco presents a politically grounded argument about how states—in particular, powerful states—have reacted to the arrival of the ICC. States, he argues, face a choice among accommodating, marginalizing, or controlling the new Court.⁵⁴ More often than not, Bosco claims, they try to construct mechanisms of control.⁵⁵ Since the creation of the ICC means that “some of the world’s most powerful states lost ownership of international justice,” they often have responded by trying to rein the Court in and regain control.⁵⁶ This struggle is central to the still-emerging story of the birth and growth of the ICC.

Bosco highlights many examples of state “control behavior” throughout *Rough Justice*, wisely focusing on the permanent five members of the Council (the so-called P5) and a handful of other key states and

48. Negotiated Relationship Agreement Between the International Criminal Court and the United Nations art. 2, ICC-ASP/3/Res.1 (Sept. 7, 2004).

49. *Id.* at 3.

50. See INT’L PEACE INST., *THE RELATIONSHIP BETWEEN THE ICC AND THE SECURITY COUNCIL: CHALLENGES AND OPPORTUNITIES 2* (2013) (explaining the “complex and delicate relationship” currently shared by the ICC and the UN).

51. See Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT’L L.J. 243, 252 (2006) (explaining that support for the ICC is complex and can often be contentious).

52. See generally S.C. Res. 1970 (Feb. 26, 2011) (expressing concern about the violence in Libya and offering support); S.C. Res. 1593 (Mar. 31, 2005) (pledging to take all necessary action to prevent violations of human rights in Darfur).

53. See BOSCO, *supra* note 11, at 39–45 (asserting that the five permanent members make decisions to protect their own interests).

54. *Id.* at 11–15.

55. *Id.* at 14–15.

56. *Id.* at 21, 23.

nongovernmental organizations.⁵⁷ But it is not solely a story of control. The first term of President George W. Bush's administration, for instance, presents a textbook case of marginalization, characterized by avowedly anti-ICC legislation and multiple U.S. efforts to shield Americans from the Court's jurisdiction.⁵⁸ By contrast, the broad European embrace of the ICC—ratifying the Rome Statute, regularly pressing for more political support—reflects acceptance and accommodation.⁵⁹ Chinese and Russian attitudes toward the Court are less open and pronounced, and they are less discussed in *Rough Justice*.⁶⁰ It is evident that China and Russia are accommodationist when accommodation is in their interests, but both have been generally transactional in their attitudes toward the ICC, their positions varying according to the policy interests at play.⁶¹

To be sure, the ICC's success is neither guaranteed by Council cooperation nor foreclosed by Council disregard. The ICC has achieved successes and failures that have little to do with the Council's assistance. Its on-again, off-again saga during the trial of Thomas Lubanga Dyilo, who was ultimately convicted of war crimes, had more to do with prosecutorial decisions than UN cooperation.⁶² Its lengthy trials result mainly from the structure of the Rome Statute and the failure of the chambers to streamline proceedings and resist the avalanche of motions from all parties, including victim participants.⁶³ The collapse of the case against Kenya's President Uhuru Kenyatta has roots in the prosecution's approach, the intimidation of

57. *See id.* at 39–45 (giving examples of how the P5 has tried to control the ICC, such as by screening complaints and suggesting that any new court should be controlled by the Security Council).

58. *See id.* at 71–75 (explaining that after the attacks on September 11, 2001, the U.S. government developed an aggressive antiterrorism policy and sought to give American citizens immunity from the ICC).

59. *See id.* at 84, 179 (noting the understanding that “the European powers were the principal movers behind” the ICC and the European Union's encouragement of the ratification of the Rome Statute).

60. *See generally id.* (failing to address Chinese and Russian attitudes to the same extent as European attitudes).

61. The Russian and Chinese statements at an open ICC debate at the Security Council in October 2012 provide evidence of such transactional attitudes. *See* U.N. SCOR, 67th Sess., 6849th mtg. at 11–12, 19–20, U.N. Doc. S/PV.6849 (Oct. 17, 2012) (showing that China and Russia supported the efforts of the U.N. to create international peace).

62. *Cf.* Larry D. Johnson, *The Lubanga Case and Cooperation Between the UN and the ICC*, 10 J. INT'L CRIM. JUST. 887, 887 (2012) (“During its first case, the International Criminal Court (ICC) faced several challenges. One of these challenges—which almost derailed the whole trial—was the implementation of the cooperation regime with the United Nations . . .”).

63. *See* Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219, 238 (2006) (explaining that the Pre-Trial Chamber must balance the rules allowing victim participation with the defendant's right to reasonably speedy proceedings).

witnesses by those associated with Kenyan authorities, and the African Union's political engagement, much more than any action—or inaction—on the part of the Security Council.⁶⁴

Bosco goes beyond the maneuvers of states, however, to show how ICC officials, aiming not to be pawns in a great power game themselves, tried to shape that power dynamic to their own ends. The first prosecutor, Luis Moreno-Ocampo of Argentina, went to European capitals to lobby for his job with an “itinerary [that] reflected an understanding that while more than seventy states had joined the court [at that time, 2003], the European powers were the principal movers behind the new institution.”⁶⁵ On balance, however, the Court has seemed to come out on the losing side when it has sought to play the power game.⁶⁶ Bosco is sensitive to the challenges faced by Moreno-Ocampo.⁶⁷ But despite the prosecutor's vision of engaging and speaking the language of states when necessary, Bosco notes that he sometimes alienated them, triggering numerous crises.⁶⁸ Moreno-Ocampo's chief prosecutorial legacy—an understandable focus on African situations that ultimately led to a deeply fraught and problematic relationship with the African Union—reinforces Bosco's presentation of evidence that the ICC has been significantly constrained by major-power interests.⁶⁹

No realist will be surprised that great power politics has constrained the ICC. But what about the flip-side? What has—and what can—the Security Council do to further the ICC's mission of justice? There are several Council powers that can in theory benefit the Court's activity. There is the power, embedded in the Rome Statute, to refer a situation to the Court for investigation and possible prosecution.⁷⁰ There is the power to authorize a state to use force that would otherwise be illegal under the UN Charter, such as crossborder force to apprehend an individual fugitive wanted by the ICC.⁷¹ There is the power to obligate all states to cooperate

64. Alex Whiting, *The ICC in Kenya: Institutional Promises and Limitations*, JUST SECURITY (Sept. 15, 2015, 9:14 AM), <https://www.justsecurity.org/26087/icc-kenya/> [<https://perma.cc/M267-2TK2>].

65. BOSCO, *supra* note 11, at 84.

66. Cf. Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444, 458 (2014) (concluding that there is a “clear pattern of politicization in the ICC's prosecutions” that indicates the Court is being manipulated by the member states, undermining the Court's “credibility and legitimacy”).

67. See BOSCO, *supra* note 11, at 84–86 (acknowledging that Moreno-Ocampo was a determined investigator but faced a difficult question of how to prosecute the Iraq war).

68. See *id.* at 151–52 (noting that the prosecutor was criticized by certain African leaders and the media).

69. *Id.* at 151, 187.

70. Rome Statute, *supra* note 47, art. 13.

71. See U.N. Charter art. 42, ¶ 1 (stating that in certain circumstances the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”).

with the Court, as the Council did when it directly created war-crimes tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively.⁷²

These are meaningful powers. And yet the Council almost never wields them; indeed, it never deployed the last two noted powers in the two cases that the Council itself referred to the ICC. In one case only has the Council authorized UN forces to support the arrest of ICC indictees.⁷³ It has provided mainly limited political or rhetorical support for the several other situations pending before the Court today.⁷⁴ In fact, the Council has more often exercised its power to *limit* the reach of the ICC, using such tools as jurisdictional exemptions and funding limitations in the resolutions referring the Darfur and Libya situations.⁷⁵ In short, the Council has shown itself to be more than a match for the forces of international justice and ICC autonomy.

IV. Council Cooperation and the Independence of the Court

The heavy shadow cast by the Council has led many partisans of international justice to consider how the ICC might be more independent and less prone to political influence. ICC independence can be thought of in three ways: judicial independence, prosecutorial discretion, and institutional independence. Several years ago, then-professor (now Judge) Theodor Meron laid out the internal and external factors necessary for an independent judiciary in the international context.⁷⁶ At its most abstract and general, judicial independence demands that judges be free from influence external to the legal and factual situations they are obligated to adjudicate—

72. See S.C. Res. 955, ¶ 2 (Nov. 8, 1994) (deciding that “all States shall cooperate fully” with the Rwanda Tribunal); S.C. Res. 827, ¶ 4 (May 25, 1993) (deciding the same for the Yugoslavia Tribunal).

73. See S.C. Res. 2098, ¶ 12(d) (Mar. 28, 2013) (expanding the mandate of the UN peacekeeping operation, MONUSCO, in the Democratic Republic of the Congo).

74. DAVID KAYE ET AL., *THE COUNCIL AND THE COURT: IMPROVING SECURITY COUNCIL SUPPORT OF THE INTERNATIONAL CRIMINAL COURT I* (2013).

75. See S.C. Res. 1970, *supra* note 52, ¶ 6 (deciding “that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State”); S.C. Res. 1593, *supra* note 52, ¶ 7 (recognizing that expenses from the referral “shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”).

76. Theodor Meron, Editorial Comment, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT’L L. 359, 360–61 (2005); see also Martin Shapiro, *Judicial Independence: New Challenges in Established Nations*, 20 IND. J. GLOBAL LEGAL STUD. 253, 258–60 (2013) (explaining challenges to judicial independence, such as constitutional review of decisions creating conflict between judges and the government, “judicialization” of politics giving judges potential kickbacks from making specific decisions, and long-arm proliferation expanding a Court’s jurisdiction).

including, and perhaps especially, from their home states. Similarly, others have argued that prosecutors in international tribunals must enjoy the independence to investigate alleged crimes committed by all parties to a conflict, free of political pressure, however well-intentioned.⁷⁷ For instance, a Council referral directing the prosecution of specific individuals would clearly interfere with prosecutorial independence. The Rome Statute seeks to protect both judicial and prosecutorial independence, focusing on internal and external factors that could inappropriately influence Court actors—in particular, the prosecutor.⁷⁸ As Bosco writes, “[a]t the heart of the court is an independent prosecutor responsible for reviewing complaints and information about possible crimes, conducting investigations, requesting arrest warrants, and prosecuting those on trial.”⁷⁹

Institutional independence differs from judicial and prosecutorial independence, though all three are connected. Judicial and prosecutorial independence speak to the influence exercised by external actors in specific cases before the Court, disadvantaging particular defendants or undermining the credibility of judicial or prosecutorial decisions. Institutional independence addresses more generally the ways in which external actors shape the overall docket of the ICC, as well as its practices and trajectory.⁸⁰ Individual states, which may refer situations to the Court for investigation, and the Council itself may both strongly influence the overall focus and direction of the Court. Indeed, the Court’s docket today is not the result of wholly independent decisions on the merits. Instead, Sudan and Libya were both Council referrals, and Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali were all state self-referrals.⁸¹ An independent judicial institution may not have opened investigations in any one of these six situations.

77. See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 47–48 (2010) (discussing the “seductive argument holding that justice should be even-handed, and that atrocities perpetrated on both sides must receive equal attention”).

78. See *id.* at 564–66, 801 (explaining factors that could inappropriately influence judges, such as financial interests in the outcome of the case and the requirement that judges’ and prosecutors’ functions in open Court are impartial).

79. BOSCO, *supra* note 11, at 54.

80. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 277 (1997) (stating that the independence of the European Court of Justice and the European Court of Human Rights from the state as part of a supranational jurisdiction has resulted in “a ‘community of law’: a partially insulated sphere in which legal actors interact based on common interests and values, protected from direct political interference”); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *CALIF. L. REV.* 1, 67 (2005) (noting that designers of newer tribunals have tried to provide them with a high level of institutional independence in order to “increase the courts’ legitimacy and ultimately their ability to achieve compliance”); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 *AM. J. INT’L L.* 225, 257 (2012) (describing the link between external actors and judicial independence).

81. *ICC Investigations & Cases*, AM. NON-GOVERNMENTAL ORGANIZATIONS COALITION INT’L CRIM. CT., <http://www.amicc.org/icc/cases> [<http://perma.cc/ZM8Q-VFXZ>].

At Rome and in its lead-up, discussions around jurisdiction and the ability to refer cases were largely framed in terms of the concept of gatekeeping.⁸² The case for a more dependent ICC rested on the realities of world politics: when global security is at stake, the pursuit of individual justice can block meaningful peace deals and constrain negotiators' options. Peace, according to this position, must sometimes trump justice. And to do so, the processes of international justice must serve peace, not interfere with it. This conception had and retains many admirers.⁸³ As a result, some sought to place the Security Council fully in control of the ICC's jurisdiction.⁸⁴ This would ensure that politics trumped legalism. Not unrelatedly, it also would give the P5 a special measure of influence.

The Rome negotiators ultimately rejected the idea of the Council as primary gatekeeper. Instead, the Rome Statute rests jurisdiction principally on the traditional pillar of state consent, a deliberate move aimed at bolstering the Court's independence and placing law over politics.⁸⁵ The Rome Statute also gave the prosecutor *proprio motu* power—the power to initiate an investigation at the prosecutor's own discretion, though such an investigation has to be approved by a panel of judges.⁸⁶ In *Rough Justice*,

82. See Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism,"* 4 CHI. J. INT'L L. 223, 225, 231 (2003) (explaining how the United States supported a "gatekeeper" role for the UN Security Council in order to prohibit countries from being subject to the Court's jurisdiction without consent).

83. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SECURITY, Winter 2003/04, at 5, 6 ("Justice does not lead [peace]; it follows. . . . [N]orm-governed political order must be based on a political bargain among contending groups and on the creation of robust administrative institutions that can predictably enforce the law. Preventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses . . ."); cf. Mariano-Florentino Cuéllar, *The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 HARV. L. & POL'Y REV. 401, 404–05 (2007) (advocating a "pragmatic approach" to refugee problems termed "strategic humanitarianism" that would "develop[] protocols to monitor, restrict, and redirect aid" in order to "lower the risk that aid funneled through the refugee system will subsidize ongoing conflict"); *id.* at 432 ("Idealism without limits is all but impossible, as no American refugee policy can long survive if pivotal constituencies find it irretrievably at odds with American interests. But a policy of limits without idealism in a world capable of engendering such capacious misery and expectations of American leadership poses its own dangers.").

84. HEMI MISTRY & DEBORAH RUIZ VERDUZCO, CHATHAM HOUSE, THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT 3 (2012) ("Article 13(b) was the product of a negotiation that sought to delimit the appropriate relationship between a permanent international criminal court and the UN Security Council, the latter being the primary organ responsible for the maintenance of international peace and security. Article 13(b), in conjunction with Article 16 . . . sought to reconcile the concerns of those who wished to establish a permanent and independent international criminal court, a tribunal independent from the politics of the Security Council, and those on the other hand who sought to establish the court subject to the control of the Security Council.").

85. And, some would argue, justice over peace.

86. Rome Statute, *supra* note 47, art. 15.

Bosco notes that the United States and China in particular opposed this provision, fearing “it would afford the prosecutor too much discretion and insist[ing] that if neither a state party nor the Security Council referred a situation, it likely was not of international concern.”⁸⁷

The flipside was that many other actors feared granting the Security Council too much power to refer situations to the Court.⁸⁸ The more the Security Council was linked to the Court, the more it could become a tool of the Council, subject to the political dynamics of the moment. In the end, the Council’s powers were cabined. Referrals may not direct the prosecutor to reach particular outcomes, nor can they pinpoint specific individuals.⁸⁹ Yet the Council was given an important power to start and stop Court investigations if, in its view, security concerns necessitated it.⁹⁰ Reflective of the power dynamics of world politics, it was the sort of pragmatic decision that, like the insertion of the veto for the P5 in the Charter, could help save idealism from itself.⁹¹

The compromise struck in Rome between a vision of robust judicial and prosecutorial independence and the reality of power politics left many dissatisfied. The United States, China, and Russia never joined the ICC, in part due to their dissatisfaction with the jurisdictional structure created at Rome.⁹² On the other hand, no less a figure than Louise Arbour, former chief prosecutor of the ICTY and ICTR and UN High Commissioner for Human Rights, argued that the Council–Court relationship embedded at Rome created deep threats to the Court’s independence.⁹³ That the Council can shape the court’s jurisdiction through referrals or suspend proceedings based on security concerns seems to give an overtly political—and unrepresentative—body control over a core judicial function. Yet to work

87. BOSCO, *supra* note 11, at 55.

88. *See id.* (explaining that although some were disappointed with the compromise on the ICC’s jurisdiction, it was still too extensive for some countries because their citizens could be exposed to prosecution).

89. Rome Statute, *supra* note 45, arts. 14–15.

90. *See id.* art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect . . .”).

91. For an example of this kind of thinking, see generally KENNEDY, *supra* note 20, which traces the evolution of the United Nations, including the balance between pragmatism and idealism.

92. *See* BOSCO, *supra* note 11, at 55 (explaining the fear some countries had that the ICC’s jurisdiction went too far because it allowed for their citizens to be prosecuted).

93. *See* Louise Arbour, *Doctrines Derailed?: Internationalism’s Uncertain Future*, INT’L CRISIS GROUP (Oct. 28, 2013), <http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx> [<http://perma.cc/3LSM-J22T>] (“Council referrals may in fact underscore the Court’s impotence rather than enhance its alleged deterrent effect.”).

well a court needs a cop, and this recognition guided many of the delegates in Rome to seek a balance of sorts between Council control and Court inconsequence.

The Court nonetheless struggled to attract a full range of member states. As Bosco writes, the ICC “attracted dozens of new member states and established linkages with key intergovernmental organizations. The process of international acceptance was incomplete however. The Court made only limited progress in attracting major powers that had opted to stay outside the system.”⁹⁴ Three of those major powers—China, Russia, and the United States—just happened to be permanent members of the Security Council.⁹⁵

V. From Hostility to Engagement

Just eleven days after the Rome Statute entered into force in 2002, the United States successfully demanded the adoption of Security Council Resolution 1422, which sought to protect UN peacekeepers from the ICC’s jurisdiction if they hailed from non-Rome Statute states.⁹⁶ Adopted as a measure under Article 16 of the Rome Statute, the provision that enables the Council to suspend proceedings before the Court, the effort had limited support in the law, but the United States was determined to hold peacekeeping—especially in the Balkans—hostage to its demand.⁹⁷ However, after two years opposition grew such that the Bush administration abandoned the annual effort.⁹⁸

In 2005, in the wake of the Security Council-mandated Commission of Inquiry’s condemnation of massive atrocities in Darfur, ICC supporters were confident enough to turn to the Court for accountability.⁹⁹ On March 31, by referring the situation in Darfur to the Court, the Council took its first, landmark step in acknowledging the ICC’s legitimacy.¹⁰⁰ China and the United States abstained, while Russia, the United Kingdom, and France—the latter two then and still now the only ICC member states on the Council—cast votes in favor.¹⁰¹ The price for U.S. abstention, as opposed to a veto, was high: the referral resolution barred UN funding of ICC

94. BOSCO, *supra* note 11, at 131.

95. *Countries Elected Members of the Security Council*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/members/elected.asp> [<http://perma.cc/6RG9-TA2U>] (listing China, Russia, and the United States as permanent members, never elected to the council).

96. S.C. Res. 1422, ¶ 1 (July 12, 2002).

97. *See generally id.*

98. BOSCO, *supra* note 11, at 103–04.

99. Rep. of the Int’l Comm. of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004), transmitted by Letter Dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, at 4, U.N. Doc. S/2005/60 (Jan. 31, 2005).

100. S.C. Res. 1593, *supra* note 52, ¶ 1.

101. U.N. SCOR, 60th Sess., 5158th mtg. at 2, 3, 5, U.N. Doc. S/PV.5158 (Mar. 31, 2005).

activities pursuant to the resolution, sought to preclude jurisdiction over Rome Statute nonparties apart from Sudan, and—in contrast to the resolutions establishing the ICTY and ICTR—failed to obligate states outside of Sudan and the Rome Statute to cooperate with the Court.¹⁰² The Council thus expanded the Court’s jurisdiction while limiting its ability to carry out its mandate.

This state of affairs frustrated many ICC supporters, and not least the then-prosecutor himself, Moreno-Ocampo. As Bosco recounts,

Frustrated by the fickle commitment of states, the prosecutor delivered a scathing speech at a Nuremberg conference on international justice in May 2007. He complained that the court faced incessant—and, to his mind, unfair—calls to accommodate itself to political realities. “We also hear officials of States Parties calling for amnesties, the granting of immunities and other ways to avoid prosecutions, supposedly in the name of peace.” The prosecutor insisted that “there can be *no* political compromise on legality and accountability” and he laid down a daunting challenge for states: “Dealing with the new legal reality is not easy. It needs political commitment; it needs hard and costly operational decisions: arresting criminals in the context of ongoing conflicts is a difficult endeavor. . . . *If the States Parties do not actively support the Court, in this area as in others, then they are actively undermining it.*”¹⁰³

This somewhat curious echo of the Bush Doctrine¹⁰⁴ makes plain how much frustration was felt in The Hague over the inability, or more to the point, the unwillingness of powerful states to help the ICC work. The locus of that frustration was the Security Council.

For its part, the Council did not deign to answer the prosecutor nor to pay much, if any, attention to the Court—even to provide support for efforts on Darfur, which it had referred.¹⁰⁵ From the adoption of the Darfur referral in 2005 to the adoption of the Libya referral on February 23, 2011, not a single Security Council resolution offered support for the work of the ICC, even though the Court’s work in Africa overlapped neatly with situations that seized the Council.¹⁰⁶

102. S.C. Res. 1593, *supra* note 52, ¶¶ 6, 7.

103. BOSCO, *supra* note 11, at 131 (omission in original).

104. There are various things so labeled but, recall President Bush’s famed post-9/11 statement to a joint session of Congress: “Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists.” President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript> [<http://perma.cc/7NFG-B4D5>].

105. S.C. Res. 1593, *supra* note 52, ¶ 7.

106. See *Security Council*, COALITION FOR INT’L CRIM. CT., <http://www.iccnw.org/?mod=sc> [<https://perma.cc/T38R-ZHC7>] (documenting Security Council discussions pertaining to the ICC and showing no resolutions regarding the ICC between Darfur and Libya).

Then, something changed. Beginning in early 2011, the Council expressed new interest in the Court, repeatedly (and approvingly) noting it in its resolutions and debates. Yet a close inspection reveals a pattern of mixed signals and uneven (and usually hollow) support. On the one hand, the Council referred the situation in Libya to the ICC for investigation and prosecution in February 2011 in what was widely seen as a supportive symbol of the role the ICC might play in preventing mass atrocity.¹⁰⁷ Over the course of the next three years, the Council repeatedly welcomed the role of the ICC in a variety of contexts, regularly citing its work with support, especially outside of the referral-situation countries.¹⁰⁸ Council members—including the United States, China, and Russia—held an open meeting in 2012 that left an impression of widespread support for the Court and its work.¹⁰⁹

The Council crossed the Rubicon from rhetorical to logistical and military support for the ICC in the context of the long-standing and extensive conflict in the Democratic Republic of the Congo (DRC). In 2013, the Council authorized the establishment of an “Intervention Brigade” as part of the UN’s peacekeeping force in the DRC.¹¹⁰ The authorization, remarkable for its provision of an offensive capability to a peacekeeping force,¹¹¹ was also notable for the support it offered the ICC. The Intervention Brigade, the resolution provided, would be expected to work with the Court and the Government of the DRC “to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country.”¹¹²

The Intervention Brigade, however, represents a rare form of concrete support for the work of the ICC. Overall, despite these recent steps the Council has shown a marked reluctance to flex its muscle to generate broader cooperation by other states. That reluctance continues to this day.

107. S.C. Res. 1970, *supra* note 52, ¶ 4. See, for example, the statement from Mr. Hardeep Singh Puri (India), as well as statements from France and Germany. U.N. SCOR, 66th Sess., 6491st mtg. at 2, 5–6, U.N. Doc. S/PV.6491 (Feb. 26, 2011) (“[W]e note that several members of the Council . . . believe that referral to the Court would have the effect of an immediate cessation of violence and the restoration of calm and stability.”).

108. See Colum Lynch, *The World’s Court vs. the American Right*, FOREIGN POL’Y: TURTLE BAY (Feb. 11, 2013), http://turtlebay.foreignpolicy.com/posts/2013/02/11/the_icc_vs_american_conservatives [<http://perma.cc/N42K-EBG8>] (quoting the French UN envoy as recognizing the key role that the ICC plays in preventing atrocities).

109. See generally U.N. SCOR, 67th Sess., 6849th mtg., *supra* note 61.

110. Bruce ‘Ossie’ Oswald, *The Security Council and the Intervention Brigade: Some Legal Issues*, ASIL INSIGHTS (June 6, 2013), <http://www.asil.org/insights/volume/17/issuec/15/security-council-and-intervention-brigade-some-legal-issues> [<http://perma.cc/VU8V-P7EP>].

111. *Id.* The Security Council first sent such a peacekeeping force to the Congo in 1960. S.C. Res. 143 (July 14, 1960).

112. S.C. Res. 2098, *supra* note 73, ¶ 12(d). The Brigade saw some success when it helped bring about the end of M23. Press Release, Sec. Council, Security Council Issues Statement Welcoming End of Hostilities by ‘M23’ in Democratic Republic of Congo, U.N. Press Release SC/11174 (Nov. 14, 2013).

On Libya, the Council's follow-through has been tepid at best. As soon as the Qaddafi regime began to crumble, leading Council members' support for the ICC's role faded away.¹¹³ On Sudan, the Council has barely addressed the lack of state cooperation, despite repeated requests for engagement by the ICC.¹¹⁴ This led Prosecutor Fatou Bensouda, who succeeded Moreno-Ocampo in 2012, to deliver an impassioned plea to the Council during her semiannual report on the situation in Darfur in 2013, using powerful language rarely heard in the Council chamber. Emphasizing her "frustration and despair at the Council's inaction and paralysis regarding the situation in Darfur," the prosecutor detailed how the lack of Council support has undermined her work.¹¹⁵

VI. Looking Forward

In his conclusion to *Rough Justice*, Bosco writes:

It will not be surprising if the world is willing to tolerate an international justice system constrained by major-power interests. . . . [O]ther significant international justice initiatives have been influenced and constrained by political considerations. Instead of being denounced for their defects and limitations, these instruments were mostly celebrated and, in fact, served as the inspiration for the ICC. Double standards are deeply rooted in existing global governance structures, and the new court appears more likely to reflect those than to alter them.¹¹⁶

It is undeniable that Council support is a necessary, if insufficient, component of any long-run success for the ICC. For the Court, the question is how to engage the Council in a way that does not fundamentally compromise its essential independence—or perhaps, how to do so in a way that *acceptably* compromises the Court's independence while enhancing its effectiveness. For the Council, the question is how to partner with the ICC to ensure that its primary responsibility—the maintenance of international peace and security—can be more effectively achieved. In what follows, we offer some reflections as well as some concrete suggestions about the way forward.

A number of international workshops and conferences in recent years have brought experts and observers together to evaluate and understand the Council's behavior.¹¹⁷ All of these efforts aim toward identifying an

113. Mark Kersten, *Used and Abandoned: Libya, the UN Security Council and the ICC*, JUST. CONFLICT (Aug. 31, 2011), <http://justiceinconflict.org/2011/08/31/used-and-abandoned-libya-the-un-security-council-and-the-icc> [<http://perma.cc/VV5W-FDLH>].

114. U.N. SCOR, 68th Sess., 7080th mtg. at 2–4, U.N. Doc. S/PV.7080 (Dec. 11, 2013).

115. *Id.* at 2.

116. BOSCO, *supra* note 11, at 189.

117. *See, e.g.*, INT'L PEACE INST., *supra* note 50, at 2 (noting a meeting's conclusion that improvements in the relationship between the Security Council and the ICC are needed; KAYE ET

optimal level of support by the Council for the Court.¹¹⁸ What kind of support could the ICC expect, and how could that support be generated? What types of situations would be appropriate for the Council to refer? When might the Council use its Rome Statute authority to defer an ongoing investigation? The prescriptions tend to fall into categories of structure and substance, wishlist and realpolitik, short-term and long-term. In principle, they do not question the premises underlying a strong Council–Court relationship. But the results of these meetings—the formal papers and reports—tend to hide a vigorous discussion over the nature and value of the relationship.

First, while there are obvious advantages to a relationship with the Security Council, what risks does such a relationship pose for the Court? The Council is an unabashedly political institution. While procedural rules may govern its working calendar and diplomatic and military realities may constrain its actions, few substantive rules constrain its decisions.¹¹⁹ The Council does not need to distinguish and explain one situation from the next. Its decisions often appear unprincipled, driven by the political, economic, or military equities of the P5 rather than a reasoned accounting of when it should invoke Chapter VII of the Charter.¹²⁰ While a lack of principle well serves an institution that must balance competing interests from crisis to crisis, it nonetheless undermines its claim to be acting in the interests of the international community as a whole. Indeed, such political motives call attention not merely to the Council's inconsistencies but also to its claim of representativeness and ability to speak to the security concerns of all UN members.¹²¹ None of this is new. The Council cannot be judged according to the same standards as a court of law. But its political nature sits uneasily alongside notions of individual culpability for atrocities.

AL., *supra* note 74, at 17–23 (reporting the findings of a workshop held to discuss improving support for the ICC); MISTRY & VERDUZCO, *supra* note 84, at 2 (summarizing the conference held to discuss the development of the relationship between the Security Council and the ICC).

118. See, e.g., INT'L PEACE INST., *supra* note 50, at 5 (discussing a strategy for improving Security Council support of the ICC through arrest warrants); KAYE ET AL., *supra* note 74, at v (stating that the goal of the workshop was to foster optimal support of the ICC by the Security Council); MISTRY & VERDUZCO, *supra* note 84, at 9–10 (suggesting that the Security Council could properly support the ICC through coordination of approach and procedure).

119. UNITED NATIONS, PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL (1983).

120. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 562–65 (1993) (noting that a “major charge against the Security Council[’s legitimacy] is that it is dominated by several of the permanent members” and describing how the P5 members are able to exert dominance over the Council's decisions).

121. See *id.* at 558 (providing examples of how the perceptions of illegitimacy may work against the effectiveness of the Security Council, such as a state having difficulty convincing its citizenry that the Council's action, which is UN authorized, is supportive of community concerns rather than the “thinly veiled imperialism of the Council's permanent members”).

This then is a key risk of the Court's relationship with the Council: unless it protects itself, the Court increasingly will become entangled in the politics and credibility gap of the Council, tarred by its association with a body that has significant power to shape its docket. The Council refers Libya but not Syria, Sudan but not Sri Lanka.¹²² It expands the ICC's jurisdiction while purporting to limit the reach of its cases so as to protect nonstate parties.¹²³ This kind of selectivity will continue, as selectivity is simply an everyday feature of Council behavior across the vast range of issue areas it addresses. But this selectivity, coupled with the seeming inability of the ICC to expand its own reach to state parties beyond Africa, highlights that the ICC has limited capacity to achieve its purpose, as emphasized in the Rome Statute's Preamble, "to guarantee lasting respect for and the enforcement of international justice."¹²⁴

This risk of entanglement may be a feature of the Rome Statute inasmuch as it enables the ICC to exercise jurisdiction over situations referred by the Council. As the work of both institutions continues to overlap, the ICC may find it difficult to protect itself from such politicization, but it is not without tools. Most importantly, it needs a strategy for dealing with Council referrals—not only the fact of referral but also the politicized elements of referrals that seek to limit the ICC's jurisdiction and funding and fail to promote state cooperation.

Conversely, a strong relationship with the Council may be desirable from the ICC's perspective, but is it desirable for the Council? What does the Council gain from the Court? The Council is an institution with extraordinary lawmaking powers, uniquely able to compel action by or against any UN member state.¹²⁵ It can even, as it did in the 1990s with the ICTY and ICTR, create ad hoc courts to address the aftermath of atrocities.¹²⁶ All this suggests that the Council actually needs little from the ICC, and indeed the balance of power is undeniably in the Council's favor. Yet the ICC, deliberately designed not to be under the direct supervision of the Council, is a reality—and as such is both a new tool and partner to the Council as well as a possible rival and competitor. The Court can

122. *Situations and Cases*, *supra* note 16.

123. *See supra* text accompanying notes 98–105 (illustrating how the Council "expanded the Court's jurisdiction while limiting its ability to carry out its mandate" in part because of non-state-parties' actions that sought to preclude the Court's jurisdiction over them).

124. Rome Statute, *supra* note 47, pmbl.

125. U.N. Charter art. 25.

126. *See About the ICTY*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/about> [<http://perma.cc/762S-VE7C>] (reporting that the Council established the ICTY as an ad hoc court in 1993 to address war crimes committed during the Balkan conflicts in the 1990s); *The ICTR in Brief*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/en/tribunal> [<http://perma.cc/GGV2-P4SD>] (reporting that the Council established the ICTR in 1995 to prosecute human rights violators during the Rwandan genocide).

legitimate Council actions and share in the burden of addressing pressing international problems. The Court can take action when the Council does not want to. But the Court can also complicate and even disrupt the work of the Council, particularly in situations where a majority of the Council seeks a resolution to a crisis that may involve an actor accused or indicted of grave crimes. A full inquiry into these conflicting interests and incentives cannot be carried out here, but we can at least survey the waterfront.

Consider first the challenges posed to the Council by the Court. That the ICC can initiate investigations without a green light from the Council was a hard-won victory for those who sought meaningful judicial independence. The original vision of the Council as a decisive body required that it be empowered to act with dispatch against threats to the peace. That the great powers (at least as of 1945) had a permanent place and veto was designed to allow that decisive action to take place only when no vital interest of a permanent member was threatened. This structure—inevitably frustrating to justice and fairness—was deemed essential lest the world once again risk devolving into an unimaginably horrific global conflagration.

The ICC's ability to initiate prosecutions does not alter this structure. But it permits a new and notable international organization to address core questions of international security in ways that can impinge on the traditional prerogatives of the Council and, perhaps, to interfere with the delicate politicking necessary to achieve peace. And it inevitably creates a new star in the international galaxy, one that has the potential to command both popular and diplomatic attention. While the Council can defer an ICC prosecution that it does not want, that decision must be renewed every twelve months (and, like any other substantive decision of the Council, must secure nine votes and no vetoes).¹²⁷ In short, the ICC can inject itself into areas of concern to the Council and, as long as one permanent member is supportive of the Court, the Council can do nothing about it.

This redistribution of power among international actors may seem abstract. Yet given the often close connection between breakdowns in state authority and grave crimes and the often vigorous disputes, both academic and political, over how (if at all) to balance peace and justice,¹²⁸ the ICC's

127. Rome Statute, *supra* note 47, art. 16.

128. See, e.g., Eric Blumenson, *The Challenge of A Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 804 (2006) (discussing the role of the Office of the Prosecutor and the proper weight it should give potentially conflicting claims of peace, pluralism, punishment, and justice); Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 210 (2008) (noting that international courts may negotiate peace in international conflict at the expense of justice but considering how courts can sometimes achieve both); Linda M. Keller, *The False Dichotomy of Peace Versus Justice and the International Criminal Court*, 3 HAGUE JUST. J. 12, 13 (2008) (explaining how the conflict in Uganda supports the argument that the international community can sometimes accept a peace

powers in this regard are hardly insignificant. Recall how stability was the core concern of the framers of the UN Charter and how the Council's powers and rules were explicitly crafted to ensure stability, both among and between the great powers and their informal empires.¹²⁹ In such a context, the ability of the Court to enter a conflict with an indictment becomes more than simply a matter of justice. It has the potential to upend carefully crafted compromises and strategies and insert considerations of law into what were, traditionally, largely political deliberations.

Yet the Court also offers real advantages to the Council. Because its work sounds in the language of justice, the Court can, when working alongside or in ways consistent with those of the Council, add an element of legitimacy to the sometimes craven and cynical deliberations of the Council. By appearing to “do something,” even if ineffectually, the ICC can take some heat off the Council in situations that the Council would rather not delve into. The ICC is also consistent with some important goals of the Council. To the degree the ICC is successful as a deterrent to atrocities, it furthers the overarching aim and *raison d'être* of the Council to preserve and secure global peace and security. And to the degree the ICC, through the doctrine of complementarity, builds judicial capacity in member states, it furthers the Council's interest in promoting the rule of law locally.

Given these differing interests, what kind of approaches, if any, would overcome the barriers to a sound relationship between the two institutions?

Structurally, the most important measure would involve the establishment of a regular channel of communication between the two institutions. The Council now has an informal Tribunals Working Group, devoted to issues related to the ICTY, ICTR, and Special Tribunal for Lebanon.¹³⁰ The members of the working group streamline Council decision-making in the area.¹³¹ An expanded working group should enable discussions of the ICC as well; it would not commit any Council member to any particular course of action with regard to the ICC's work, as the group operates on the basis of consensus, but would provide a forum for technical and relatively quiet

deal for impunity while promoting justice); Snyder & Vinjamuri, *supra* note 81, at 5 (arguing that the prosecution of perpetrators of atrocities according to universal standards risks causing more atrocities than it would prevent); Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 88 (2011) (suggesting that the ICC should promote peace as it does justice by assessing contextual factors in its interpretation of the law).

129. See U.N. Charter art. 1, ¶ 1 (declaring that the purpose of the United Nations is to maintain international peace and security).

130. *Working Groups*, UNITED NATIONS, http://www.un.org/en/sc/repertoire/subsidiary_organs/working_groups.shtml#cat6 [<http://perma.cc/86CJ-HYBS>].

131. *Id.*

discussions on a range of areas of common concern. A working group need not focus solely on Council-referred cases, especially given the engagement of the Council in areas such as the Cote d'Ivoire, Central African Republic, DRC, Kenya, Mali, and Uganda. The Court's annual report to the UN¹³² could serve as the basis for identification of Court needs.

In addition to structural innovations, a number of substantive changes, some more politically realistic, some less, would serve to protect the Court and advance state cooperation with it. We briefly describe several here:

1. Obligate States to Cooperate with the Court.—Referral resolutions have imposed obligations on the target states, Sudan and Libya, and other parties to the conflict, and they have encouraged cooperation by other states and regional and international organizations.¹³³ This is helpful, but falls short of the more concrete and sweeping obligations imposed under the resolutions establishing the ICTY and ICTR. Article 29(2) of the ICTY Statute, which obligates states to comply with trial chamber orders, should be a model for such obligations.¹³⁴ Council referrals involve the same kind of policy motivations that led to the ICTY and ICTR; likewise, the Council should impose similar kinds of obligations. Again, they need not be limited to referral situations, since the Council's engagement in other areas—such as the DRC—clearly indicates the Council's expectations of support as well.

2. Extend Key Rome Statute Protections in Referral Situations.—Privileges and immunities of international civil servants advance cooperation and indeed are central and long-standing features of international law precisely because they enable international relations. The work of any international institution will be undermined if governments do not respect the individuals conducting work on its behalf. Libya highlighted this problem in June 2012 when registry and defense-counsel officials were detained for a month, triggering a rare press statement on the ICC from the

132. Int'l Criminal Court, Rep. of the Int'l Criminal Court on its Activities in 2013/14, U.N. Doc. A/69/321 (Sept. 18, 2014); Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, *supra* note 48, art. 6.

133. S.C. Res. 1970, *supra* note 52, ¶¶ 4–6, 9–21 (deciding that the government of Libya shall cooperate with the ICC and provide assistance to the Court and prosecutor and proclaiming an arms embargo, asset freeze, and travel restrictions to Libya for member states of the Rome statute); S.C. Res. 1593, *supra* note 52, ¶ 2 (deciding that the government of Sudan shall cooperate with the ICC and provide assistance to the Court and prosecutor and encouraging the ICC to support international cooperation with domestic efforts to promote the rule of law and protect human rights).

134. U.N. Secretary-General, Rep. of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, art. 29, U.N. Doc. S/25704 (May 3, 1993).

Council.¹³⁵ All states, especially those subject to investigation, should accord Court officials all necessary privileges and immunities so they may carry out their work efficiently and without external intervention. Under Article 48 of the Rome Statute, Office of the Prosecutor and Registry staff “shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.”¹³⁶ This provision should be extended in application to all states at the time of referral, and the Council may consider extending it in specific nonreferral cases.

3. *Promote Funding in Referral Situations.*—The funding restriction appears inequitable to many, as it enables the Council to use the ICC as a Chapter VII tool without providing even a portion of the resources for the ICC to carry out its functions.

It is also argued that, as a matter of law under the UN Charter, the Council cannot “preclude the Assembly from budgeting for ICC situations.”¹³⁷ By contrast, among P-5 governments there is an argument that ICC member states must have understood at the time of Rome Statute adoption that Council referrals could not *obligate* the Council to fund those cases.¹³⁸

Ultimately, the realities of funding within the UN system take precedence over theory, and as seems always to be the case, the Court’s capacity to pursue investigations and prosecutions is stretched by a full docket involving investigations, hearings, motion practice, administration, and so forth. Every annual budget adopted by the Assembly of States Parties seems unlikely to support further serious referral cases. As argued elsewhere, “[f]uture referrals should seek to eliminate the offending funding paragraph and replace it either with nothing or with a more encouraging commitment of the Council to assist the Court in financing referral-related work.”¹³⁹

4. *Eliminate Jurisdictional Restrictions.*—Limitations on jurisdiction undermine the reputation and credibility of the Court and are widely seen as political concessions to nonparties—in particular, Russia, China, and the United States—that do not recognize the ICC’s jurisdiction over their

135. Press Release, Security Council, Security Council Press Statement on International Criminal Court Staff Detained in Libya, U.N. Press Release SC/10674-AFR/2405-L/3196 (June 15, 2012).

136. Rome Statute, *supra* note 47, art. 48, ¶ 3.

137. KAYE ET AL., *supra* note 74, at 21.

138. *Id.*

139. *Id.*

nationals.¹⁴⁰ These provisions respond to an unlikely hypothetical situation, and yet they generate considerable frustration among supporters of the Court.¹⁴¹ The symbolic importance was captured by the South African Deputy Permanent Representative to the UN when he asked, “How can the Council begin to trust the Court and, consequently, expect others to trust it, when it is unwilling to subject nationals of its member countries to the scrutiny of the ICC?”¹⁴²

5. *Work with Regional Bodies, Especially the African Union.*—The ICC’s ability to generate Council support will depend on the support of critical regional organizations as well. Much has been written about the African Union and the general problem, or phenomenon, of African focus by the ICC,¹⁴³ and we only pause here to note that a more positive approach by the African Union could be helpful in generating the support of other actors, especially China. Unfortunately, developments in 2016 seem to be militating against African Union support, as Kenya’s President Kenyatta, a former indictee of the Court, has been vigorously advocating for African Union member states to consider withdrawing from the Rome Statute.¹⁴⁴

6. *Conduct Diplomacy in New York to Encourage Support for Council Improvements Related to the ICC.*—Early indications suggest that China and Russia may be reluctant to move forward on some of the more promising efforts to build the Council–Court relationship, even in the technical sphere of the Council’s informal Tribunal Working Group.¹⁴⁵ ICC supporters, especially the United Kingdom, France, and the United States, should work closely with the Chinese and Russian delegations to identify the concerns and develop ways to overcome them. This could mean a limited mandate for the working group at the outset, focused on technical

140. See INT’L PEACE INST., *supra* note 50, at 3 (discussing the relationship between the UN Security Council and the ICC and the limitations of jurisdiction of the ICC).

141. See U.N. SCOR, 67th Session, 6849th mtg., *supra* note 61, at 9, 11–12, 16 (showing supporters of the ICC noting preferences for expansive jurisdiction which would include nationals and others (notably China, the United States, and Pakistan) arguing that some cases should be left to national jurisdiction).

142. *Id.* at 16–17.

143. See, e.g., Tendayi Achiume, *The African Union, the International Criminal Court, and the United Nations Security Council 6–7* (Nov. 2012) (unpublished manuscript) (discussing the tensions between the African Union and the ICC and the perception the ICC is an “African Criminal Court” rather than an international court). See generally Charles C. Jalloh, Dapo Akande & Max du Plessis, *Assessing the African Union Concerns About Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5 (2011) (assessing the African Union’s concerns regarding Article 16 of the Rome Statute).

144. Isaac Mugabi, *ICC: What Next for Africa and the Tribunal in Quest for Justice?*, DW (Feb. 2, 2016), <http://www.dw.com/en/icc-what-next-for-africa-and-the-tribunal-in-quest-for-justice/a-19020659> [<https://perma.cc/F6NL-NBEA>].

145. See KAYE ET AL., *supra* note 74, at 10–13 (chronicling China and Russia’s policies and reactions towards Council–Court relations).

exchange of information, and deferral of some of the recommended policy changes.

7. *Involve China and Russia in Unofficial Meetings Related to International Justice.*—The United Kingdom, France, and the United States have expressed relatively consistent support for the ICC in recent years and have engaged with the community of governments, NGOs, and scholars thinking through how to improve the institution and cooperation with it.¹⁴⁶ Chinese and Russian delegations have participated less regularly in discussions outside the Council or Assembly of States Parties.¹⁴⁷ ICC supporters should seek to involve Chinese and Russian counterparts in the efforts to build a constructive Council–Court relationship by including them in unofficial discussions. Neither government is a confirmed spoiler of the Court; each has accepted the referrals of situations to the ICC and joined in the Council resolutions expressing support for ICC activity in nonreferral situations.¹⁴⁸ Each said supportive things about the ICC’s work during the October 2012 open debate on the Court.¹⁴⁹ But, they have not sufficiently participated in the range of conversations about the relationship otherwise. An active approach to bring them into those discussions could go a long way.

8. *Build a Knowledge Base over the Long Term.*—Knowledgeable actors at the domestic and international levels should begin a long-term process of engaging foreign policy analysts on ICC issues. Sustainable Chinese and Russian support for a cooperative Council–Court relationship will require exchanges that go beyond legal scholars and involve security

146. See *id.* at 9–10, 16 (discussing France and the United Kingdom’s support for the ICC and the United States’ better relationship with the ICC in recent years, as well as the important role NGOs play in the development of the ICC).

147. See UNIV. OF CAL. IRVINE SCH. OF LAW, THE BEIJING WORKSHOP ON THE UNITED NATIONS SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: SUMMARY OF DISCUSSIONS 2 (2014) (“Yet while the governments of Russia and China have remained non-party observers . . . of the activities of the ICC, until recently neither they nor Russian and Chinese academics and analysts have been actively engaged in international discussions about the Court and its relationship with the Council.”), <http://councilandcourt.org/files/2014/06/Beijing-Workshop-Proceedings.pdf> [<https://perma.cc/YY6L-ED6B>].

148. See, e.g., Joel Wuthnow, *China and the ICC*, DIPLOMAT (Dec. 7, 2012), <http://thediplomat.com/2012/12/china-and-the-icc/> [perma.cc/56GR-TLD7] (noting, for example, China’s agreement to launch ICC tribunals for Rwanda and the former Yugoslavia in the 1990s, its acquiescence to a referral of Darfur in 2005, and its vote in 2011 to refer Libya’s Muammar Qaddafi); *The International Criminal Court Bares its Teeth*, ECONOMIST (May 12, 2011), <http://www.economist.com/node/18682044> [<https://perma.cc/9JHH-D3G2>] (noting, among other things, Russia’s acquiescence to various referrals).

149. See, e.g., U.N. SCOR, 67th Sess., 6849th mtg., *supra* note 61, at 12 (stating the ICC is “an integral part of the international system of the rule of law”); *id.* at 19–20 (calling for broader support for the ICC and expressing hope the ICC would become a “truly universal organ of international criminal justice”).

and policy analysts in government and academia. International criminal law experts in China and Russia, natural constituencies to support national engagement with the ICC, would benefit from a higher profile in policy-making circles. Court supporters could encourage this in a number of ways: engage them in building educational programs for nonlaw analysts in government (and, for China, Party) institutions; establish collaborations that involve domestic thinkers in addressing international justice issues; help academics and analysts take research trips to The Hague and to institutions in the United States and Europe; and fund internship opportunities for promising students.

9. *Identify Areas of Collaboration in International Justice.*—Chinese and Russian officials have expressed commitment to the principles of accountability and justice, and their delegations have repeatedly voted in favor of ICC-supportive resolutions at the Council.¹⁵⁰ These demonstrations of support should be advanced and nourished. Beyond the ICC, there are areas where Chinese engagement in particular could be especially useful, such as helping to build national jurisdictions (perhaps by involving Chinese help in infrastructure building).¹⁵¹

Conclusion

The International Criminal Court “represents one of the world’s most elaborate experiments in enforcing legal restrictions on violence.”¹⁵² Although it suffers from many grave infirmities that have severely limited its reach and power, the ICC is nonetheless a major step forward in the long and arduous quest for justice at the international level. David Bosco’s *Rough Justice* ably documents the most recent twists and turns in that quest and details how, in his words, “powerful states and a potentially revolutionary court learned to get along.”¹⁵³

For all its power and promise, the ICC functions in a larger framework of global governance. At the core of this framework rests the great powers. Without the strong support of those powers, the ICC will remain a niche player with much of its docket driven by external actors and factors and little ability to make a difference in the hardest cases. The Security Council is both the primary institutionalized forum for great power politics and the key interlocutor for the Court. Building deep support within the Security

150. See KAYE ET AL., *supra* note 74, at 10 (stating that China and Russia have participated as observers in ICC meetings and have joined Council resolutions and statements supporting the ICC).

151. See DAVID A. KAYE, COUNCIL ON FOREIGN RELATIONS, JUSTICE BEYOND THE HAGUE: SUPPORTING THE PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL COURTS 28 (2011) (highlighting the importance of building infrastructure in developing the rule of law).

152. BOSCO, *supra* note 11, at 177.

153. *Id.* at 2.

Council will be essential to the Court's future. This will not be easy, especially since China, Russia, and the United States remain nonparties to the Court, with little prospect of change. Yet the Court has great potential as a tool to help the Council achieve its mandate "to promote the establishment and maintenance of international peace and security."¹⁵⁴ In the long run, a strong Council–Court relationship may prove impossible. But it is in the interest of both institutions to try very hard to achieve it.

154. U.N. Charter art. 26.

Notes

The Writing Is on the Wall: How the *Briseno* Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*

I. Introduction

In 2002, the Supreme Court held in *Atkins v. Virginia*¹ that the execution of intellectually disabled people is cruel and unusual punishment in violation of the Eighth Amendment.² When *Atkins* was decided, Texas did not have a statute governing how intellectual disability claims should proceed in the capital context, so Texas's highest criminal court, the Court of Criminal Appeals (CCA), created the legal framework to govern these claims.³ Notably, the CCA did more than create procedural rules to govern *Atkins* claims; citing concerns about whether Texans believe that all intellectually disabled capital offenders should be exempted from the death penalty, the CCA created a distinctive and restrictive approach to determining intellectual disability. Recently though, in *Hall v. Florida*,⁴ the Supreme Court held a Florida practice unconstitutional because it was restrictive and diverged from professional norms.⁵ This Note serves as a comprehensive evaluation of Texas's approach in theory and practice, highlighting its departure from *Atkins* and *Hall* and the important policy objectives that guided those decisions.

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1. 536 U.S. 304 (2002).

2. *Id.* at 321. In the mid-2000s, “intellectual disability” (ID) became the preferred term for the disability previously known as “mental retardation.” Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116 (2007). Court opinions used the term “mental retardation” until *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014), when the Supreme Court changed its terminology. Thus, while I will use “intellectual disability” throughout this Note, quotations from court cases may use “mental retardation.”

3. *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

4. 134 S. Ct. 1986 (2014).

5. *Id.* at 1990, 1995, 2001.

First and foremost, the Note will argue that the CCA's approach to determining intellectual disability contradicts the fundamental holding of *Atkins*: that all individuals with intellectual disability should be exempt from execution. The Note will then examine and demonstrate how, in order to effectuate its more restrictive understanding of intellectual disability, the CCA substantively changed the definition of intellectual disability, departing from traditional diagnostic practices by creating new categories of assessment—"the *Briseno*⁶ factors." These factors ignore many professional notions about how to assess an individual's adaptive deficits—an aspect of the intellectual disability diagnosis that focuses on how the individual functions day-to-day in society. Because of the *Briseno* factors' deviation from professional practices, this Note argues that they create an unconstitutional risk of executing an intellectually disabled person under *Hall*, in which the Supreme Court reaffirmed the importance of professional practices in *Atkins* determinations.⁷ This is true despite several cases decided since *Hall* that have attempted to justify the use of the *Briseno* factors.⁸ Finally, this Note concludes by recognizing that while there are inherent difficulties in evaluating and diagnosing capital defendants for intellectual disability, the solution is to privilege the best and most reliable information that can be obtained consistent with best practices in the clinical community—not to add artificial categories to the diagnosis that do not add to the accuracy of the analysis and which ultimately undermine the existing clinical approach.

II. Underenforcement of *Atkins v. Virginia* in Texas

A. *Atkins v. Virginia and the Texas Response*

Atkins was a dramatic reversal of *Penry v. Lynaugh*,⁹ decided a short thirteen years earlier. In *Penry*, the Court had considered creating a categorical bar on executing intellectually disabled people but declined to do so, finding no "national consensus" against execution of the intellectually disabled because only one state and the federal government barred their execution.¹⁰ Furthermore, Justice O'Connor found that while intellectual disability should be considered by the jury as a mitigating factor against

6. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

7. *Hall*, 134 S. Ct. at 1995–2000.

8. *See, e.g., Ex parte Cathey*, 451 S.W.3d 1, 10 n.22 (Tex. Crim. App. 2014) (characterizing *Atkins* hearings as "a subjective battle between dueling forensic experts," necessitating the CCA's development of the "more objective" *Briseno* factors); *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) (stating that while clinical determinations of mental retardation are "instructive," they do not always conclusively answer whether the Constitution permits the death penalty in a given case).

9. 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

10. *Id.* at 334. At the time of the decision, one other state had enacted legislation barring the execution of the intellectually disabled, but it had not yet taken effect. *Id.*

imposition of the death penalty, not “all mentally retarded people of Penry’s ability . . . inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.”¹¹

By the time *Atkins* was decided in 2002, seventeen additional states had passed legislation barring the execution of intellectually disabled people.¹² Although this number did not constitute a majority of states, or even a majority of death penalty states—a factor that the Court has found important in other cases¹³—the Court emphasized the “consistency of the direction of change”¹⁴ in demonstrating a national consensus against the execution of the intellectually disabled. The Court also indicated, contrary to its finding in *Penry*, that all individuals who are clinically diagnosed as having intellectual disability “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁵ Thus, they bear “diminish[ed] . . . personal culpability.”¹⁶ The Court recognized that “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.”¹⁷ Quoting *Ford v. Wainwright*,¹⁸ which prohibited the execution of insane defendants,¹⁹ the Court left to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”²⁰

Notably, the Court in *Atkins* listed Texas among the seventeen states that had passed legislation exempting capital offenders with intellectual disability.²¹ In 2001, the Texas legislature unanimously passed a bill barring the execution of the intellectually disabled,²² which Rick Perry, then Governor of Texas, subsequently vetoed.²³ However, he did so not because he disagreed with the principle of exempting persons with intellectual disability, but because of what he perceived as a procedural flaw in how the bill allocated responsibility between judges and juries in determining intellectual

11. *Id.* at 338 (opinion of O’Connor, J.).

12. *Atkins*, 536 U.S. at 314–15.

13. *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 422–23 (2008), *modified on denial of reh’g*, 554 U.S. 945 (2008); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 594 (1977).

14. *Atkins*, 536 U.S. at 315.

15. *Id.* at 318.

16. *Id.*

17. *Id.* at 317.

18. 477 U.S. 399 (1986).

19. *Id.* at 401.

20. *Id.* at 416–17.

21. *Atkins*, 536 U.S. at 315.

22. *Id.*

23. *Id.* at 315 n.16.

disability.²⁴ In his veto statement, Governor Perry wrote: “We do not execute mentally retarded murderers today.”²⁵

Because of this veto, Texas did not have a legislative framework in place to enforce *Atkins*'s holding.²⁶ Thus, when the first post-*Atkins* intellectual disability claim was submitted to the CCA, the CCA announced the various procedures and standards that would be used in the determination of intellectual disability.²⁷ In addition to resolving purely procedural issues, such as the burden of proof and whether a jury determination was required,²⁸ the CCA adopted a new substantive definition of intellectual disability.²⁹ The CCA justified its more restrictive definition based on its view that not all persons who satisfy the prevailing clinical definition of intellectual disability are undeserving of the death penalty.³⁰ The centerpiece of this more limited approach focuses on the adaptive deficits prong of intellectual disability.³¹ Instead of adopting the standard clinical definition, the court promulgated the *Briseno* factors, ostensibly to supplement the standard clinical definition of intellectual disability.³² In fact, those factors have supplanted the professional definition in Texas courts and have resulted in a troublingly low rate of success in Texas *Atkins* claims compared to other death penalty states.³³

24. Veto Proclamation of Gov. Perry, Tex. H.B. 236, 77th Leg., R.S. (2001), <http://www.lrl.state.tx.us/scanned/vetoes/77/hb236.pdf> [<https://perma.cc/X35Z-DQ8P>].

25. *Id.*

26. *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

27. *Id.*

28. *Id.* at 10, 12 (holding that defendants are not entitled to have a jury determine the question of mental retardation and that defendants must establish their intellectual disability by a preponderance of the evidence).

29. *Id.* at 7–8 (adopting the American Association on Mental Retardation definition for mental retardation as “(1) ‘significantly subaverage’ general intellectual functioning; (2) accompanied by ‘related’ limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18” until an alternate definition is provided by the Texas Legislature for capital sentencing (footnotes omitted)).

30. *See id.* at 5–6 (observing that mental retardation ranges in severity and emphasizing that it is up to the states to determine which individuals are so impaired as to fall within the range of offenders who would be ineligible for the death penalty under *Atkins*).

31. *See id.* at 8, 18 (adopting additional factors for adaptive behavior and denying the applicant's claim of mental retardation based on a failure to show significant limitations in adaptive functioning); John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 407–08 (2014) (noting how the *Briseno* factors distort the analysis of adaptive functioning).

32. *See Briseno*, 135 S.W.3d at 8–9.

33. *See* Blume et al., *supra* note 31, at 397, 413 (finding that the average national success rate for *Atkins* claims is 55% while the success rate in Texas is only about 17%). In that article, the authors found that success rates were significantly lower in states that deviate substantially from clinical practices. *Id.* at 412–14. Texas, of course, deviates from clinical practices with its use of the *Briseno* factors. *Id.* at 414. Florida and Alabama, with success rates of 0% and 15% respectively, adhered to strict IQ-score cutoffs (prior to *Hall*, which invalidated this practice). *Id.* at 413–14. Georgia, with a success rate of 11%, is the only state that requires a showing of intellectual

Specifically, as this Note will demonstrate, the *Briseno* factors have functionally displaced and distorted the “adaptive deficits” inquiry that is used in widely accepted clinical definitions of intellectual disability. The following subparts will describe: (1) the *Briseno* factors and the CCA’s administration of intellectual disability claims, demonstrating how the factors have been deployed to defeat even strong claims of intellectual disability, (2) the ways in which *Ex parte Briseno* misreads *Atkins* as permitting a substantive redefinition of intellectual disability in violation of *Atkins* and *Hall*, and (3) the ways in which the factors defy clinical definition, perpetuate unfounded stereotypes about intellectual disability, and underprotect the class of persons that *Atkins* intended to exempt from execution.

B. *The Briseno Factors*

Although the Supreme Court gave discretion to states to develop appropriate procedures for implementing *Atkins*, the Court gave no discretion to states to alter the class of people protected—the intellectually disabled. Throughout the decision, the Court discusses this class of people by reference to clinical definitions of intellectual disability.³⁴ Specifically, the Court cited the definitions promulgated by the major national professional organizations on the subject: the American Association on Intellectual and Developmental Disabilities (AAIDD)—at the time known as the American Association on Mental Retardation (AAMR)—and the American Psychiatric Association (APA), which produces the Diagnostic and Statistical Manual (DSM).³⁵ Both definitions are similar and require the defendant to meet the following three criteria:

disability beyond a reasonable doubt—other states require the lower burden of preponderance of the evidence. *Id.* at 401 n.39, 412–14.

34. For example, the Court stated:

As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins v. Virginia, 536 U.S. 304, 318 (2002).

35. *Id.* at 308 n.3; Press Release, Am. Ass’n on Mental Retardation, World’s Oldest Organization on Intellectual Disability Has a Progressive New Name (Nov. 27, 2006), <http://www.pnnewsire.com/news-releases/worlds-oldest-organization-on-intellectual-disability-has-a-progressive-new-name-56524127.html> [<https://perma.cc/R3Z6-NUF8>].

1. Significant subaverage intellectual functioning (usually defined as an IQ that is two standard deviations below the mean, generally 70 or below with a 5-point standard error measurement);³⁶
2. Significant limitations in adaptive functioning (normally this means a finding of significant deficits in two or more skill areas);³⁷ and
3. Onset in the developmental period (typically considered to be before the age of eighteen).³⁸

The second criterion, adaptive functioning, refers to the “skills that people have learned to be able to function in their everyday lives. Significant limitations in adaptive behavior impact a person’s daily life and affect the ability to respond to a particular situation or to the environment.”³⁹ For purposes of evaluating an individual’s adaptive functioning, a basic tenet of professional diagnosis is that “people with ID . . . have strengths mixed with deficits.”⁴⁰ This means that individuals with intellectual disability are able to function in some areas like normally functioning people while having weaknesses in other areas.⁴¹ This is especially true of individuals with mild intellectual disability, who are often able to function normally in many or even most respects, and whose disability may go unnoticed for much of their lives.⁴²

36. *Atkins*, 536 U.S. at 308 n.3.

37. *Id.* For the AAIDD, the defendant must show limitations in two or more of the following areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, or work. AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (10th ed. 2002). For the DSM, the defendant must show sufficient impairment in at least one domain of adaptive functioning—conceptual, social, or practical—that the defendant needs ongoing support to perform adequately in one or more life settings at school, work, home, or in the community. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013).

38. *Atkins*, 536 U.S. at 308 n.3.

39. AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, FREQUENTLY ASKED QUESTIONS ON INTELLECTUAL DISABILITY AND THE AAIDD DEFINITION 2 (2008), http://aaidd.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=2 [<http://perma.cc/3U6J-WJTD>]; see also J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 2. The Importance of Adaptive Behavior*, PSYCHOL. MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, Fall 2006, at 7, 7 (“[A]t its heart, the diagnosis of mental retardation is not primarily about test scores; it is about whether the individual has been able to function adequately in age-appropriate roles throughout life. In other words, the essence of a valid diagnosis is adaptive behavior.”).

40. Stephen Greenspan, *The Briseño Factors*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 219, 229 (Edward A. Polloway ed., 2015).

41. *Id.*

42. *Id.* at 221 (emphasizing that “ID at the upper end of the spectrum is a somewhat hidden disability, as many individuals who apply for *Atkins* relief do not stand out in appearance or behavior in routine (especially brief) settings as obviously impaired”).

After the Supreme Court decided *Atkins*, the Texas Court of Criminal Appeals in *Briseno* adopted the AAMR (and the very similar Texas Health and Safety Code) definition of intellectual disability.⁴³ However, the CCA was concerned that this definition, while appropriate in the context of social services, might not conform to what most Texans would agree justifies exemption from the death penalty.⁴⁴ The court stated: “Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment.”⁴⁵ To this end, the CCA stated that their role was to “define *that level and degree of mental retardation* at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”⁴⁶ As an example of an individual that most Texans would agree should be exempt, the court cited Lennie, the fictional character in Steinbeck’s *Of Mice and Men*.⁴⁷

With regard to the AAMR definition of intellectual disability, the court was especially concerned with the second prong—adaptive deficits—which the Court found to be “exceedingly subjective.”⁴⁸ To alleviate these concerns and to help establish the proper “level and degree” of intellectual disability required for exemption in Texas, the CCA established factors which “factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder.”⁴⁹

43. *Ex parte Briseno*, 135 S.W.3d 1, 7–8 (Tex. Crim. App. 2004).

44. *See id.* at 6 (“[I]s there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a ‘mental retardation’ bright-line exemption from our state’s maximum statutory punishment?”).

45. *Id.* at 8. While the CCA implied that Texas citizens would find this definition to be over-inclusive, it is worth noting that the pre-*Atkins* bill exempting intellectually disabled capital offenders—which was passed unanimously by the Texas House and Senate, but later vetoed by then-Governor Perry—adopted the Texas Health and Safety Code definition of intellectual disability. *Id.* at 6.

46. *Id.* (emphasis added).

47. *Id.*

48. *Id.* at 8.

49. *Id.* at 6, 8. This statement—that the factors should be used by factfinders to “weigh[] evidence as indicative of mental retardation or a personality disorder”—could be read to mean that the factors should only be used to differentiate symptoms that could be indicative of a personality disorder (for which there is no constitutional exemption) rather than intellectual disability. *See id.* at 8. However, in practice this distinction has been almost entirely ignored, and the factors have been used in cases where no evidence of personality disorder is presented. *See, e.g., Ex parte Butler*, 416 S.W.3d 863, 874–78 (Tex. Crim. App. 2012) (per curiam) (reviewing evidence of the defendant’s intellectual ability—without discussing any evidence of a personality disorder—in upholding the trial judge’s determination that the defendant failed to prove that he was mentally retarded).

These seven factors are now known as the *Briseno* factors, enumerated as follows:

- [1.] Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- [2.] Has the person formulated plans and carried them through or is his conduct impulsive?
- [3.] Does his conduct show leadership or does it show that he is led around by others?
- [4.] Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- [5.] Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- [6.] Can the person hide facts or lie effectively in his own or others' interests?
- [7.] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?⁵⁰

In creating these factors, the CCA emphasized:

Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.⁵¹

Thus, the court made clear that experts could agree that a defendant meets the diagnostic criteria of intellectual disability, yet a jury or judge could still find that this defendant does not meet the standard of intellectual disability required for exemption from the death penalty.⁵² And indeed, this scenario has played out in several cases as illustrated below.

50. *Briseno*, 135 S.W.3d at 8–9.

51. *Id.* at 9.

52. See, e.g., Findings of Fact and Conclusions of Law at 18, *Ex parte* Clark, No. F-93-0713-C (211th Dist. Ct., Denton County, Tex. Nov. 20, 2003) [hereinafter *Ex parte* Clark Findings of Fact and Conclusions of Law] (“[E]ven if Applicant falls within the upper range of mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty.” (emphasis added)); Findings of Fact and Conclusions of Law at 9, *Ex parte* Taylor, No. C-297-006327-0542281-B (297th Dist. Ct., Tarrant County, Tex. Sept. 29, 2004) (coming to the same conclusion) [hereinafter *Ex parte* Taylor Findings and Conclusions].

C. *Application of Briseno Factors*

Juan Lizcano was found guilty of capital murder in 2007.⁵³ The same jury that convicted Lizcano was charged with deciding whether he was intellectually disabled during the sentencing phase of the trial—at the same time they decided whether he deserved to live or die.⁵⁴ Lizcano needed to show by a preponderance of the evidence that he was intellectually disabled.⁵⁵ Lizcano had a full-scale IQ of 60,⁵⁶ and the CCA subsequently determined that Lizcano had adequately shown significant deficits in intellectual functioning.⁵⁷

The claim, then, turned on the adaptive-deficits inquiry.⁵⁸ In order to meet this burden, the defense had psychologists administer various tests and review interviews with his family and friends.⁵⁹ Two psychologists testified that Lizcano had significant deficits in adaptive behaviors.⁶⁰ One testified that Lizcano had deficits in two areas—communication and self-care—thus meeting the clinical requirement of significant deficits in at least two areas.⁶¹ On cross-examination, though, the prosecutor insisted that Texas’s definition of intellectual disability differed from the clinical definition the expert had used, specifically because of Texas’s embrace of the *Briseno* factors.⁶²

The defense elicited testimony from Lizcano’s elementary school teacher that Lizcano was a “very slow” learner, having remained in the sixth grade until the age of fifteen, when he had to leave because he was too old to remain.⁶³ Testimony from others revealed that Lizcano didn’t understand funny stories and often laughed inappropriately,⁶⁴ couldn’t read a clock,⁶⁵ had difficulty following simple directions, and dressed inappropriately—including one time when he wore his girlfriend’s blouse, thinking it was a t-

53. *Ex parte* Lizcano, No. WR-68,348-03, slip op., at 1 (Tex. Crim. App. Apr. 15, 2015) (per curiam) (not designated for publication), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=ba5373fd-f5bd-40d0-9057-f8745da181b7&coa=coscca&DT=OTHER&MediaID=80ee9ff7-6d94-48ab-b0cc-f9b7277bcd00> [https://perma.cc/6LMZ-5ECS].

54. *Id.* at 1–2 (applying TEX. CODE CRIM. PROC. ANN. art. 37.071 2(e)(1) (West 2006)).

55. *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *11 (Tex. Crim. App. May 5, 2010) (not designated for publication).

56. Transcript of Proceedings vol. 56 at 46, *State v. Lizcano*, No. F05-59563-QS (282nd Dist. Ct., Dallas County, Tex. Oct. 31, 2007) [hereinafter *Lizcano* Transcript].

57. *See Lizcano*, 2010 WL 1817772, at *11–12 (finding that Lizcano “clearly satisfied” the sub-average general intellectual functioning prong of the intellectual disability inquiry).

58. *Id.* at *11.

59. *Lizcano* Transcript, *supra* note 56, vol. 56 at 8–9, 28–29, 103–05.

60. *Id.* at 8–9, 103–05, 117.

61. *Id.* at 40.

62. *Id.* at 56 (“So the definition that the jury has is going to be different, then, than the definition you used in the clinical approach . . . ?”).

63. *Lizcano*, 2010 WL 1817772, at *12.

64. *Lizcano* Transcript, *supra* note 56, vol. 54 at 31.

65. *Id.* vol. 53 at 25.

shirt.⁶⁶ Lizcano's former supervisor testified that he had to help Lizcano read the measurements on a ruler ten to fifteen times a day and that Lizcano was "almost childish."⁶⁷ Lizcano could perform tasks immediately after they were explained to him, but would be unable to perform those same tasks ten to fifteen minutes later.⁶⁸ He was never able to learn how to use a saw and was not trusted with putting traffic cones on the streets because his supervisors didn't believe he could adequately gauge the proper stopping distance.⁶⁹ Lizcano's supervisor testified that, of all the employees he had encountered on the job, Lizcano was the only one who was simply unable to learn the skills for the job.⁷⁰

The state presented no expert testimony on the issue of Lizcano's intellectual disability, despite having engaged a psychologist to interview Lizcano.⁷¹ Instead, the state called a used-truck salesman who had sold a truck to Lizcano.⁷² The salesman testified that during the transaction, he saw nothing about Lizcano's mental capacity that caused him to hesitate in selling Lizcano a truck.⁷³ The jury found that Lizcano was not intellectually disabled and sentenced him to death.⁷⁴

Michael Wayne Hall, executed in 2011, likewise lost his *Atkins* claim because of the CCA's *Briseno* approach.⁷⁵ During the *Atkins* hearing in the state trial court, three defense experts provided testimony or affidavits concluding that Hall was intellectually disabled,⁷⁶ and the only expert for the state conceded that Hall was either mildly intellectually disabled or borderline intellectually disabled.⁷⁷ Hall's mother and brother testified that Hall had been in special education classes from first through eighth grade,⁷⁸ that

66. *Id.* at 33, 36–37.

67. *Lizcano*, 2010 WL 1817772, at *14; *Lizcano* Transcript, *supra* note 56, vol. 54 at 56.

68. *Lizcano* Transcript, *supra* note 56, vol. 54 at 57.

69. *Id.* at 55–56.

70. *Id.* at 57.

71. *Id.* vol. 58 at 37.

72. *Id.* vol. 56 at 162–64.

73. *Id.* at 165.

74. *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *1, *10 (Tex. Crim. App. May 5, 2010) (not designated for publication).

75. *See* *Hall v. State*, 160 S.W.3d 24, 38 (Tex. Crim. App. 2004) (observing that the groundwork for the court's conclusion in the case at bar had been laid in *Briseno*); *Executed Offenders*, TEX. DEP'T CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html [<https://perma.cc/4ZVP-K5Z2>].

76. *Hall*, 160 S.W.3d at 39–40.

77. *Id.* at 30. This expert testified that Hall was "at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's—it's sort of a judgment call." *Id.*

78. *Id.* at 27–28. The majority emphasized that Hall's school labeled him "learning disabled" and not "mentally retarded." *Id.* at 29. But in fact, school records showed that the school had tried to designate Hall as "mentally retarded" but had not done so at his mother's request. *Id.* at 44 (Johnson, J., dissenting).

at the age of fifteen he played with eight- to nine-year-olds, that he could not count money or tell time on a traditional clock, that he could not use public transportation, and that he often became lost just a few blocks from home.⁷⁹

One teacher testified that Hall could not understand concepts, even after repetition, and that he would forget things from one day to the next.⁸⁰ Another teacher testified that she had to set a five-minute task timer to keep Hall on task; otherwise he would fall asleep or sit and stare.⁸¹ Several teachers noted that Hall drooled in class, and one remarked that he was the object of ridicule by his classmates.⁸²

A fellow death row inmate, incarcerated in a cell immediately adjacent to Hall's, noted that Hall was called "Half Deck" by guards and inmates and that Hall had become very upset when he found out that a civil lawsuit had been filed against him by the victim's family because he thought he could get another death penalty from the suit.⁸³ Hall's trial attorneys submitted affidavits stating that even after repeated explanations, Hall could not understand the legal theory that made him eligible for capital murder (Hall's codefendant had killed the victim, so Hall was only death eligible under the law of parties), and that Hall would ask them a question, say that he understood the answer, and then re-ask the same question within a short period of time.⁸⁴

In support of its case, the state presented the testimony of a waitress who had once served Hall and who observed that he had ordered his own meal and appeared to eat it using proper eating utensils.⁸⁵ A former coworker testified to Hall's ability to bag groceries.⁸⁶ The state also presented affidavits from five guards on death row, who stated that they did not believe that Hall was intellectually disabled.⁸⁷ In affirming the trial court's finding that Hall was not intellectually disabled, the CCA also emphasized that Hall could read and write at a fourth-grade level, use a phone, operate a microwave, unload a dishwasher, and use a pen and pencil, among other things.⁸⁸ The CCA further noted that one of the defense experts conceded that during one

79. *Id.* at 27–28 (majority opinion).

80. *Id.* at 28.

81. *Id.*

82. *Id.* at 29, 34.

83. *Id.* at 34.

84. *Id.* at 34; *id.* at 42 (Johnson, J., dissenting).

85. *Id.* at 31 (majority opinion).

86. *Id.*

87. *Id.* at 34–35.

88. *Id.* at 28.

of his interviews, Hall had lied to him about several issues relating to the crime.⁸⁹ The court also cited the circumstances of the crime itself as evidence that Hall was not intellectually disabled.⁹⁰

The cases of Juan Lizcano and Michael Wayne Hall are not “battles of the experts” like so many factually difficult cases. In all of these cases, the experts were overwhelmingly on the defense’s side, yet the *Briseno* factors, with their emphasis on lay opinion and anecdotal evidence of functioning, allowed the state to prevail.

Thus, the *Briseno* factors enable the CCA to affirm findings of no intellectual disability despite un rebutted expert testimony to the contrary. And while the CCA has indicated that consideration of the factors is not mandatory, they have functionally become required, especially if a trial judge credits the defendant’s expert and not the state’s. In *Ex parte Sosa*,⁹¹ the CCA remanded a trial court’s finding of intellectual disability for further consideration,⁹² notwithstanding the CCA’s position that in reviewing a trial court’s *Atkins* determination, “we afford almost total deference to a trial judge’s determination of the historical facts supported by the record, especially when those fact findings are based on an evaluation of credibility and demeanor.”⁹³ But the trial judge in *Sosa*’s case had credited the defense expert, who stated that the last *Briseno* factor—whether the facts of the crime itself showed “forethought, planning, and complex execution of purpose”—was contrary to AAIDD standards for diagnosing intellectual disability.⁹⁴ Furthermore, the case involved an actual innocence claim, so the expert did

89. *Id.* at 30.

90. *Id.* at 40. The court does not explain exactly which aspects of the crime demonstrate Hall’s intellectual ability, but to the extent that it is relevant, Hall and a friend abducted a mentally disabled former co-worker and they took her to a remote location where they shot at her with various weapons. *Id.* at 27. Hall’s codefendant did the brunt of the shooting, including the fatal shot, but Hall shot at her with a pellet gun. *Id.* Several days later, Hall and his codefendant returned to the crime scene, and a few weeks later they were arrested while trying to flee to Mexico. *Id.* While this was undoubtedly a heinous crime, nothing about it is particularly sophisticated or well planned, and Hall appears to have been following the lead of his older and more violent codefendant—behavior consistent with intellectually disabled individuals. See *id.* (explaining the codefendant’s leading role in the crime); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (stating that “[m]entally retarded persons” are more apt to act on impulse rather than construct premeditated plans and, in group settings, are “followers rather than leaders”).

91. 364 S.W.3d 889 (Tex. Crim. App. 2012).

92. *Id.* at 890.

93. *Ex parte Briseno*, 135 S.W.3d 1, 12–13 (Tex. Crim. App. 2004).

94. *Sosa*, 364 S.W.3d at 893. The AAIDD does, in fact, instruct professionals that they should not consider the facts of the crime. Brooke Amos, *Atkins v. Virginia: Analyzing the Correct Standard and Examination Practices to Use when Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469, 494 (2011).

not discuss the facts of the crime with the defendant.⁹⁵ As a result, the defense expert offered no opinion about whether the facts of Sosa's crime revealed forethought or planning.⁹⁶

On review, the CCA was concerned with this perceived omission, noting that

[t]here appears to be a marked inconsistency between the evidence of the applicant's actions adduced at the applicant's 1984 trial and the evidence of his abilities adduced at his 2008 habeas hearing. In the current record, we have no basis on which to make a determination of whether a man who committed the offense that a jury found beyond a reasonable doubt in 1984 could have had the disabilities that the applicant proved by a preponderance of the evidence to a habeas judge in 2008.⁹⁷

This reasoning exemplifies the CCA's belief that a professional diagnosis of intellectual disability—which by its nature will not address the facts of the crime—may not suffice for purposes of an *Atkins* exemption. Thus, the CCA remanded the case so that the judge could make findings as to whether the symptoms of mental retardation that the applicant has alleged are inconsistent with his being able to commit the crime of which he was convicted, and whether, considering the facts of the offense and the applicant's role in the offense, the judge still finds that the applicant is mentally retarded.⁹⁸

The CCA seemed to recognize the contradiction between their holding in *Ex parte Sosa* and the fact that they “did not make consideration of any or all of these [*Briseno*] factors mandatory.”⁹⁹ However, the court justified this contradiction by emphasizing that the *Briseno* factors reflected concerns expressed by the Supreme Court in *Atkins*: whether the defendant's limitations in adaptive functioning make him “less morally culpable, less responsive to deterrence, and less capable of assisting in his own defense.”¹⁰⁰ In cases of severe intellectual disability, the court went on to say, the answer to these questions is certainly “yes.”¹⁰¹ But in more borderline cases, a clinical diagnosis of intellectual disability is not always enough.¹⁰² In these cases,

95. *Sosa*, 364 S.W.3d at 893.

96. *Id.*

97. *Id.* at 895.

98. *Id.* at 896.

99. *Id.* at 892.

100. *Id.*

101. *Id.*

102. *Id.* (“Answering questions about whether the defendant is mentally retarded for particular clinical purposes is instructive as to whether the defendant falls into the ‘range of mentally retarded offenders’ protected by the Eighth Amendment, but it will not always provide a conclusive answer to that ultimate legal question.”).

then—as demonstrated in *Ex parte Sosa*—consideration of the *Briseno* factors is functionally required in order to find a defendant intellectually disabled.

Briseno has been challenged in the Fifth Circuit on several occasions, but each time the court has stated its approval of *Briseno* and the *Briseno* factors.¹⁰³ The factors have also found support in Pennsylvania, where the Supreme Court of Pennsylvania has approved their use in the consideration of intellectual disability.¹⁰⁴

III. *Briseno* Departs from Professional Standards and Conflicts with Supreme Court Decisions

A. *Briseno* Stems from a Misreading of *Atkins* v. Virginia

In creating the *Briseno* factors, the CCA stated that “[w]e . . . must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”¹⁰⁵ This statement—and the subsequent creation of the *Briseno* factors—reveals a major misinterpretation of *Atkins* by the CCA. The CCA viewed *Atkins* as a substantive delegation to the states to determine the class exempt from the death penalty. While the Court did delegate to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,”¹⁰⁶ the class of individuals protected was clear—all intellectually disabled offenders. *Briseno* rejects that conclusion.¹⁰⁷

The CCA’s confusion seems to come from a misreading of a key sentence in *Atkins*, in which the Court states that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”¹⁰⁸

103. *Rosales v. Quarterman*, 291 F. App’x 558, 562 (5th Cir. 2008) (“This court has repeatedly approved the use of the framework laid out in *Briseno*.”). It is important to note that the Fifth Circuit is a federal appeals court, and as such must usually give deference to state court legal and factual determinations. *Chester v. Thaler*, 666 F.3d 340, 348 (5th Cir. 2011). Particularly in the federal habeas context, an appellate court may only overturn a lower court’s findings if it finds that the lower court’s legal determination is “contrary to, or involve[s] an unreasonable application of, clearly established Federal law.” 28 U.S.C. § 2254(d)(1) (2012). Thus, the Fifth Circuit’s approval of the factors may only mean that it does not find them contrary to clearly established law.

104. *Commonwealth v. DeJesus*, 58 A.3d 62, 86 (Pa. 2012) (“Because the *Briseno* factors relate directly to considerations in *Atkins* and appear to be particularly helpful in cases of retrospective assessment of mental retardation, we approve their use in Pennsylvania.”).

105. *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

106. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

107. *See Briseno*, 135 S.W.3d at 6 (defining the “level and degree of mental retardation” at which a defendant should be exempt from the death penalty in spite of *Atkins*’s requirement that all intellectually disabled individuals be exempt).

108. *Atkins*, 536 U.S. at 317.

This sentence, properly read, speaks only to the need for states to develop procedures with which to sort out individuals *claiming* to be intellectually disabled, but who are in fact not intellectually disabled. The “range of mentally retarded offenders about whom there is a national consensus” seems plainly to refer to *all* individuals who meet the professional definition of intellectual disability, which is referenced multiple times in the Court’s decision.¹⁰⁹ However, the CCA misread this sentence as stating that not all individuals who in fact *are* intellectually disabled are so impaired as to fall within the range for which there is a national consensus. Relying on this misreading, the CCA was able to justify creating a substantive definition of the class of individuals protected by *Atkins*—a different and narrower definition than the one endorsed by the Supreme Court. The result in Texas has been the continual denial, in contravention of *Atkins*, of valid claims of intellectual disability in Texas.¹¹⁰

Importantly, the Supreme Court recently reaffirmed and expounded upon its holding in *Atkins*, finding that state policies that deviate from clinical definitions of intellectual disability create an unacceptable risk of executing intellectually disabled individuals and are therefore unconstitutional.¹¹¹ *Hall v. Florida* concerned Florida’s bright-line cutoff for IQ scores, which required defendants to show an IQ score below 70, despite professional understandings that IQ tests have margins of error of about five points.¹¹² Thus, under professional standards, an individual with an IQ score of 75 could still meet clinical standards for intellectual disability, but would be unable to get relief in Florida courts.¹¹³

The Court acknowledged that “the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.”¹¹⁴ Instead, the Court described *Atkins*—which cited to professional definitions of intellectual

109. *See id.* at 308 n.3, 317–18.

110. *See supra* subpart II(C).

111. *See Hall v. Florida*, 134 S. Ct. 186, 2001 (2014) (holding unconstitutional a Florida law defining intellectual disability based on an IQ score of 70 or below because those scoring slightly above the cutoff fall within the test’s medically recognized margin of error).

112. *Id.* at 1990, 1999.

113. *Id.* at 1999.

114. *Id.* at 1998.

disability—as providing “substantial guidance on the definition of intellectual disability.”¹¹⁵ In fact, the *Hall* Court noted, “[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*.”¹¹⁶ *Atkins* stated that

those persons who meet the “clinical definitions” of intellectual disability “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” Thus, they bear “diminish[ed] . . . personal culpability.”¹¹⁷

Turning to the Florida rule, the Court stated that in determining whether a particular practice is constitutional, “it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning” of the practice in question to determine how it relates to the Court’s holding in *Atkins*.¹¹⁸ In reviewing the professional studies and practices, the Court found that the Florida rule “disregards established medical practice” by using the IQ score as conclusive evidence when experts would consider other evidence, and by refusing to recognize the professional understanding that IQ scores are imprecise.¹¹⁹ The Court relied heavily on these professional understandings and practices in finding the IQ cutoff unconstitutional.¹²⁰

Hall has generated enormous interest and speculation. Many scholars and practitioners contend that *Hall* requires the discontinuation of some practices relating to the legal determination of ID,¹²¹ and lower courts have begun to interpret the holding. The Fifth Circuit entered the fray almost immediately after *Hall* was decided, construing the Court’s holding

115. *Id.* at 1999.

116. *Id.*

117. *Id.* (alterations in original) (citations omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)). Diminished personal culpability is a factor considered by the Court when determining whether a class of persons is ineligible for the death penalty. See *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (discussing the diminished culpability of juvenile defenders and barring the imposition of the death penalty on capital offenders under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (discussing the diminished culpability of intellectually disabled defendants and the availability of the death penalty); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (rejecting the imposition of the death penalty in an accomplice-liability case due to culpability concerns).

118. *Hall*, 134 S. Ct. at 1993.

119. *Id.* at 1995.

120. See *id.* at 2002 (Alito, J., dissenting) (arguing that the Court struck “down a state law based on the evolving standards of *professional societies*, most notably the American Psychiatric Association (APA)”).

121. E.g., James W. Ellis, *Hall v. Florida: The Supreme Court’s Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 390 (2014); Bidish J. Sarma, *How Hall v. Florida Transforms the Supreme Court’s Eighth Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISCOURSE 186, 195–96 (2014); Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a “Scientific Stare Decisis,”* 23 WM. & MARY BILL RTS. J. 415, 423 (2014); *The Supreme Court, 2013 Term—Leading Cases*, 128 HARV. L. REV. 271, 279–80 (2014).

narrowly.¹²² In *Mays v. Stephens*,¹²³ the Fifth Circuit limits *Hall* to striking down an impermissible restriction on a defendant's ability to present evidence.¹²⁴ The court argues that *Briseno* creates no restrictions on a defendant's ability to present evidence and that "no reasonable jurist could theorize that the reasoning animating *Hall* could possibly be extended to *Briseno*."¹²⁵ Thus, the court concludes that *Hall* "in no way affects this court's reading and application of *Briseno*, and we so hold."¹²⁶

Although the Fifth Circuit is not alone in interpreting *Hall* narrowly,¹²⁷ this reading is simply not supported by the text of the opinion. In finding that Florida's bright-line cutoff for IQ scores was unconstitutional, the Court emphasized that every defendant who meets the clinical definition of intellectual disability "by definition" bears "diminish[ed] . . . personal culpability" for their actions¹²⁸—in direct conflict with *Briseno*'s interpretation of *Atkins* as stating that not all defendants who meet the diagnostic criteria fall within the class of people exempt from the death penalty. Furthermore, the Court stated that it is proper to consult professional practices when determining the constitutionality of a procedure relating to the diagnosis of ID, and when the Florida rule was viewed against the overwhelming professional understanding of IQ scores as having margins of error, the Court rejected

122. See *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015) (deciding that *Hall* "exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs").

123. 757 F.3d 211 (5th Cir. 2014).

124. *Id.* at 218.

125. *Id.*

126. *Id.* The Fifth Circuit seemed determined to bar the use of *Hall* as a means of obtaining relief for Texas defendants in federal habeas. In doing so, however, the court chose an unusual vehicle. *Mays* had procedurally defaulted his initial *Atkins* claim and was before the Fifth Circuit asking for a certificate of appealability (COA) based on the district court's denial of an ineffective assistance of counsel claim that would allow him back into court. *Id.* at 212. The Fifth Circuit denied the COA, but then went on to address *Mays*' contention that *Hall* casts doubt upon the constitutionality of *Briseno*. *Id.* at 217. However, because the determination about *Hall* was not necessary to deny the COA, it is not clear that this is a true legal holding, despite the court's contention that it is. See *id.* at 219 (holding that "the *Briseno* factors do not conflict with *Atkins*" but denying petitioner's claim for a COA based on Fifth Circuit precedent). Regardless, it is clear that the Fifth Circuit recognized the potential import of *Hall* for the *Briseno* factors and acted swiftly to narrow its reach. However, the Fifth Circuit's decision in *Mays* will likely have no impact if the Supreme Court invalidates *Briseno* based on *Hall*, because the Supreme Court is much more likely to take a case on direct review, where it can assess the permissibility of *Briseno* without the procedural morass of federal habeas and the Anti-Terrorism and Effective Death Penalty Act of 1996.

127. See *In re Hill*, 777 F.3d 1214, 1224 (11th Cir. 2015) (holding that "*Hall* and its consideration of Florida's strict IQ cut-off of 70 (that barred presenting any other evidence) are materially different from the issue in this case concerning Georgia's beyond-a-reasonable-doubt standard for capital intellectual disability claims").

128. *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014) (alteration in original) (quoting *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)).

it.¹²⁹ Although the Court was attentive to the particular Florida rule at issue, the Court wrote broadly, using language and reasoning that applies to all *Atkins* determinations.¹³⁰

Given the Court's concern with practices that depart from professional standards and the nearly unanimous rejection of the *Briseno* factors in the professional community as described below,¹³¹ the continuing validity of *Briseno* is a serious question. Indeed, two judges on the CCA have separately expressed doubts about the legitimacy of the *Briseno* factors. Judge Alcala recently dissented from an opinion affirming a trial court's denial of an *Atkins* claim, writing that "*Briseno* conflicts with the Supreme Court's rationale in *Hall* in that its test for determining intellectual disability is not grounded in the current consensus of the medical community."¹³² Similarly, Judge Price has noted that "[p]articularly after the recent opinion of the United States Supreme Court in *Hall v. Florida*, I should think that the writing is on the wall for the future viability of *Ex parte Briseno*."¹³³

This past term, the Supreme Court reversed the Fifth Circuit in an *Atkins* case, ruling for the defendant.¹³⁴ While the issue in *Brumfield v. Cain*¹³⁵ was related to federal habeas, not to Louisiana's definition of intellectual disability, in answering the question before it the Court had to make detailed factual findings.¹³⁶ The majority opinion, written by Justice Sotomayor, makes a passing reference to the facts of Brumfield's crime, stating that they "might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns."¹³⁷ This statement reflects the troubling reality that many judges, including Supreme Court Justices who would be charged with analyzing the constitutionality of the *Briseno* factors, are confused or misguided about the nature of mild intellectual disability. Justice Sotomayor did recognize this potential conflict by following the above statement with a "But cf." citation to the portion of the AAMR text that warns about overemphasizing a person's strengths,¹³⁸ but

129. *Id.* at 1995, 1998.

130. *See id.* at 1999 (explaining that clinical definitions of intellectual disabilities were a fundamental premise of the *Atkins* decision).

131. Greenspan, *supra* note 40, at 219 ("Few if any intellectual disability (ID) scholars, representative bodies, or specialists consider that the *Briseno* factors provide a valid diagnostic framework.").

132. *Ex parte Moore*, No. WR-13,374-05, 2015 WL 5449887, at *39 (Tex. Crim. App. Sept. 16, 2015) (Alcala, J., dissenting) (not designated for publication).

133. *Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring).

134. *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015).

135. 135 S. Ct. 2269.

136. *See id.* at 2276–77 (identifying and examining "two underlying factual determinations on which the trial court's decision was premised").

137. *Id.* at 2281.

138. *Id.*

Brumfield's nod to the facts of an *Atkins* defendant's crime creates cause for concern.¹³⁹ Importantly, though, the case also makes clear that the Court is paying attention to state and lower court practices, and is willing to intervene when practices do not conform to *Atkins*. Considering the myriad ways that the *Briseno* factors depart from professional norms—as detailed below—the Court would have ample reason to intervene.

B. *The Briseno Factors Versus Professional Norms*

As described above, the professional diagnosis of intellectual disability requires showing three things—significant subaverage intellectual functioning (usually demonstrated by performance on IQ tests); substantial deficits in two or more areas of adaptive behavior; and onset in the developmental period.¹⁴⁰ The *Briseno* factors implicate the second criterion of the diagnosis; they were created because the CCA viewed the adaptive-deficits prong of the diagnosis as “exceedingly subjective.”¹⁴¹ The factors are used to varying degrees depending on the court; some courts consider them in addition to professional categories of adaptive deficits, while others have completely replaced the adaptive-deficits analysis with the *Briseno* factors. Regardless of how the factors are used, they depart from professional understandings of how to assess deficits in adaptive behavior in several significant ways, resulting in the systematic denial of valid intellectual disability claims and underenforcement of *Atkins*.

1. *The Briseno Factors Focus on Strengths.*—The *Briseno* factors incorrectly focus on a defendant's strengths rather than his weaknesses.¹⁴² Professionals understand and emphasize that individuals with intellectual

139. The Fifth Circuit has already held that *Brumfield* “does not cast any doubt on the constitutionality of the *Briseno* standard.” *Henderson v. Stephens*, 791 F.3d 567, 586 (5th Cir. 2015).

140. *See supra* subpart II(B).

141. *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

142. At least three judges of the CCA have explicitly endorsed this focus on strengths, reasoning in one case:

Applicant argues that the trial judge was wrong to rely upon objective examples of applicant's strengths, competencies, and skills. Instead, he argues, we should focus on evidence of limitations and deficiencies. Were applicant's methodology required, then any evidence of a purported limitation would prevent the factfinder from balancing that evidence against evidence of competency in that particular area. Such is not the law. Instead, in making her determination, the trial judge used “the proper methodology of examining *all evidence* pertaining to a possible deficit in adaptive behavior,” including evidence of applicant's “strengths that clearly rebutted allegations of his limitations.”

Ex parte Butler, 416 S.W.3d 863, 878 (Tex. Crim. App. 2012) (Cochran, J., concurring) (footnotes omitted).

disability possess strengths in addition to weaknesses.¹⁴³ This is particularly true for individuals with mild intellectual disability, who are often able to lead relatively normal lives.¹⁴⁴ Thus, professional literature instructs psychiatrists and psychologists to look only for weaknesses, and once these weaknesses have been established to the requisite degree, the deficit in adaptive behavior is deemed present.¹⁴⁵ In contrast, the *Briseno* factors allow judges and juries to focus on a defendant's strengths to the exclusion of evidence of significant weaknesses.¹⁴⁶ Finding strengths is not difficult, particularly since factfinders are required to consider the facts of the crime—and most defendants before them have demonstrated the ability to commit capital murder.¹⁴⁷ Though criminal activity may show some minimal ability, it does not necessarily show “strengths” as understood by professionals; in fact, criminal activity is often demonstrative of maladaptive behavior.¹⁴⁸

But even if criminal activity is evidence of adaptive behavior, professionals understand that strengths coexist with weaknesses, and that people with intellectual disability are capable of many age-relevant activities such

143. AM. ASS'N ON MENTAL RETARDATION, *supra* note 37, at 8. The AAMR's definition of “mental retardation” is premised upon an assumption that “[w]ithin an individual, limitations often coexist with strengths.” *Id.* AAMR explained:

This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

Id.

144. As one expert put it:

He's not severely or profoundly mentally retarded. I don't really even believe that he's moderately mentally retarded. I believe that he's in the middle to upper range of a mild mental retardation range of intelligence. So these individuals can do things. They can function. Most of them can live independently.

Lizcano Transcript, *supra* note 56, vol. 55 at 215.

145. *See, e.g.*, AM. ASS'N ON MENTAL RETARDATION, *supra* note 37, at 8 (defining “mental retardation” as a disability characterized by significant limitations in functioning, without any reference to strengths).

146. *See supra* subparts II(B)–(C).

147. Although 156 individuals have been exonerated from death row since 1973, *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> [<http://perma.cc/3CKY-ATW4>], the majority of individuals on death row do not claim factual innocence. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 126 (2008) (reporting the results of an empirical study of exonerations that found “exonerees often did not invoke factual claims during their appeals and postconviction proceedings, much less claims of their innocence”).

148. For example, criminal behavior is one type of non-socially acceptable behavior that is often viewed as indicative of a personality disorder, most notably antisocial personality disorder. *See* Sophie Davison & Aleksandar Janca, *Personality Disorder and Criminal Behaviour: What is the Nature of the Relationship?*, 25 CURRENT OPINION PSYCHIATRY 39, 39–45 (2012) (analyzing a “framework for understanding how personality disorder may contribute to criminal behaviour”).

as independent living and employment.¹⁴⁹ There is no reason to think that the ability to commit crime should be treated any differently. But the *Briseno* factors disregard these professional understandings, allowing a handful of facts that seem to indicate adaptive behavior to undermine otherwise valid claims of intellectual disability.¹⁵⁰

The case of Elkie Lee Taylor exemplifies this practice of privileging strengths over weaknesses. Taylor was convicted in 1994 of capital murder.¹⁵¹ Taylor was administered two intellectual-functioning tests by officials in the Texas Department of Criminal Justice and scored a sixty-three and sixty-nine.¹⁵² As a result, he was placed in Texas's "Mentally Retarded Offenders Program."¹⁵³ Despite this, and a wealth of other evidence indicating his intellectual disability, the district court found that he was not intellectually disabled.¹⁵⁴ In finding that Taylor did not possess significant adaptive deficits, the court relied in large part upon his ability to drive a manual gear tractor that he stole while fleeing from police.¹⁵⁵ The court detailed the process of changing gears, emphasizing that Taylor had to "perform[] a coordinated series of movements by which Applicant would depress of the truck's clutch pedal, place the truck's transmission into one of the five forward gears, and depress the truck's accelerator pedal while simultaneously releasing pressure on the truck's clutch pedal."¹⁵⁶

While apparently conceding that Taylor suffered from some level of intellectual disability, the court nonetheless concluded that "Applicant's conduct in properly operating and driving a vehicle equipped with a manual transmission is indicative that Applicant's mental abilities are not at the level at which a consensus of the citizenry would agree that *Applicant's mental retardation* should exempt Applicant from the imposition of the death sentence."¹⁵⁷ Thus, the focus on Taylor's strength—his ability to drive a manual-transmission vehicle—superseded all other evidence of intellectual disability. The court also stated that Taylor was a leader, not a follower—

149. Greenspan, *supra* note 40, at 228–29.

150. This issue has not gone unnoticed in the CCA. In an unpublished opinion in *Lizcano v. State*, No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting) (not designated for publication), three judges stated that finding strengths in some areas should not necessarily rebut a defendant's *Atkins* claim so long as weaknesses are identified in at least two other areas. *Id.* at *37. In *Ex parte Butler*, 416 S.W.3d 863 (Tex. Crim. App. 2012) (Price, J., dissenting), two of those judges reiterated this concern, arguing in dissent that "this emphasis on adaptive strengths rather than adaptive weaknesses runs contrary to standard diagnostic protocol, which I believe the courts are obliged to follow in implementing *Atkins*." *Id.* at 883.

151. *Ex parte Taylor*, No. WR-48498-02, 2006 WL 234854, at *1 (Tex. Crim. App. Feb. 1, 2006) (not designated for publication).

152. *Id.* at *3.

153. *Id.*

154. *Id.* at *2.

155. See *Ex parte Taylor Findings and Conclusions*, *supra* note 52, at 4.

156. *Id.*

157. *Id.* (emphasis added).

one of the *Briseno* factors—because he had bragged about killing the victim to several individuals.¹⁵⁸ The court did not explain how this behavior indicated leadership ability; nor did the court consider how bragging about a murder to multiple people might in fact have been evidence of deficits in adaptive behavior. Taylor was subsequently executed in 2008.¹⁵⁹

Clifton Williams was convicted of capital murder in 2005.¹⁶⁰ During his sentencing trial, the defense presented the testimony of two experts who diagnosed Williams as mildly intellectually disabled.¹⁶¹ One expert used the Vineland Adaptive Behavior Scales and found significant adaptive deficits in the areas of academic functioning, communication, daily living skills, and socialization.¹⁶² The jury also heard that Williams's elementary school had tried to hold him back in kindergarten but his mother refused; Williams subsequently failed the first grade and was later placed in remedial classes.¹⁶³ At the age of nineteen, Williams could only read and write at a fourth-grade level, was repeatedly fired from jobs at fast-food restaurants, and had been homeless off and on throughout his life.¹⁶⁴

But one major source of contention was Williams's former job at Kentucky Fried Chicken. After lengthy questioning about the responsibilities of fast-food workers and the process of frying chicken, the prosecution's expert stated, "there's been testimony about him putting orders together and cooking chicken. It just—when you're talking about the bottom 2 or 3 percent, that just doesn't fit at all for me."¹⁶⁵ The defense was able to elicit from this expert, on cross-examination, that fast-food restaurants regularly hire people with intellectual disability and that working in a fast-food restaurant is within the capabilities of someone with mild intellectual disability.¹⁶⁶ Despite the defense's efforts to explain why the jury should not let perceived

158. *Id.* at 3–4.

159. *Elkie Lee Taylor*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/taylor1130.htm> [<http://perma.cc/39L5-MFEP>].

160. *Clifton Williams*, TEX. TRIB., <https://www.texastribune.org/library/data/texas-prisons/inmates/clifton-williams/840014/> [<https://perma.cc/U3AX-GH4X>].

161. Transcript of Proceedings vol. 56 at 219–20, 273, *State v. Williams*, No. 114-1505-06 (114th Dist. Ct., Smith County, Tex. Oct. 21, 2006) [hereinafter *Williams* Trial Transcript].

162. *Id.* at 96–97.

163. *Id.* at 81–83, 90–91.

164. *Id.* vol. 55 at 197, 201, 216.

165. *Id.* vol. 59 at 59–60.

166. *Id.* at 193. One defense expert also tried to combat the prosecution's emphasis on Williams's perceived strengths, stating:

[O]ften a mildly retarded person can do a lot, and it becomes tricky, because you can get involved in cherry picking, meaning this: Well, they can do this, so, therefore, you generalize it to all of this. They adapted to homelessness; therefore, they have high adaptive behavior skills, which is a preposterous idea in the field of measuring adaptive behaviors. If you get in there and say they can swing a hammer, that means they should be a construction worker; that's a mistake to generalize like that.

Id. vol. 56 at 32.

strengths outweigh Williams's significant deficits in adaptive functioning, the jury found that Williams was not intellectually disabled and sentenced him to death.¹⁶⁷

James Lee Clark was convicted of capital murder in 1994 and executed in 2007.¹⁶⁸ At his *Atkins* hearing, two experts concluded that Clark was intellectually disabled and had significant deficits in adaptive behavior after interviewing Clark and Clark's ex-wife, performing various assessments, and reviewing past school records and the circumstances of the offense.¹⁶⁹ One

167. *Williams v. State*, 270 S.W.3d 112, 113 (Tex. Crim. App. 2008). It is worth noting that even if a defendant has never had a legitimate job, courts often cite to their criminal behavior as an example of adapting to their environment, and if the defendant has a long criminal record, this is evidence of some success as a criminal. Thus, defendants are put in a difficult position—earning a legitimate income, no matter how menial the work, is used as evidence of adaptive behavior, but earning income through illegal means is also used as evidence of adaptive behavior. See, for example, this exchange during a cross-examination:

Q: [S]omebody chooses that that's the line of work that they want to commit and they're pretty darn good at it, that doesn't necessarily mean they have a deficit in adaptive behavior, does it?

A: It may mean if they don't do well in it.

Q: Well, how would you characterize somebody that has committed eight to ten aggravated robberies and has really only been caught doing one? I'd say they're pretty successful."

Transcript of Punishment Proceedings vol. 27 at 33–34, *State v. Hunter*, No. 968719 (230th Dist. Ct., Harris County, Tex. July 22, 2004) [hereinafter *Hunter* Transcript]. And another example:

Q: So essentially, at least in his teenage years, he is choosing to lead a life of crime? Fair?

A: He is leading a life of crime.

....

Q: And when you were looking at the records pertaining to his crimes, I'm sure you saw that—that a lot of those, if not all of them, require some forethought and some planning and some execution. Would you agree with that?

A: Most of them, yes.

Q: Sure. For example, when he broke into the theatres in Wichita Falls, he had to pry open a door, had to get the tools to do that with, remember?

Transcript of Trial vol. 37 at 186–87, *State v. Neal*, No. 2005-CR-0698 (226th Dist. Ct., Bexar County, Tex. Apr. 6, 2006) [hereinafter *Neal* Transcript]. This emphasis on illegal behavior departs from professional practices, which focus more on the "integrated-in-society, healthy, having-a-good-job, work-ethic type of things as opposed to the law-violation kind of behavior." *Hunter* Transcript, *supra*, vol. 27 at 71.

168. *James Lee Clark*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/clark1070.htm> [<http://perma.cc/AM2Z-6YET>].

169. One of these experts was Dr. George Denkowski, who was reprimanded in 2011 by the Texas State Board of Examiners of Psychologists for his unscientific methods that artificially inflated scores on intelligence tests and adaptive-behavior scores. See Brandi Grissom, *Texas Psychologist Punished in Death Penalty Cases*, TEX. TRIB. (Apr. 15, 2011), <http://www.texastribune.org/2011/04/15/texas-psychologist-punished-in-death-penalty-cases/> [<http://perma.cc/9L7F-2DQD>] ("As part of a settlement, the Texas State Board of Examiners of Psychologists issued a reprimand against Dr. George Denkowski, whose testing methods have been sharply criticized by other psychologists and defense attorneys as unscientific."). Because of his controversial methods, Denkowski was usually retained by prosecutors in capital cases. *Id.* But in Clark's case, he concluded that Clark was intellectually disabled and testified for the defense. *Ex parte Clark* Findings of Fact and Conclusions of Law, *supra* note 52, at 14–16.

of these experts found Clark's adaptive skills to be "extremely dysfunctional."¹⁷⁰ But the court denied relief, citing one expert who testified that Clark was not intellectually disabled as well as the testimony of several individuals who knew Clark briefly.¹⁷¹ For example, the Ranger who investigated the case testified that he found the butt stock of a gun in a trash can in Clark's trailer home that matched the remainder of the gun found in the creek where the bodies were recovered.¹⁷² The Ranger testified that he believed, based on this, that Clark "understood the ramifications of leaving evidence at the scene."¹⁷³ The Ranger also testified that it takes some skill to operate a gun, and that in order to buy ammunition, Clark would have had to know what type of gun it was.¹⁷⁴ Hence, a capital defendant's use of a gun is almost enough by itself to deny *Atkins* relief in Texas.

Texas courts have also emphasized the ability to communicate as a ground for denying claims of intellectual disability. A court has cited a Spanish-speaking defendant's ability to understand English as evidence of adaptive skills,¹⁷⁵ and courts often reference a defendant's vocabulary to negate an intellectual disability claim. For example, one judge cited the defendant's use of the word "subpoena" in a phone call with his mother.¹⁷⁶ The judge failed to acknowledge, however, that while "subpoena" is not a word regularly used outside the legal profession, individuals who have been through lengthy trial proceedings would be very familiar with the term.¹⁷⁷

170. *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 16.

171. *Id.* at 9–14, 17, 18–19.

172. *Id.* at 10.

173. *Id.* The court did not discuss the fact that Clark seemingly failed to understand the ramifications of leaving evidence in his home.

174. *Id.* In finding that Clark was not intellectually disabled, the court also referenced the testimony of the officer who took Clark to and from jail during trial. This officer stated that during trial, Clark took notes and passed notes to his lawyers, made comments about what was happening, and "reacted emotionally by crying in his holding cell after the sentence of death was assessed." *Id.* at 11. While it might seem odd to think of crying in response to a death sentence as a "strength," it makes more sense when viewed in light of the stereotype that intellectually disabled people always behave differently and irrationally. Thus, reacting in a way that factfinders can relate to becomes proof of normalcy.

175. Findings of Fact, Conclusions of Law and Recommendations of the Trial Court on Application of Writ for Habeas Corpus at 9–10, *Ex parte* Ibarra, No. 1996-634-CB (54th Dist. Ct., McLellan County, Tex. Sept. 18, 2006).

176. Findings of Fact and Suggested Conclusions of Law at 25, *Ex parte* Bridgers, No. 114-81252-97-B (114th Dist. Ct., Smith County, Tex. Mar. 6, 2007).

177. Two mental health experts who have consulted in numerous *Atkins* cases have pointed out that incarcerated individuals often spend a lot of time watching The History Channel, The Discovery Channel, and other relatively sophisticated TV shows. Stephen Greenspan & Harvey N. Switzky, *Lessons from the Atkins Decision for the Next AAMR Manual*, in *WHAT IS MENTAL RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY* 279, 289 (Harvey N. Switzky & Stephen Greenspan eds., 2006). Thus, *Atkins* defendants may sometimes use words or phrases that appear to be beyond the repertoire of intellectually disabled people. *Id.* These isolated incidents, however, should not be used to trump other standardized assessments.

Finally, a defendant's behavior in prison has often been used as a means of refuting a claim of intellectual disability. Prison guards often testify or submit affidavits about a defendant's cleanliness,¹⁷⁸ ability to understand orders and use the grievance system,¹⁷⁹ communication skills with guards and other inmates,¹⁸⁰ and use of the commissary system.¹⁸¹ This type of testimony is problematic for several reasons. First, it relies on perceived strengths instead of weaknesses, as previously discussed. Even more, these prison guards are usually unable to say whether they actually saw the defendant writing out his grievance or commissary form by himself or whether he received help from others, as the guards are not present when these tasks are accomplished.¹⁸² This is a troubling omission, since cellmates or neighbors often testify that they help the defendant with writing and other tasks.¹⁸³

However, even if the defendant is able to fill out a grievance or commissary form by himself, this information should be viewed in light of the fact that individuals with intellectual disability thrive in highly structured environments where their options are limited and day-to-day decision making is kept to a minimum.¹⁸⁴ Thus, while many defendants have spent years or even decades in prison, their behavior there is not representative of their ability to function in free society, which is what adaptive behavior assessments attempt to measure.

Not only do the *Briseno* factors allow factfinders to focus on strengths in spite of professionals' objections, they have occasionally been used to discredit entirely a defense expert who refuses to consider an individual's strengths. For example, one district court discredited a defense expert who stated that the conflicting objectives—professionals' emphasis on weaknesses versus Texas courts' emphasis on strengths—created a "train wreck"

178. *E.g.*, Findings of Fact, Conclusions of Law and Order at 21, *Ex parte* Matamoros, No. 643410-B (180th Dist. Ct., Harris County, Tex. Dec. 18th, 2006).

179. *See* Findings of Fact and Conclusions of Law at 18, *Ex parte* Simpson, No. 25200 (3d Judicial Dist. Ct., Anderson County, Tex. July 28, 2003) (discussing a report by officers detailing some of the defendant's communications and highlighting a number of articulate inmate requests that defendant made while in prison prior to trial).

180. *E.g.*, *Ladd v. Thaler*, No. 1:03CV239, 2013 WL 593927, at *4 (E.D. Tex. Feb. 15, 2013), *aff'd sub nom.* *Ladd v. Stephens*, 748 F.3d 637 (5th Cir. 2014); Findings of Fact, Conclusions of Law and Order, *supra* note 178, at 28.

181. *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 12.

182. *See, e.g.*, TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 52–54 (2004) (detailing the Texas grievance procedure whereby prisoners are responsible for independently retrieving and filling out grievance forms and, if needing assistance, are helped by a unit grievance investigator).

183. *See, e.g.*, *Ladd*, 2013 WL 593927, at *10 ("After committing the present crime, Ladd was able to use the prison library to research the *Atkins* case and utilize the services of other inmates to help him write letters.").

184. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. 2013) ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.").

between the DSM definition of intellectual disability and the legal determination.¹⁸⁵ The district court found that this statement “indicates a misunderstanding of, or an unwillingness to follow, the law in *Atkins*, which left to the States the task of developing appropriate ways to enforce the constitutional restriction on execution of persons with mental retardation.”¹⁸⁶

The court explained:

Applicant argues that this Court cannot consider evidence of applicant’s adaptive behavioral strengths.

. . . While this assertion may be true in a clinical setting geared toward developing a treatment plan and providing support, the Court rejects this method for criminal forensic purposes. As noted above, the Court of Criminal Appeals in *Briseno* lists several factors that are relevant to determining whether, in the criminal context, an applicant has adaptive skill deficits. These factors clearly contemplate consideration of a person’s behavioral strengths as well as weaknesses.¹⁸⁷

Thus, the court found that “Dr. Garnett’s disregard of applicant’s behavioral strengths in this case when *Briseno* specifically allows for it . . . indicate[s] he is biased in favor of applicant.”¹⁸⁸

This particular expert was discredited for the same reason in two other *Atkins* proceedings.¹⁸⁹ The CCA did not reverse any of the three findings.¹⁹⁰ The CCA has recognized that its position regarding adaptive strengths is a controversial one,¹⁹¹ but has sought to justify it by reasoning that

it would seem foolhardy to say that a person who has obtained a graduate law degree (demonstrating his conceptual abilities), who is a television talk-show host (demonstrating his social skills), but who

185. Findings of Fact and Conclusions of Law at 29, *Ex parte* Thomas, No. W86-85539-M(B) (194th Dist. Ct., Dallas County, Tex. Aug. 15, 2008).

186. *Id.*

187. *Id.* at 18-19 (citations omitted).

188. *Id.* at 30.

189. Findings of Fact, Conclusions of Law and Order at 15-16, *Ex parte* Pierce, No. 267685-C (174th Dist. Ct., Harris County, Tex. Jan. 18, 2007) (“The Court finds, based on official records, that Dr. Garnett has been found to be a biased witness by the 114th District Court in Smith County, Texas for ‘failure to open-mindedly review all the evidence in making an assessment of mental retardation.’”); Findings of Fact and Conclusions of Law at 30, *Ex parte* Lewis, No. 01-91-32-B (114th Dist. Ct., Smith County, Tex. Feb. 14, 2005) [hereinafter *Ex parte* Lewis Findings of Fact and Conclusions of Law] (“The failure of Dr. Garnett to open mindedly review all the evidence in making an assessment of mental retardation is evidence of bias by said expert in his opinions and diminishes his credibility in his opinions and evaluations.”).

190. Order of No Action Taken, *Ex parte* Lewis, No. WR-44,725-02 (Tex. Crim. App. Apr. 8, 2013); *Ex parte* Thomas, No. WR-16556-05, 2010 WL 1240296, at *1 (Tex. Crim. App. Mar. 31, 2010) (not designated for publication); *Ex parte* Pierce, No. WR-15859-04, 2007 WL 1139414, at *1 (Tex. Crim. App. Apr. 18, 2007) (not designated for publication).

191. See *Ex parte* Cathey, 451 S.W.3d 1, 27 (Tex. Crim. App. 2014) (“Some psychologists also say that factfinders should not consider a person’s strengths, but only his weaknesses, when deciding the question of intellectual disability.”).

simply cannot learn to drive properly and has multiple automobile accidents (demonstrating a limitation in practical skills), meets the adaptive-deficits prong of intellectual disability by ignoring all of his educational and social strengths and focusing exclusively on his deficiencies.¹⁹²

If an individual were able to attain a law degree and become a talk-show host, the CCA is correct that this person is likely not intellectually disabled, despite an inability to learn how to drive. However, as the above examples demonstrate, courts simply are not being presented with lawyers and television hosts. Instead, courts focus on a defendant's ability to fry chicken, drive a car, swim, and eat out¹⁹³ in order to trump a diagnosis of ID. These are the types of basic functions that professionals correctly recognize should not be allowed to outweigh significant deficits in other areas.

2. *The Briseno Factors Require Consideration of the Facts of the Crime.*—The final *Briseno* factor requires factfinders to ask whether “the commission of [the capital] offense require[d] forethought, planning, and complex execution of purpose.”¹⁹⁴ In addition to yet again emphasizing a defendant's strengths over his weaknesses, this factor is particularly problematic for several reasons.

The American Association for Intellectual and Developmental Disabilities strongly discourages professionals from considering the facts of the crime when diagnosing an individual.¹⁹⁵ Different concerns are implicated for post-*Atkins* cases and pre-*Atkins* cases. For cases going to trial post-*Atkins*, experts will generally testify at the sentencing phase (though sometimes during the guilt/innocence phase as well) that immediately follows the determination of guilt.¹⁹⁶ This means that defense attorneys must arrange to have their clients evaluated before the determination of guilt. Discussing the facts of the crime at this point would create constitutional concerns about the defendant's right against self-incrimination,¹⁹⁷ so professionals generally never ask about the crime.

192. *Id.*

193. *E.g.*, *Ex parte Clark* Findings of Fact and Conclusions of Law, *supra* note 52, at 9.

194. *Ex parte Briseno*, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004).

195. See ROBERT L. SCHALOCK ET AL., AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 22 (10th ed. 2007) (advising professionals to refrain from using past criminal behavior to infer a patient's level of adaptive behavior or about having an intellectual disability because of a lack of available and normative information).

196. Kathryn Raffensperger, Comment, *Atkins v. Virginia: The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENVER U. L. REV. 739, 748 (2012).

197. Greenspan, *supra* note 40, at 227–28.

For cases tried pre-*Atkins*, consideration of the facts of the crime is less problematic from a legal standpoint,¹⁹⁸ but there are concerns about the adequacy of the information for diagnostic purposes. The facts of the crime, even after trial, are typically not revealed in sufficient detail to know exactly what happened, including the possible role of others in aiding the defendant or planning the crime.¹⁹⁹ Furthermore, while some crimes may appear sophisticated on the surface, they often in fact contain a strong element of impulsivity; for example, a robbery gone awry that results in homicide.²⁰⁰

Consideration of the facts of the crime is also inconsistent with professional norms because the crime in question will have occurred after the defendant was eighteen years of age.²⁰¹ Because the definition of intellectual disability requires that an individual demonstrate adaptive deficits during the developmental period (interpreted as before the age of eighteen), professionals try to gather information from the developmental period. This is another reason why the defendant's family, friends, and teachers are typically mined for information about the defendant's behavior growing up, and why the facts of crimes committed after the defendant turned eighteen are not necessarily probative for diagnosis.²⁰² And although the defendant's behavior after the

198. With the exception of potential innocence claims, as occurred in the case of Pedro Solis Sosa. See *Ex parte Sosa*, 364 S.W.3d 889, 894 (Tex. Crim. App. 2012) (“We cannot agree that the facts of the offense are categorically irrelevant to the determination of mental retardation for Eighth Amendment purposes.”).

199. Greenspan, *supra* note 40, at 228. The AAIDD's position regarding the facts of the crime is in direct contrast to many judges, who view the capital offense as the most well-documented period of the defendant's life and thus more reliable than the testimony of friends or family. See, e.g., *Sosa*, 364 S.W.3d at 894 (“The capital offense for which an *Atkins* claimant was convicted will generally be one of the best documented events in his life, and certain facts will have been proven to a jury beyond a reasonable doubt.”).

200. Greenspan, *supra* note 40, at 228.

201. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (barring the execution of individuals who committed a capital offense before the age of eighteen).

202. The questioning of the defense expert in Clifton Williams's sentencing hearing is illustrative of the clash between this *Briseno* factor and professionals' considerations for diagnosis:

Q: . . . Did you ever ask him if he committed this crime?

A: I don't think so.

Q: Okay. Would that not be—if you're trying to diagnose the behavior of an individual, would—whether or not they committed an offense this horrific, would that not be relevant to you?

A: You don't have to take a confession to determine whether or not someone is [mentally retarded]. . . .

. . . .

Q: Well, I mean, by asking him, you would have first information from him regarding the complex or not complex, depending on how you interpreted it as the person interviewing him, aspects of the crime.

A: . . . [T]his was not a particular [sic] complex crime. A lot of crime is not very complex. . . . [T]he complexity you're describing is not a complex, violent crime. I mean, a 10-year-old can do all of those things. Literally, they can break into houses.

developmental period may be of some value, particularly in cases where evidence from the developmental period is limited, focusing on the facts of the crime carries a risk of “cherry-picking”—emphasizing the facts that seem to demonstrate strengths while ignoring facts that exhibit deficits. Often, for example, capital defendants are identified and arrested quickly, and many of them confess to their crimes even though doing so is undoubtedly not in their best interests.²⁰³ But courts rarely discuss these circumstances when analyzing the facts of the crime.²⁰⁴ The risk of cherry-picking is especially high when considering the facts of capital murder, because the gruesome and tragic details of the crime might distract from the reality that the crime was not, in fact, all that sophisticated.

The gruesome and tragic nature of most every capital murder case creates another risk: that juries will nullify a valid *Atkins* claim because they believe that even if intellectually disabled, the defendant deserves the death penalty. This is especially true in states such as Texas, where the jury is usually charged with determining intellectual disability during the sentencing phase of the trial—the same time when they are also charged with determining whether the defendant deserves the death penalty.²⁰⁵ The jury will have already heard evidence of the defendant’s capital crime and convicted him of that crime. Then, during the sentencing phase, while the defense puts on evidence of intellectual disability and other mitigating factors, the prosecution presents evidence of the defendant’s past crimes and testimony from family members of the victim.²⁰⁶ It is not hard to imagine, then, that jurors might choose (perhaps unconsciously) to ignore a very compelling *Atkins* claim because they believe the defendant still deserves the death penalty. But the Supreme Court’s decision in *Atkins* created a categorical bar that should not be replaced by a jury’s moral reasoning on the issue. Yet a focus on the facts of the crime and the placement of the decision during the sentencing phase—as opposed to a pretrial determination—inevitably creates this risk.

They can kill people. They can try to drive cars and wreck them. That I had to interview him in terms of the specifics of the murder to determine if he was M.R. is just false. You just don’t have to do that.

Williams Trial Transcript, *supra* note 161, vol. 56 at 157–58.

203. See, e.g., Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 956–60 (2008) (reporting research that showed nearly two-thirds of executed convicts were arrested within ten days of the crime and that approximately half of those executed had confessed to the crime).

204. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 307–08 (2002) (discussing the case facts without analyzing facts that exhibit defendant’s intellectual deficits).

205. See *In re Allen*, 462 S.W.3d 47, 52 (Tex. Crim. App. 2015) (“[W]e have endorsed, but have not mandated, the submission of a ‘special issue’ on intellectual disability to the jury . . .”).

206. See, e.g., *Ex parte Briseno*, 135 S.W.3d 1, 13–18 (Tex. Crim. App. 2004) (analyzing a lower court’s handling of the sentencing phase of a capital murder trial in which the defendant was determined not “mentally retarded” after each party presented witness testimony).

Despite these concerns, the *Briseno* factors require judges and juries to consider the facts of the crime in their determination, sometimes to the exclusion of all other evidence of adaptive deficits.²⁰⁷ In one case, the CCA held that the trial court was free to discount the testimony of the defendant's friends and family and rely instead on the defendant's "remarkably competent crime-spree behavior."²⁰⁸ The court found that this behavior "was well-documented by both applicant and the various crime victims" and asked: "Did this conduct paint the portrait of a mentally retarded person?"²⁰⁹

Trial judges and prosecutors have readily followed the CCA's lead, regularly relying on the facts of a defendant's crime. Elkie Lee Taylor was administered a Street Survival Skills Questionnaire—one of the many objective tests that can be used to measure aspects of adaptive functioning.²¹⁰ Taylor registered below normal range on the tools subtest.²¹¹ The trial court wrote, however, that

[w]hile Applicant failed to score in the normal range on the "Tools" subtest by only a single point, Applicant demonstrated his mental ability to take an instrument or tool designed for one purpose and adapt it to his desired purpose by using a wire coat hanger as a deadly weapon to strangle the victim of the instant underlying capital offense.²¹²

The test administered to Taylor had nothing to do with the facts of the crime, nor did it allow for supplementation of the results by resorting to facts outside the purview of the test.²¹³ Yet the *Briseno* factors' focus on the facts of the crime allowed for this manipulation of the test results.²¹⁴

207. See, for example, the questioning of a defense expert by the prosecutor in Clifton Williams's sentencing hearing:

Q: . . . [W]hat you've told the jury is that someone who can break into a lady's house, stab her, take her purse, dispose of the property, leave in her car, hide his clothes, lie to the police does not have the ability to mix spices?

A: Sure, that can be entirely consistent. I mean, you can get some incredibly dumb people who commit murder, Mr. Bingham.

Williams Trial Transcript, *supra* note 161, vol. 56 at 131.

208. *Ex parte* Butler, 416 S.W.3d 863, 873–76 (Tex. Crim. App. 2012) (per curiam).

209. *Id.* at 875.

210. See *Ex parte* Taylor Findings and Conclusions, *supra* note 52, at 6.

211. *Id.*

212. *Id.*

213. See *id.* at 6–7 (noting that the test assesses the subject's ability to "perform certain tasks demonstrative of whether that person has significant deficits in adaptive behaviors" and does not rely on self-reporting).

214. See Findings of Fact, Conclusions of Law and Order, *supra* note 178, at 32–33 ("The Court finds, based on the 2006 writ hearing testimony, that the applicant possesses the following skills that show logic, knowledge, and adaptability even though he would not receive credit for such skills on adaptive behavior tests: stealing cars, attempting to manipulate the TYC staff, committing the instant offense and attempting to escape detection, procuring marijuana while on deathrow, and committing an attack for the Mexican Mafia in prison . . .").

Taylor's case represents a particularly innovative use of the facts of the crime to bolster a denial of an *Atkins* claim. More often, courts simply list the facts of the defendant's crime and then use those facts to address the other *Briseno* factors. With such a surface-level analysis (and with the previously discussed emphasis on strengths over deficits), the facts are usually found to answer each factor in a way that indicates no intellectual disability. For example, in one case a judge wrote,

that [habeas corpus petitioner] Moore did not have significant deficits in adaptive behavior was amply supported by the application of the *Briseno* factors.

For example, the crime itself implicates at least four of the seven *Briseno* factors, including Moore's ability to formulate and execute plans, to do so in the role of leader, to respond to external stimuli rationally, and to execute a crime that required planning and complex execution.²¹⁵

In another case, a judge found that

the applicant attempted to keep his victims under control by placing the complainant in a position where he could not do anything, an action that indicates purposeful, goal-directed behavior and a certain degree of discipline; that the applicant understood what was said to him by his victims and the applicant was able to respond; and, that the applicant analyzed the situation based on reality, responded appropriately to the situation, and attempted to avoid apprehension.²¹⁶

Neither of the crimes in the above two cases were particularly complex or sophisticated, and both defendants were apprehended quickly.²¹⁷ Yet viewed through the final *Briseno* factor, their crimes alone sufficed as evidence that they did not have adaptive deficits and consequently that they were not intellectually disabled.

This technique is used in jury trials as well. During closing arguments in the sentencing phase of a trial, one prosecutor argued to the jury,

You have all those crimes [referencing the defendant's string of aggravated robberies] to look at. Was he a leader or a follower? He planned out those activities? He sure did . . . That's not impulsivity.

215. *Moore v. Quarterman*, No. 4:07-CV-077-A, 2007 WL 1965544, at *5 (N.D. Tex. July 6, 2007) (footnote omitted). Moore was executed in 2009. *Curtis Moore*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/moore1137.htm> [<http://perma.cc/X958-JRTE>].

216. Findings of Facts, Conclusions of Law and Order at 8, *Ex parte McCoskey*, No. 615396-B (185th Dist. Ct., Harris County, Tex. Aug. 5, 2003). McCoskey was executed in 2013. *Jamie Bruce McCoskey*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/mccoskey1354.htm> [<http://perma.cc/BW6H-JD9D>].

217. See *Moore*, 2007 WL 1965544, at *2–3 (detailing the facts and circumstances surrounding the murder); Findings of Facts, Conclusions of Law and Order, *supra* note 216, at 2–4 (same).

That's not a lack of planning. That is someone who plans a career as an aggravated robber and plans to be successful at it.²¹⁸

Like the *Briseno* factors' focus on strengths rather than weaknesses, this factor has also been used to discredit defense experts who refuse to consider the facts of the crime. In Elkie Lee Taylor's *Atkins* hearing, the defense expert presented standardized tests used by professionals to measure adaptive behavior, which showed that Taylor had deficits in several areas.²¹⁹ However, after detailing the facts of the capital offense, the judge concluded that "[th]e results received by the testing conducted by Dr. Keyes [were] inconsistent with the objective trial evidence demonstrating Applicant's conduct and the mental abilities required of Applicant to perform such conduct."²²⁰ Because of this inconsistency, the defense expert was discredited.²²¹

The *Briseno* factors' emphasis on a defendant's strengths and the final factor's consideration of the facts of the crime clash with professional approaches to diagnosing intellectual disability. This disconnect creates an atmosphere in which prosecutors and judges can cherry-pick behaviors that they think demonstrate a defendant's adaptive functioning, and can cite to the one thing that all *Atkins* applicants have in common—capital murder—to undermine convincing evidence of adaptive deficits. Furthermore, requiring the consideration of the facts of the crime results in the systematic discrediting of experts who try to adhere to the professional approach, and inevitably results in the denial of valid claims of intellectual disability.

3. *The Briseno Factors Are Grounded in Stereotypes and Misconceptions About the Intellectually Disabled.*—As discussed above, most individuals who have intellectual disability in the criminal setting have mild intellectual disability—a “somewhat hidden disability.”²²² Individuals with mild intellectual disability do not appear or sound disabled, especially if viewed only in brief instances.²²³ Furthermore, individuals with mild intellectual disability are often able to live independently and maintain employment.²²⁴ But the lay conception of an intellectually disabled person is of someone who immediately stands out as disabled in the way they look, speak, and behave, and who is incapable of functioning on almost any level.²²⁵ These traits, however, are more typical of those with moderate or

218. *Hunter* Transcript, *supra* note 167, vol. 29 at 22–23.

219. *Ex parte* Taylor Findings and Conclusions, *supra* note 52, at 5–6.

220. *Id.* at 5.

221. *Id.* at 5–6.

222. Greenspan, *supra* note 40, at 221.

223. *Id.*

224. *Id.* at 228–29.

225. *See id.* at 221 (bemoaning the “lay conception” that all people with intellectual disabilities are “globally deficient”).

severe intellectual disability, not the mild intellectual disability presented by most *Atkins* claimants.²²⁶ But the *Briseno* factors, by emphasizing the observations and opinions of lay individuals, allow these misconceptions about intellectually disabled people to overrule professional diagnosis.

Indeed, several of the *Briseno* factors are based on stereotypical assumptions about the intellectually disabled: one factor asks whether the defendant can lie effectively in his own interest, even though many very young children can lie effectively, as can many intellectually disabled individuals.²²⁷ Another factor asks whether the defendant's conduct in response to external stimuli is rational and appropriate. This is a broad and ill-defined factor, but it seems to imply that individuals with ID are incapable of ever acting appropriately.²²⁸ As such, it is an incorrect characterization of the intellectually disabled—especially those with mild intellectual disability.²²⁹

A third factor asks whether the defendant can respond coherently, rationally, and on point to oral or written questions.²³⁰ This factor originates from a common misconception of the intellectually disabled as unable to communicate “normally,” even though research has shown that individuals with mild intellectual disability actually have relatively normal syntax, vocabulary, and grammar.²³¹ While individuals with mild intellectual disability do suffer from some communication deficits, these deficits tend to be sociolinguistic in nature—for example, a person's ability to recognize and correct a mistaken understanding, or to perceive how specific instances of communication fit into a larger goal, and to act accordingly.²³² These deficits are subtler than the formal grammatical and syntactical deficits that lay people expect, and are not immediately apparent in short samples of communication.²³³

Despite the problems with these factors, *Briseno* states that they are tools to aid judges and juries in the determination of intellectual disability.²³⁴ As a result, judges have felt free to cite their direct observations of the

226. *See id.*

227. *See id.* at 227 (“Lying is virtually a universal behavior that starts early in childhood; it may begin around age 2 or 3, although understanding that one is lying starts around age 4.”).

228. *Id.* at 225. As one particularly snarky defense expert retorted to a question of whether the defendant's conduct in response to external stimuli was rational (the fourth *Briseno* factor), “Well, acting appropriately to external stimuli is something that a snail can do, if you're using scientific terminology. . . .” *Lizcano* Transcript, *supra* note 56, vol. 55 at 214.

229. *See supra* notes 218–21 and accompanying text.

230. *See Greenspan, supra* note 40, at 225–26.

231. *Id.* (“Of all the *Briseno* factors, written and oral communication may be the aspect of everyday functioning that most ties into the popular stereotype that characterizes people with ID. That stereotype, which derives from the functioning of people with *moderate* or *severe* ID, is reinforced in popular portrayals on television . . . or film . . .”).

232. *See id.* at 226 (conjuring an example of a defendant discussing his case on the phone despite being told not to on multiple occasions).

233. *See id.*

234. *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

defendant's demeanor at trial or during a hearing as support for their finding of no intellectual disability. For example, one judge remarked that while a witness was testifying, the defendant "watched him intently with his eyes moving from the lawyer to the witness with each question and answer."²³⁵ Later, the judge concluded that "[a]lthough the Trial Court cannot articulate with expertise a definition and identification of mental retardation, the Court concludes that it can identify it when it sees it; the court [sic] has not observed mental retardation in the Defendant."²³⁶ The trial judge thus cited the defendant's ability to follow a conversation with his eyes to rebut his claim of mild intellectual disability,²³⁷ even though this is a skill that people with even moderate or severe intellectual disability can accomplish. And the very notion that intellectual disability is always visible clashes directly with professional understandings of mild intellectual disability.²³⁸

Another judge noted that in the many years he had served as a judge, he had "come into contact on numerous occasions with persons who are mentally ill, legally incompetent and retarded."²³⁹ While acknowledging that "the applicant did not testify during the trial or otherwise conduct any lengthy conversations to, or in the presence of the court," the judge nonetheless found that "there was no indication that the applicant acted unusually or in a manner consistent [with] a person who is mentally retarded . . . nor did he ever act in a manner indicating that he was unable to understand or comprehend the charges against him, or the nature of the proceedings."²⁴⁰ As has been

235. Findings of Fact and Conclusions of Law ¶ 30, *Texas v. Henderson*, No. 181-CR-12-93 (102d Dist. Ct., Red River County, Tex. Oct. 5, 2011).

236. *Id.* ¶ 44.

237. Similarly, in the case of Rickey Lynn Lewis, the judge remarked that during the hearing, Lewis's job supervisor on death row testified that Lewis carried tray carriers with eight to ten trays per carrier. *Ex parte* Lewis Findings of Fact and Conclusions of Law, *supra* note 189, at 23. Lewis interrupted her testimony and corrected her, indicating that there were only seven trays per carrier. *Id.* The judge used this ability to follow along to testimony as a strength to rebut Lewis's intellectual disability claim, implying that individuals with intellectual disability are unable to follow a conversation. *See id.* Notably, this instance was actually strong evidence of impairment, because Lewis failed to understand that how many trays were on the tray carrier was of no import to the larger question and that it is inappropriate to interrupt a testifying witness.

238. *See* Findings of Fact and Conclusions of Law at 18, *Ex parte* Mathis, No. 31361-A (268th Dist. Ct., Fort Bend County, Tex. Jan. 4, 2006) ("Applicant's testimony and demeanor in court during the trial was a significant indicator that Applicant was not acting with a significant sub-average level of intelligence or significant deficits in adaptive skills."). *Compare Ex parte* Lewis Findings of Fact and Conclusions of Law, *supra* note 189, at 23, with *supra* notes 218–21 and accompanying text.

239. Findings of Fact and Conclusions of Law at 5, *Ex parte* Hernandez, No. A 97-364 (216th Dist. Ct., Kerr County, Tex. Mar. 7, 2006).

240. *Id.* at 6. Note that comprehending the charges against him and the nature of the proceedings is the standard used for competency to stand trial—a completely different (and more burdensome) claim than intellectual disability. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*) (noting that the test for whether a defendant is competent to stand trial is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable

explained, denying a claim of ID because there is no outward manifestation of disability relies on the stereotype and misconception that ID is always visible.

Judges are not the only individuals whose stereotypes about intellectually disabled people are given weight by the *Briseno* factors. The first *Briseno* factor asks whether the defendant's family, friends, and teachers thought the defendant was intellectually disabled.²⁴¹ While professionals typically rely heavily on the memories of these individuals regarding the defendant's behaviors growing up, professionals do not directly ask these individuals whether or not they thought the defendant was intellectually disabled.²⁴² Instead, they ask for examples of the defendant's behavior growing up, looking for behavior that might reveal deficits in adaptive functioning.²⁴³ The *Briseno* factor, however, requires lay individuals to explicitly state that the defendant was intellectually disabled; anything less is viewed as evidence against a finding of disability.

Thus, in one case, the defendant's mother, brother, and sister-in-law stated in affidavits that he was "a slow learner, slow to develop, gullible, and a concrete thinker."²⁴⁴ The defendant's former employer additionally stated that he "had difficulty performing his duties as a cook or dishwasher if left unsupervised."²⁴⁵ These are all statements that a professional would deem to be evidence of intellectual disability, but the court used the statements as evidence against a finding of disability because "not one of these individuals asserts they ever believed applicant to be mentally retarded."²⁴⁶

Similarly, another judge found that the first *Briseno* factor was not met, even though several family members and friends of the defendant testified that they considered him to be "slow," because they did not state that they considered him to be mentally retarded.²⁴⁷ Given the somewhat hidden nature of mild intellectual disability, the common misunderstanding of how mild intellectual disability manifests in individuals, and the societal stigma

degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (internal quotations omitted).

241. *Ex parte Briseno*, 135 S.W.3d 1, 8 (2004).

242. *See Greenspan & Switzky*, *supra* note 177, at 290–91 (discussing how the adaptive-behavior assessment instruments used by professionals assess a child's "typical" performance of adaptive behavior over time, as described by informants familiar with the child's typical level of functioning over a period of time).

243. *See id.* at 287–90 (discussing the types of behaviors evaluated in adaptive-behavior assessments and evaluating the problems associated with these measurements).

244. Findings of Fact and Conclusions of Law at 26, *Ex parte Hines*, No. W91-21511-1(B) (2d Dist. Ct., Dallas County, Tex. June 23, 2005).

245. *Id.* at 26–27.

246. *Id.* at 27.

247. Findings of Fact and Conclusions of Law at 5, *Ex parte Wilson*, No. 62490-B (Dist. Ct., Jefferson County, Tex. Aug. 31, 2004).

that is attached to individuals labeled as such, it is not surprising that friends and family often cannot meet the factor's needlessly high burden.²⁴⁸

However, when family members or friends do assert that they thought the defendant was intellectually disabled, their testimony is often discredited because they are not experts or because they may be biased. One defendant's ex-wife asserted that during their marriage, the defendant displayed characteristics indicative of ID.²⁴⁹ But the court found that her statement did not constitute "any evidence of mental retardation, particularly since the witness was a 15 or 16 year old at the time of this offense with no training or expertise in diagnosis of mental retardation."²⁵⁰ In another case, a defense expert was discredited in part because he relied on statements from the defendant's wife, but "d[id] not account for the bias of Applicant's wife to help Applicant avoid execution."²⁵¹

As demonstrated above, this *Briseno* factor is highly manipulable, and puts defendants in a difficult position. If their family or friends give statements supporting a clinical finding of intellectual disability but do not explicitly say that the defendant is intellectually disabled, the factor will not be met. But if they do state that the defendant is intellectually disabled, their statements may be discredited because they are not experts or because they are potentially biased.

Professionals also rely heavily on interviews with the defendant's former teachers to collect anecdotal evidence that may support a finding of intellectual disability. However, the first *Briseno* factor has the same impact on these individuals, giving teachers the authority to state whether or not they thought the defendant was intellectually disabled despite their lack of expertise in the area. For example, in one case the defendant's first-grade teacher testified that "the characteristics of an MR [mentally retarded] child would be that that child possibly couldn't even learn the alphabet or learn to read at

248. The questioning in Calvin Hunter's case detailed this dynamic:

Q: Are parents—in terms of adaptive behavior in children, are parents generally relied upon to assess adaptive behavior.

A: They're used as one source of information. Parents are typically, specially at that age, having real [sic] a difficult time with whatever the growing signs of problems are, and they have problems with that and have to get used to it over time. Sometimes they refuse to have their children in special education.

Q: Why is that?

A: It's denial and it's fear. It's a whole variety of reasons.

Q: I guess most parents don't want to—well, I mean, no one would really want to have their child be disabled?

A: I was a professional in the field and I had trouble, so it's pretty common for parents and families to have trouble.

Hunter Transcript, *supra* note 167, vol. 26 at 222–23.

249. Findings of Fact and Conclusions of Law, *supra* note 179, at 21–22.

250. *Id.*

251. *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 16.

[the] level [of a first-grader].”²⁵² Because the defendant was able to do these things, she did not think he was intellectually disabled.²⁵³

In another case, a defendant’s former teacher stated: “I do not believe that he was mentally retarded. I do, however, believe that he was a slow learner and that he suffered from sort [sic] of learning disability. I also do not believe that [he] was so mentally deficient as not to be able to determine right from wrong.”²⁵⁴ This statement reveals the danger of allowing lay individuals to make a clinical determination: knowing right from wrong is not a consideration in the diagnosis of intellectual disability and is more closely related to mental illness and competency concerns.²⁵⁵ In fact, in many jurisdictions a defendant’s inability to distinguish right from wrong is a complete insanity defense, exempting that defendant from all criminal liability and punishment.²⁵⁶ Despite these incongruities, though, the court credited the teacher’s statement.²⁵⁷

Consideration of whether friends and family members thought the defendant was intellectually disabled also allows prosecutors—aware of the jury’s potential distrust or skepticism of experts—to emphasize the failure of friends, family, and teachers to diagnose the defendant to the jury. In closing argument, one prosecutor argued to the jury that the individuals they heard from are “not psychologists, they’re not psychiatrists, they’re not experts but they are the people who know the defendant. None of them thought he was mentally retarded.”²⁵⁸ This argument discounts the experts and privileges the testimony of the family because they were the only witnesses who knew the defendant during the developmental period. The problem, of course, is that

252. *Williams* Trial Transcript, *supra* note 161, vol. 57 at 100–01.

253. *See id.* at 101 (“The disparity wasn’t that great in—in the gap between where he was and passing and the gap that a mentally retarded child more than likely would have been, and so I did not request testing.”). However, it is well established that individuals with mild intellectual disability are often able to meet elementary academic levels. *See Intellectual Disabilities (Formerly Mental Retardation)*, HEAD START, http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/teaching/Disabilities/Services%20to%20Children%20with%20Disabilities/Disabilities/disabl_fts_00014_061105.html [<https://perma.cc/FG9W-2SFJ>] (explaining that limitations may not be obvious and that children with intellectual disabilities can do well in school).

254. Findings of Fact and Conclusions of Law at 10, *Ex parte* Wooten, No. 16820 HC-2 (6th Dist. Ct., Lamar County, Tex. Feb. 14, 2006).

255. As the expert in Ronnie Neal’s case explained the distinction, not knowing the difference between right and wrong is more often a function of a pathology, a psychopathic person, somebody that has schizophrenia, a psychotic episode and can’t—doesn’t know what reality is. What you have with people with mental retardation is again the whys of the behavior. . . . And so doing something that you know is wrong may be doing it for a simple reason like a pat on the back, although it’s a bad thing to do. Like you may steal something to give to somebody else. It’s that superficiality, lack of understanding the complexities of it.

Neal Transcript, *supra* note 167, vol. 37 at 245.

256. PAUL H. ROBINSON, *CRIMINAL LAW* 512–13 (1997).

257. Findings of Fact and Conclusions of Law, *supra* note 254, at 10.

258. *Hunter* Transcript, *supra* note 167, vol. 29 at 24.

the family members are lay witnesses, who like the jury are uneducated about the behaviors of individuals with mild intellectual disability.

Individuals who work at the prison where the defendant is housed are also often solicited for their opinion regarding the defendant's intellectual capacity. In Michael Wayne Hall's case, another inmate and five prison guards submitted affidavits stating that they did not believe Hall was intellectually disabled.²⁵⁹ A fellow inmate referenced Hall's habit of listening to the radio as evidence that Hall was not intellectually disabled.²⁶⁰ A guard stated that he "knew some children in school with Down's syndrome, but he had not seen anything in [Hall] to indicate that he is mentally retarded."²⁶¹ A second guard stated that he "had been around people who were slow mentally" but did not see the same traits in Hall.²⁶²

In another case, the prosecution presented the testimony of Cesar Garcia, a pharmacist who worked at the defendant's prison and who saw the defendant for five to ten minutes every month.²⁶³ Garcia stated that he had no training in diagnosing intellectual disability and had never held a lengthy conversation with the defendant, but went on to testify that the defendant "doesn't present like a mentally retarded person does. He's articulate, he can make his needs known, he knows how to navigate through the system there."²⁶⁴ Describing his perception of the intellectually disabled, Garcia stated, "they are inept, they are inadequate, they are passive, they are dependent, they are needing adult supervision, redirection."²⁶⁵

It is not surprising that judges, juries, and lay witnesses have misconceptions about the intellectually disabled—most people do. But the intellectual disability determination should be an educational process in which misconceptions and stereotypes are rebutted with sound diagnostic

259. Hall v. State, 160 S.W.3d 24, 34 (Tex. Crim. App. 2004); *id.* at 42 (Johnson, J., dissenting).

260. See *id.* at 34 (majority opinion) ("He listened to cartoons on the radio . . . and could parrot what he heard, if it was something he has heard over and over again.").

261. *Id.* at 35.

262. *Id.*

263. Neal Transcript, *supra* note 167, vol. 38 at 307, 310, 312–13.

264. *Id.* at 307, 311–12.

265. *Id.* at 310. Similarly, a former girlfriend of Juan Lizcano, Jessica Barron, testified during the punishment phase of his trial that Lizcano had difficulty finding her home even when given simple directions, had a "basic" vocabulary, and always responded to questions "simply." Lizcano Transcript, *supra* note 56, vol. 49 at 143–44, 146–48. But on cross-examination, she testified that she did not believe Lizcano was intellectually disabled because "[h]e didn't have any problems understanding me." *Id.* at 166. Barron stated that she had some experience with intellectual disability, because her aunt had severe intellectual disability to the point that she could not speak. *Id.* at 166–67. In contrast to her aunt, Lizcano probably did appear to be quite functional, because Barron was unaware of the various levels and manifestations of intellectual disability. Despite these issues with her understanding, Barron was still allowed to give extremely damaging testimony on the matter.

criteria and information about the actual functioning of the mildly intellectually disabled. One judge who found that a defendant was intellectually disabled remarked that

before being educated through this writ process, [Mr. Van Alstyne's] appearance on the televised interview is not one which this court would have thought was indicative of mental retardation. As noted in *Briseno*, Steinbeck's Lenny [sic] is more what this court would think a mentally retarded individual would look and act like. Unfortunately, in this case, it is not that easy and the court must look at all the factors and not just one.²⁶⁶

In the vast majority of cases, however, the depiction of Lenny referenced in *Briseno* and embodied in the *Briseno* factors serves only to reinforce a judge or juries' preexisting notions about intellectual disability, guaranteeing that some individuals with valid claims will fall through the cracks.

IV. *Briseno* Is the Wrong Answer to a Real Problem

The *Briseno* factors have served only to complicate an already difficult diagnostic procedure. After *Atkins*, many legal and mental-health professionals wrote articles highlighting important issues in *Atkins* claims.²⁶⁷ One article identified fifty-two unresolved issues in the diagnostic process for capital defendants, and seventeen of those issues related directly to the adaptive-deficits criteria.²⁶⁸ Despite these issues, the adaptive-deficits criteria is becoming increasingly important in the diagnosis of ID, in part because of the current understanding that IQ scores have been historically overemphasized as a generalized standard of overall ability.²⁶⁹

One ongoing debate amongst mental-health professionals is the use of standardized measures of adaptive functioning. In the past, professionals usually measured adaptive behavior by conducting structured interviews with family members and others who knew the individual well, and then using that information to assess adaptive behavior.²⁷⁰ However, standardized measures,

266. *Ex parte* Van Alstyne, 239 S.W.3d 815, 822 n.21 (Tex. Crim. App. 2007) (per curiam) (quoting the trial judge). Interestingly, this judge did a thorough analysis of the *Briseno* factors, but he seems to have taken the professional viewpoint about intellectual disability seriously, allowing him to find intellectual disability in spite of the factors. *See id.* at 822–23.

267. Lisa Kan et al., *Presenting Information About Mental Retardation in the Courtroom: A Content Analysis of Pre-Atkins Capital Trial Transcripts from Texas*, 33 LAW & PSYCHOL. REV. 1, 2–3 (2009).

268. J. Gregory Olley et al., *Division 33 Ad Hoc Committee on Mental Retardation and the Death Penalty*, PSYCHOL. MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, Winter 2006, at 11, 12–13.

269. James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 CURRENT OPINION PSYCHIATRY 260, 260–62 (2013).

270. *See* J. Gregory Olley & Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-II*, in ADAPTIVE BEHAVIOR ASSESSMENT SYSTEM-II: CLINICAL USE AND INTERPRETATION 381, 393 (Thomas Oakland &

such as the Vineland Adaptive Behavior Scale, are increasingly becoming the norm in intellectual disability diagnosis. In 2002, the American Association of Intellectual and Developmental Disabilities changed its definition of intellectual disability to encourage the use of standardized measures.²⁷¹ Some scholars have even hypothesized that the difference in outcome between two similarly situated capital defendants may be attributable to the use of, or failure to use, a standardized assessment for adaptive behavior.²⁷²

The emphasis on standardized scales for adaptive behavior is problematic in the capital context, though, because no scale has been created for or normed on individuals who have been incarcerated for a significant portion of their lives.²⁷³ Because the adaptive behavior inquiry focuses on how an individual functions in society, many of the questions relate to behaviors that an incarcerated person may be barred from doing (“participates in an organized program for a sport or hobby” or can cook a meal) or may have no choice but to do (“bathes daily”).²⁷⁴ The highly restrictive and regimented environment of death row simply does not easily allow for a realistic and comprehensive assessment of adaptive behavior.²⁷⁵

Because of the difficulties in assessing the adaptive behavior of an incarcerated person, and because the diagnostic inquiry is more concerned with the defendant’s functioning during the developmental period (in order to meet the third criterion) and at the time of the offense (because of concerns about reduced moral culpability),²⁷⁶ evaluators often conduct a retroactive assessment of adaptive behavior.²⁷⁷ If the defendant was identified early in life as having intellectual disability, there may be plenty of test records and other data to pull from in order to conduct the retroactive assessment.²⁷⁸ Similarly, if credible individuals are located who were close to the defendant during the developmental period, they can fill out an adaptive-behavior rating instrument to provide data about the defendant’s functioning.²⁷⁹

Patti L. Harrison eds., 2008) (discussing the use of interviews with family, neighbors, friends, and employers to obtain information about an individual’s adaptive behavior).

271. See AM. ASS’N ON MENTAL RETARDATION, *supra* note 37, at 13 (suggesting that limitations on adaptive behavior should be established through the use of standardized measures).

272. Dennis R. Olvera et al., *Mental Retardation and Sentences for Murder: Comparison of Two Recent Court Cases*, 38 MENTAL RETARDATION 228, 228–30 (2000).

273. Kan et al., *supra* note 267, at 6.

274. Greenspan & Switzky, *supra* note 177, at 285–86, 291.

275. *Id.* at 291.

276. See, e.g., *Ex parte Sosa*, 364 S.W.3d 889, 895 (Tex. Crim. App. 2012) (explaining that the court had “no basis on which to make a determination of whether a man who committed the offense that a jury found beyond a reasonable doubt in 1984 could have had the disabilities that the applicant proved by a preponderance of the evidence to a habeas judge in 2008”).

277. Greenspan & Switzky, *supra* note 177, at 290.

278. *Id.*

279. *Id.* at 291.

However, many *Atkins* claimants were never diagnosed with intellectual disability.²⁸⁰ This may be because their families and communities did not have the resources for proper identification and assessment, because the stigma associated with intellectual disability prevented families from seeking assessment or acknowledging signs, or because the defendant was experiencing so much trauma from other sources that his poor functioning was never identified as intellectual disability. Regardless, a lack of childhood diagnosis does not and should not preclude a later finding of intellectual disability.²⁸¹

Attempting a retroactive assessment of intellectual functioning, though, can be difficult and the results may be easily attacked. “The process of assessing adaptive behavior is a matter of drawing information from many sources, all of which are imperfect. When a conclusion is based on many imperfect sources, and that conclusion is stated in court, the expert witness can expect many critical questions in cross-examination.”²⁸² This is further complicated when family members and teachers must remember behavior up to twenty years before the assessment. Furthermore, if no assessments were conducted in childhood that can corroborate the memories of the family members, they may be easily accused of bias. Some professionals have argued that the best practice for assessing individuals on death row is to synthesize assessments of preincarceration functioning and current functioning, but there is no consensus, and professionals continue to use widely varying approaches.²⁸³

The issues outlined above are only a fraction of the difficulties that mental-health professionals face when assessing a defendant and testifying in his case. While none of these issues have been satisfactorily resolved, it is clear that the *Briseno* factors are not the solution. As demonstrated above, the factors inject improper considerations into the *Atkins* inquiry and focus factfinders on considerations such as the facts of the crime and isolated incidents of strengths that most professionals intentionally do not rely upon. Furthermore, the factors are indeterminate—it has never been explained what level of proof must be shown to meet a factor, nor is it clear how many factors must be met to support a finding of intellectual disability. When none of the factors are necessary or sufficient, the factors can be manipulated in ways

280. *Id.* at 281.

281. *See id.* at 290 (explaining that mental retardation is a dynamic status that an individual can come into and out of at various stages of life).

282. *See* Olley, *supra* note 39, at 7.

283. Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 *ETHICS & BEHAV.* 3, 7 (2003). Only half of the psychologists in one study used standardized assessments of adaptive behavior, and many evaluators felt that it was appropriate to use information about the crime to assess functioning—a position inconsistent with that of the AAIDD. *See* Bethany Young et al., *Four Practical and Conceptual Assessment Issues that Evaluators Should Address in Capital Case Mental Retardation Evaluations*, 38 *PROF. PSYCHOL.: RES. & PRAC.* 169, 172 (2007).

that allow for outcome-oriented analysis. And when a defendant's life is on the line, this risk of biased, uninformed, or arbitrary decision making should not be tolerated.

Instead, professionals must continue to research and develop methodologies that meet the specific needs created by the *Atkins* inquiry, and courts should rely on these methodologies instead of creating their own. Otherwise, as has been demonstrated in the preceding sections, serious problems occur, valid claims are denied, and intellectually disabled individuals continue to be executed.

V. Conclusion

Supreme Court decisions such as *Atkins* are often heralded as important transformations in the protections afforded to an entire class of people, and indeed *Atkins* reflects an improved understanding of the ways in which intellectual disability affects individuals. But these decisions rely on diligent enforcement by states and lower courts. In Texas, the Court's decision in *Atkins* was greeted with outright skepticism by the Court of Criminal Appeals. This skepticism translated into a substantive redefinition of intellectual disability that underenforces the Court's mandate and allows for the continuing execution of the intellectually disabled.

It is not yet clear how this unconstitutional practice will be corrected, either. Although the Court has already chastised Florida for erecting an artificial and unscientific barrier to *Atkins*,²⁸⁴ Texas courts have not embraced that decision as applying to the *Briseno* factors: while one of the judges on the CCA has recognized that the *Briseno* factors are likely unconstitutional under *Hall*, none of the other eight judges agreed.²⁸⁵ And the Texas legislature's inability to pass a statute to govern *Atkins* claims in the thirteen years since *Atkins* was decided does not inspire confidence that the legislature will dismantle *Briseno*. Thus, the discontinuation of the *Briseno* factors will likely have to come from the Supreme Court. And given the pace at which Texas executes individuals, the Court should decide this issue sooner rather than later.

—Hensleigh Crowell

284. *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

285. *Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring).

Protecting North America's Past: The Current (and Ineffective) Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities and How We Can Improve Them*

I. Introduction

We have a problem here in North America. A huge quantity of black-market goods are being smuggled across the border from Mexico into the United States—but they are not what you might think. The smuggled goods are not illegal narcotics, but Mexican pre-Columbian antiquities. The illicit trade of antiquities moves artifacts valued in the billions of dollars annually, making it the most valuable international criminal activity after the drug trade.¹ The United States and Mexico feel the cost of this illicit trade severely, and these two countries have been at the forefront of international efforts to curb smuggling activities and protect the irreplaceable pre-Columbian antiquities put at risk.² But as this Note endeavors to demonstrate, these efforts have not been adequate.

The reasons this problem exists are well explored.³ The United States is what is known as a “market nation”—a nation with many financial

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1. See Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 146 (2003) (explaining that outside of drug trafficking, the illegal trade of antiquities is as large as any international crime).

2. See *infra* subparts II(B)–(C) (discussing the efforts of Mexico and the United States to curb illegal smuggling of pre-Columbian antiquities). The term “pre-Columbian,” for the purposes of this Note, is defined as the period in history prior to the establishment of the Spanish culture in the National Territory of Mexico, Central America, South America, or the Caribbean Islands. The term *pre-Columbian antiquities* therefore references any object that is the product of a pre-Columbian Indian culture. These definitions are based on the definitions found in the 1972 Pre-Columbian Act, 19 U.S.C. § 2095 (2012), and Mexico’s 1972 Cultural Protection Act, Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas [LMZAA], Diario Oficial de la Federación [DOF] 06-05-1972, últimas reformas 28-01-2015 [hereinafter Mexico’s 1972 Federal Declaration (Spanish)], translated in UNESCO, COLLECTION OF LEGISLATIVE TEXTS CONCERNING THE PROTECTION OF MOVABLE CULTURAL PROPERTY: MEXICO 1 (1987) [hereinafter MEXICO’S 1972 FEDERAL DECLARATION].

3. See, e.g., Jowers, *supra* note 1, at 146–48 (noting the two primary views of protection of cultural property—cultural internationalism and cultural nationalism—and explaining how these views factor into the fundamental dichotomy of “market nations” and “source nations” (internal quotation marks removed)); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986) (recognizing that when “the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property”).

resources and a high demand for antiquities and relics from other countries.⁴ Meanwhile, Mexico is the prototype of a “source nation”—a nation with an abundance of ruins, archaeological sites, and pre-Columbian antiquities, but lacking the financial resources necessary to protect and develop these cultural and historical treasures.⁵ This high demand on the United States’ side of the border creates a strong incentive for impoverished peoples in Mexico to collect and smuggle valuable pre-Columbian antiquities by any means necessary.⁶ And Mexico’s inability to adequately protect the ruins and historical sites only increases the severity of the problem by reducing the likelihood that looters and smugglers will face retribution for their acts.⁷

The theft and illegal trade of Mexican pre-Columbian antiquities harms both the United States and Mexico. It is obvious how Mexico is harmed—its cultural history is being actively stolen and sold piecemeal on the black market.⁸ Many of the artifacts stolen from Mexico come from historical sites and ruins that haven’t even been inventoried and officially discovered yet.⁹ Mexico is denied even the benefit of taxing this illicit trade, valued in the billions of dollars internationally.¹⁰ But the United States is also harmed. Much of the historical significance of a pre-Columbian artifact, such as a Mayan stelac, lies in its relative geographic location, positioning, and other clues relative to its surroundings.¹¹ When the object is removed from its resting place without proper cataloging and recording, this historical significance is permanently lost, and we know a

4. See Merryman, *supra* note 3, at 832 (giving examples of market nations that include France, Germany, Japan, the Scandinavian nations, Switzerland, and the United States).

5. See *id.* (listing nations like Mexico, Egypt, Greece, and India as examples of source nations).

6. See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 406 (1995) (stating that “there are strong incentives for citizens in artifact-rich countries to remove artifacts illegally,” including using the artifacts as a source of income and avoiding government interference with land development); Lawrence J. Persick, Comment, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT’L L. 89, 91 (1985) (describing some of those involved in the illicit trade of antiquities as local peasants and farmers in need of money).

7. See Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT’L LAW. 627, 670 (1992) (“The Mexican government has not been successful in providing the requisite protection or preservation, primarily because of inadequate financial resources.”).

8. See *id.* at 629 (explaining the significance of cultural property to source nations).

9. See Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT’L L. REV. 227, 237 (2005) (“The governments of [source] countries cannot stay abreast of the discoveries, let alone the smuggling.”).

10. See Jowers, *supra* note 1, at 146 (noting that the international illegal trade of antiquities involves billions of dollars each year).

11. See, e.g., Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 279 (1982) (explaining that knowledge of the source and placing of the stelac is crucial to deciphering the text thereon).

little bit less about our past as a result of the theft. Additionally, the looters that find the artifacts and the smugglers that transport them are unlikely to be careful to preserve the artifacts in their original state. In many cases the thieves will cut the artifacts into pieces or deliberately deface them to conceal their value in order to export the artifacts without detection.¹² This destruction of irreplaceable historical and cultural relics deprives not only Mexico but all nations of the benefit that comes with a strong knowledge of our past.¹³ Fighting this illicit looting disrupts the delicate economy of Mexico and other source nations, forcing them to spend millions to protect these treasures and putting a strain on international relations between countries by creating disputes over cultural restitution.¹⁴

With the problem at hand, this Note suggests that the current laws and recourses available that protect and deter the theft of Mexican pre-Columbian antiquities and these artifacts' illegal import into the United States are ineffective at their goal of reducing these types of crime. Instead, a new policy is recommended that focuses on the active preservation of these antiquities before they are looted in the first place. This policy will rely primarily on educating the people of Mexico and the United States about the damage that this illicit trade causes and the penalties for those involved in this destruction. Specific groups of people will be targeted for this education, including people living in rural areas who may find or help transport stolen antiquities, border agents and tourists who may discover the antiquities as they are smuggled, museums and dealers who often serve as intentional or unintentional fences for these artifacts, and people involved in international transportation who may witness or take part in the trade.

Part II of this Note covers the current international agreements and laws in the United States and Mexico that attempt to address the illicit trade of Mexican pre-Columbian antiquities. These include the UNESCO Convention of 1970, the Cultural Property Implementation Act, the 1970 Treaty of Cooperation Between the United States and Mexico, Mexico's 1972 Federal Declaration of ownership over Mexican pre-Columbian

12. See, e.g., *id.* at 278 (reporting that stelae can be as tall as forty feet and as heavy as five tons and are thus "sawed, hacked, split apart with crowbars, or simply smashed into moveable pieces—before they are ready for the art market"); Borodkin, *supra* note 6, at 383 (explaining that antiquities traffickers will deface artifacts to make them less recognizable and therefore easier to smuggle).

13. See, e.g., Bator, *supra* note 11, at 278–79 (stating that the inscriptions on stelae are the primary source of historical knowledge of the Mayan culture, but in the artistic realm, they are valued less than the pictorial carvings and are often the parts that are cut off during the process of "thinning" the piece into moveable chunks).

14. Warring, *supra* note 9, at 243.

antiquities, and the National Stolen Property Act. Part III discusses why these attempts to correct the problem have been ineffective and outlines a possible remedial policy for both nations that focuses on education, as outlined in the previous paragraph. Part IV concludes.

II. The Current International Agreements and Laws in the United States and Mexico Protecting Mexican Pre-Columbian Antiquities

There are several legal systems in place designed to aid in the protection and recovery of Mexico's cultural artifacts and antiquities illegally imported into the United States. The UNESCO Convention of 1970 represented the first international agreement to attempt to find a solution to the problem of illicitly traded antiquities, and it shed light on the problem on the global stage.¹⁵ The United States and Mexico, recognizing the great deal of illicit trade already occurring between the two nations, ratified a bilateral treaty in the same year to prevent the destruction of antiquities and provide recourse for the return of these antiquities to Mexico.¹⁶ This treaty proved inadequate to solve the problem, which prompted the U.S. Legislature to pass the Pre-Columbian Act of 1972, strengthening import regulations at the border.¹⁷ Mexico also took action in 1972 by passing the Federal Declaration, effectively converting and vesting ownership of all Mexican pre-Columbian antiquities, discovered or not, to the Mexican Government.¹⁸ In 1983, the United States attempted to implement key elements of the 1970 UNESCO Convention in its federal law under the Cultural Property Implementation Act.¹⁹ Finally, a string of U.S. court cases began applying the National Stolen Property Act to illegally imported stolen artifacts when the source nation had adequate laws nationalizing ownership of those artifacts.²⁰ This jurisprudence, along with Mexico's 1972 Federal Declaration, now allows Mexico to bring an action under this act for the return of any Mexican pre-Columbian antiquity imported into the United States after 1972.²¹ These laws and agreements offer a diverse set of remedies and protections to Mexico, but, as discussed below, each suffers a major flaw—they do not effectively prevent the looting and destruction of the pre-Columbian antiquities they are designed to protect.

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

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

17. *See infra* subpart II(E).

18. *See infra* subpart II(D).

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

20. *See infra* subpart II(F).

21. *See infra* subpart II(F).

A. *The UNESCO Convention of 1970*

In the early part of the 20th century, increases in the efficiency of travel and transportation, the demand for rare antiquities on the world market, and the discoveries of new and fantastic lost artifacts in the heart of Latin America and elsewhere spurred a drastic spike in the looting and smuggling of pre-Columbian antiquities.²² Many nations realized there was an urgent need to protect these priceless treasures and that this need could only be met by a unified action from both market nations and source nations.²³ Source nations were the most immediate victims of this pillaging, and this is what caused Mexico and Peru to petition the United Nations Educational Scientific and Cultural Organization (UNESCO) General Conference to adopt global measures to stem the tide of the unlawful trade in cultural property.²⁴ The subsequent proceedings that came out of this petition led UNESCO to adopt the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (the "Convention") in 1970.²⁵ The Convention was the first global agreement concerning the illicit international trade in cultural property and became the starting point for the unified efforts of many nations to stem the tide of illicit trade in antiquities and cultural artifacts.²⁶ Before this instrument had been ratified, the international protection of cultural property had been limited to protection in times of war.²⁷ Though the Convention was an essential step in fostering

22. See Jowers, *supra* note 1, at 149 (discussing how Mexico urged UNESCO to adopt global measures to fight the illicit trade in antiquities in 1960).

23. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property pmbl., Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention] (stating that "the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation").

24. PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 5 (2d ed. 2007). The final product of this petition was a nonbinding instrument, ratified in 1964. Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, Nov. 19, 1964, reprinted in UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY I: COMPENDIUM OF LEGISLATIVE TEXTS 382 (1984). Several years later, Mexico and several other source nations pushed for a legally binding instrument to replace the 1964 Recommendation. UNESCO, *supra*, at 21.

25. 1970 UNESCO Convention, *supra* note 23; see also Jowers, *supra* note 1, at 149 (stating that UNESCO responded to Mexico's initiative in 1968 by authorizing a special committee to draft the convention).

26. Potter & Zagaris, *supra* note 7, at 642.

27. James A.R. Nafziger, *Protection of Cultural Property*, 17 CAL. W. INT'L L.J. 283, 283-84 (1987). The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is an early multinational agreement providing for the preservation of cultural property during armed conflict and military occupation. Warring, *supra* note 9, at 248 (describing the 1954 Hague Convention as "the first multilateral international agreement dedicated solely to the protection of cultural property"). The 1954 Hague Convention allows waiver of the obligation to respect and refrain from hostile acts against cultural property under the Convention only where imperatively required by military necessity. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4, May 14, 1954, 249 U.N.T.S. 240. Protocols I and II

the type of international cooperation necessary to combat the illicit trade of antiquities, it was only that: a single step in a prolonged process. The Convention is not self-executing.²⁸ After the adoption of the Convention by UNESCO, each participating nation had to ratify the Convention under its own laws for it to be legally applicable in that nation.²⁹ This took time—the United States did not become a full signatory to the Convention until 1983, with the enactment of the Cultural Property Implementation Act (CPIA).³⁰

B. *The Cultural Property Implementation Act*

The CPIA is the domestic law implementing the articles of the 1970 UNESCO Convention in the United States. Although the Senate ratified the 1970 UNESCO Convention in 1972, it did not pass the CPIA until eleven years later, in 1983.³¹ The CPIA did not implement every article in the Convention as written but selectively incorporated certain articles to keep with the same overall purposes embodied in the Convention.³² Specifically, the CPIA adopts Articles 7(b) and 9 of the 1970 UNESCO Convention with modifications.

Article 7(b) of the 1970 UNESCO Convention prohibits the importation of cultural property stolen from a museum, a religious or secular public monument, or similar institution.³³ The CPIA implements

Additional to the 1949 Geneva Conventions—the most recent instance of this wartime protection—prohibit acts of hostility directed against historic monuments, works of art, or places of worship that constitute the cultural or spiritual heritage of peoples and the use of such objects in support of the military effort. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 16, Dec. 12, 1977, 1125 U.N.T.S. 609. This obligation does not provide for any derogation based on military necessity. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 647, 1467 (Yves Sandoz et al. eds., 1987).

28. See 1970 UNESCO Convention *supra* note 23, art. 19 (providing that the Convention is subject to ratification or acceptance by states parties in accordance with their respective constitutional procedures).

29. *Id.*

30. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2602–06 (2012).

31. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, tit. III, 96 Stat. 2329, 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–13 (2012)).

32. See S. REP. NO. 97-564, at 23–24 (1982) (discussing the reasons for adopting the CPIA in connection with the objectives of the Convention).

33. 1970 UNESCO Convention, *supra* note 23, art. 7(b).

this article by prohibiting the import into the United States of any cultural object

documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later.³⁴

This article is of limited usefulness in combating the illegal importation of Mexican pre-Columbian antiquities, as many antiquities smuggled into the United States are not taken from museums or monuments but from undiscovered or undeveloped archeological sites.³⁵

Article 9 is the heart of the 1970 UNESCO Convention.³⁶ The purpose of Article 9 is to encourage multilateral action when a state's cultural patrimony is in danger.³⁷ Article 9 of the 1970 UNESCO Convention provides the following:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.³⁸

This language is intended to provide a mechanism for nations to provide assistance to each other when there is widespread international smuggling of pillaged archaeological and ethnological materials.³⁹ The United States' implementation of Article 9 under the CPIA is quite complex. Generally, the statutory framework allows the President to impose import restrictions on designated categories of archaeological and ethnological materials when requested by another State Party to the 1970

34. 19 U.S.C. § 2607 (2012).

35. See PERNILLE ASKERUD & ETIENNE CLÉMENT, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY 10 (1997) (noting that archaeological sites are prime targets for thieves since these undiscovered artifacts have not yet been cataloged and are therefore easier to trade).

36. Bator, *supra* note 11, at 377–79.

37. *Id.* at 379.

38. 1970 UNESCO Convention, *supra* note 23, art. 9.

39. *Convention on Cultural Property Implementation Act (CPIA) of 1983: Fact Sheet*, ARCHEOLOGICAL INST. AM. (Apr. 1, 2010), <http://www.archaeological.org/news/sitepreservation/75> [<http://perma.cc/Q9CL-4E6X>]. The terms *archaeological* and *ethnological* are not defined in the Convention. However, the CPIA defines these. 19 U.S.C. § 2601(2).

UNESCO Convention.⁴⁰ The CPIA allows the United States to enter into bilateral agreements that are negotiated between the United States and another nation without requiring the Senate to ratify a new treaty.⁴¹ Since the CPIA's ratification, the United States has entered into bilateral agreements with only a handful of nations.⁴² The United States and Mexico never entered into a bilateral treaty under the CPIA because a bilateral treaty in "the spirit" of article 9 already existed between these two nations by the time that the CPIA was passed.⁴³

Because there is no bilateral treaty between the United States and Mexico under the CPIA, the Article 7(b) incorporation is the only part of the 1970 UNESCO Convention that the CPIA statute made effective against the illegal importation of Mexican pre-Columbian antiquities into the United States. Despite this narrow applicability, the CPIA has been used successfully by Mexico to force the return of stolen antiquities. In 1999, a New York District Court found that the CPIA required the forfeiture of a Mexican document from 1778, stolen from the National Archives in Mexico City.⁴⁴ These kinds of victories have the theoretical effect of discouraging theft and illegal importation of Mexican antiquities. However, the very limited scope of the CPIA as applied to Mexico likely nullifies this effect. Thus, the CPIA is not a good instrument to lean on in the battle to preserve and protect Mexican pre-Columbian artifacts.

C. *The 1970 Treaty of Cooperation Between the United States and Mexico*

After the 1970 UNESCO Convention had been drawn up but before it had been finalized, the United States and Mexico entered into the Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties on July 17, 1970.⁴⁵ This treaty was

40. U.S. INFO. AGENCY, CURBING ILLICIT TRADE IN CULTURAL PROPERTY: U.S. ASSISTANCE UNDER THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT 1 (1989).

41. 19 U.S.C. § 2602.

42. See *Bilateral Agreements*, U.S. DEP'T ST., BUREAU EDUC. & CULTURAL AFF., <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> [<http://perma.cc/VHB4-N5GR>] (providing a list of fifteen nations with which the United States has bilateral agreements).

43. Jowers, *supra* note 1, at 157–58. See *infra* subpart II(C) for a discussion of the existing treaty with Mexico passed in 1970 and already in place when the CPIA was passed. It had been in existence for thirteen years. 19 U.S.C. § 2602 (showing the CPIA was enacted in 1983).

44. *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221, 1999 WL 97894, at *1 (S.D.N.Y. Feb. 22, 1999).

45. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Mex.-U.S., July 17, 1970, 22 U.S.T. 494 [hereinafter Treaty of Cooperation].

designed to “encourage the protection, study and appreciation of properties of archaeological, historical or cultural importance, and to provide for the recovery and return of such properties when stolen.”⁴⁶

One of the treaty's primary goals is deterring the illicit excavations of archaeological sites and their pillaging, a growing problem in Mexico in the 1960s.⁴⁷ The treaty defines the protected properties covered in Article 1 as any government property that is also a pre-Columbian artifact, either a colonial-period art object, a religious artifact that is of outstanding importance to the nation, or an important government document.⁴⁸ The phrase “importance to the national patrimony” in the definition tracks with the language in Article 9 of the 1970 UNESCO Convention, which requires that “cultural patrimony” be in jeopardy from pillage before such affected nation can invoke the Article.⁴⁹ This is one of the ways the treaty is written to follow the spirit and requirements of the Convention, even though it is not technically ratified under the Convention's authority.

The second article of the treaty creates specific requirements for each party nation to

encourage the discovery, excavation, preservation, and study of archaeological sites and materials by qualified scientists and scholars . . . ; to facilitate the circulation and exhibit [of covered properties] . . . in order to enhance the mutual understanding and appreciation of the artistic and cultural heritage of the two countries; and . . . [to ensure] the conservation of national archaeological, historical and cultural properties.⁵⁰

The language in this article is vague and does not provide for any specific action that would immediately protect or preserve endangered pre-Columbian artifacts.⁵¹ However, this agreement has an important function: to encourage future discourse on how to deter the pillaging of these artifacts and archaeological sites.⁵²

The primary mechanism that the treaty provides is the mandate for each state to help the other recover stolen covered property upon request.⁵³ An official request from one state automatically triggers enforcement procedures in the state of which the request is made.⁵⁴ In addition, the

46. *Id.* pmb1.

47. *Id.* art. II; see *supra* note 22 and accompanying text.

48. Treaty of Cooperation, *supra* note 45, art. I.

49. Compare *id.*, with 1970 UNESCO Convention, *supra* note 23, art. 9.

50. Treaty of Cooperation, *supra* note 45, art. II.

51. See *id.* (lacking specific actions and instead imposing duties to “encourage,” “deter,” and “facilitate” certain behaviors, then providing for later coordination among representatives regarding implementation of these duties).

52. *Id.*

53. *Id.* art. III.

54. *Id.*

treaty authorizes the attorney general of the latter state "to institute a civil action in the appropriate district court" if the state is unable to recover and return the stolen object.⁵⁵

The Treaty of Cooperation provided a well-tailored solution for returning illegally smuggled pre-Columbian antiquities to Mexico and contemplated the need for further measures to protect Mexico's ancient cultural resources. The treaty was initially bound by one very important restriction: it only covered artifacts owned and controlled by "governments or their instrumentalities."⁵⁶ But as discussed in the next subpart, Mexico dealt with this ownership issue in 1972. Overall, the 1970 U.S.–Mexico Treaty of Cooperation has not been considered successful in deterring the illegal pillage and export of pre-Columbian artifacts.⁵⁷ This is in part due to its focus on the recovery of already lost artifacts,⁵⁸ rather than the preservation of artifacts before they are lost.⁵⁹

D. Mexico's Federal Law on Archaeological, Artistic and Historic Monuments and Zones

In 1972 Mexico declared all pre-Columbian artifacts to be property of the state with the enactment of the Federal Law on Archaeological, Artistic and Historic Monuments and Zones, removing these artifacts from commerce and export.⁶⁰ This drastic measure was Mexico's attempt to protect against the destruction of its cultural heritage by providing a legal means to recover any pre-Columbian antiquity that is found in another country, despite any inability by Mexico to establish provenance or previous control over the artifact.⁶¹ Under Article 27 of the declaration, "[a]rchaological monuments, both movable and immovable, are the inalienable and imprescriptible property of the nation."⁶² The definition of

55. *Id.*

56. *Id.* art. I.

57. Jowers, *supra* note 1, at 161.

58. S. REP. NO. 92-1221, at 2 (1972); H.R. REP. NO. 92-824, at 3 (1972).

59. See Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 68 (1997) (criticizing the treaty's "sole concentration" on recovery); Jowers, *supra* note 1, at 161 (implying that the Treaty of Cooperation lacks a crucial focus on preventing theft before it occurs).

60. Mexico's 1972 Federal Declaration (Spanish), *supra* note 2, art. 27, translated in MEXICO'S 1972 FEDERAL DECLARATION, *supra* note 2, at 8.

61. See Eduardo Matos Moctezuma, *Las Normas Jurídicas y la Investigación en México*, in ARQUEOLOGÍA Y DERECHO EN MÉXICO 125, 125 (Jaime Litvak King et al. eds., 1980) (explaining that article 27 of the 1972 Federal Declaration seeks to establish that archeological patrimony remains in the hands of Mexico and represents a fundamental improvement over previous laws).

62. MEXICO'S 1972 FEDERAL DECLARATION, *supra* note 2, at 8, translating Mexico's 1972 Federal Declaration (Spanish), *supra* note 2, art. 27 ("Son propiedad de la Nación, inalienables e imprescriptibles, los monumentos arqueológicos muebles e inmuebles."). Declaring the monuments inalienable and imprescriptible signifies that the nation's ownership of such property

archaeological monuments given is expansive and covers nearly all pre-Columbian artifacts originating in Mexico.⁶³ This type of blanket nationalization of artifacts is not foreign to Mexican policy; the nation has historically utilized umbrella laws like this to protect its cultural heritage.⁶⁴ The 1972 Federal Declaration also excludes nearly all private ownership of pre-Columbian artifacts, including artifacts discovered by accident or through exploration.⁶⁵ The laws promulgated under this declaration also attached criminal liability to violations.⁶⁶ This was done in order to increase the deterrent effect of the laws and to expand their applicability abroad under other nations' foreign law recognition schemes, including the National Stolen Property Act in the United States.⁶⁷

This type of blanket nationalization, which completely bans the export of cultural property, has been criticized for its all-inclusive nature.⁶⁸ However, Article 13 of the 1970 UNESCO Convention expressly approves such a declaration,⁶⁹ and the advantages for the Mexican government in their efforts to recover illegally exported artifacts cannot be denied. This declaration expanded the scope and usefulness of the 1970 U.S.–Mexico Treaty of Cooperation by a large margin, making any pre-Columbian artifact crossing the border from Mexico to the United States subject to seizure under United States regulations promulgated under the 1972 Pre-Columbian Act.⁷⁰

cannot be lost through transfer of ownership or lapse of time. KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 154 (1994).

63. Jowers, *supra* note 1, at 162–63.

64. Mexico first utilized umbrella laws to regulate monuments and works of cultural significance and value in 1897, with a statute that proclaimed all archaeological monuments within Mexican territory property of the nation. *See, e.g.*, United States v. McClain (*McClain I*), 545 F.2d 988, 997 (5th Cir. 1977) (recognizing that, since 1897, “Mexican law has been concerned with the preservation and regulation of pre-Columbian artifacts,” and that national ownership of monuments and artifacts by legislation has come in stages since then); Potter & Zagaris, *supra* note 7, at 667 (“[M]any source countries such as Mexico have enacted umbrella statutes which declare that all antiquities of a certain age or older . . . are national property.”).

65. Jowers, *supra* note 1, at 163.

66. *See* Mexico's 1972 Federal Declaration (Spanish), *supra* note 2, arts. 48–52 (establishing sanctions, including fines, imprisonment of up to ten years, or both for violations of the law), translated in MEXICO'S 1972 FEDERAL DECLARATION, *supra* note 2, at 11–12.

67. *See infra* subpart II(F).

68. Borodkin, *supra* note 6, at 392–93.

69. 1970 UNESCO Convention, *supra* note 23, art. 13 (“The States Parties to this Convention also undertake, consistent with the laws of each State: . . . (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”).

70. *See infra* subpart II(E).

It has been suggested that the 1972 Federal Declaration's blanket prohibition on the export of antiquities may have been shortsighted.⁷¹ Although it does make remedial action easier under foreign laws, it also encourages the development of a black market in pre-Columbian antiquities.⁷² The export ban "encourages the desirability" of these artifacts on the international market because their scarcity increases their value.⁷³ This, in turn, creates a strong financial incentive to engage in the illicit trafficking of antiquities.⁷⁴ Additionally, nationalizing the ownership of all pre-Columbian artifacts created an overabundance of these artifacts within Mexico in need of protection and preservation.⁷⁵ Mexico has not been able to provide the requisite protection or preservation for these antiquities due to inadequate financial resources.⁷⁶

E. *The Pre-Columbian Act of 1972*

In 1972, the United States took its first unilateral action to tackle the illicit import of pre-Columbian artifacts from Mexico.⁷⁷ The Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act provides that "[n]o pre-Columbian monumental or architectural sculpture or mural . . . may be imported into the United States unless the government of the country of origin of such sculpture or mural issues a certificate . . . which certifies that such exportation was not in violation of the laws of that country."⁷⁸ This statutory framework and the series of regulations that were promulgated under it served to strengthen the relatively ineffective 1970 U.S.–Mexico Treaty of Cooperation by attacking the problem of illegal exportation at the border, rather than focusing on the retrieval of artifacts already smuggled into the United States.⁷⁹ The Legislature found this added measure necessary after it became clear that the 1970 Treaty of Cooperation not only did not reduce the trade of illegal Mexican pre-Columbian antiquities, but that such trade actually increased after the treaty was ratified.⁸⁰

71. See Potter & Zagaris, *supra* note 7, at 670 (explaining the negative long-term effects of the Pre-Columbian Act of 1972).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 656; see also Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (Pre-Columbian Act), Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091–95 (2012)).

78. 19 U.S.C. § 2092.

79. Potter & Zagaris, *supra* note 7, at 658.

80. *Id.* at 656.

Customs officers are the primary enforcers of the Pre-Columbian Act of 1972 and its regulations.⁸¹ The Secretary of the Treasury promulgates a list of artifacts included within the regulation's protection.⁸² Customs only allows importation of items on that list when a valid export certificate accompanies the item from the country of origin.⁸³ If there is no valid certificate, customs officers are authorized to seize the covered pre-Columbian artifact, unless it was exported prior to the effective date of the regulations or the exporter shows sufficient evidence that the item should be excluded from the Act's list of protected artifacts.⁸⁴

Overall, the Pre-Columbian Act has been much more successful than its earlier counterparts. This success may stem from its specific goals, but the zealous enforcement efforts of U.S. customs officers have also helped tremendously.⁸⁵ "Customs officers apply the Act's restrictions even to the smaller[,] non-monumental objects [that] do not fall within the protected list."⁸⁶ This generous application is probably the result of a tradition of border cooperation between the United States and Mexico.⁸⁷ This tradition ensured that the United States would not curtail the regulations' reach even after the expansion of authority by Mexico's 1972 Federal Declaration⁸⁸ and that U.S. customs agents would continue to vigilantly search for artifacts subject to seizure in order to incidentally curb the flow of illegal drugs into the country.⁸⁹

Some recent successes in the recovery of illegally exported pre-Columbian artifacts can be specifically attributed to the 1970 U.S.–Mexico Treaty of Cooperation, Mexico's 1972 Federal Declaration, and the Pre-Columbian Act of 1972. In 2012, U.S. Immigration and Customs Enforcement (ICE) returned more than 4,000 pieces of stolen and looted pre-Columbian cultural artifacts to the government of Mexico.⁹⁰

81. *Id.* at 657.

82. *Id.*

83. *Id.*

84. 19 U.S.C. § 2092(b) (2012).

85. Potter & Zagaris, *supra* note 7, at 658.

86. *Id.*

87. James A. R. Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAW. AM. 68, 71–73 (1975).

88. *See supra* subpart II(D).

89. Nafziger, *supra* note 87, at 71–72.

90. *ICE Returns Stolen and Looted Archeological Art and Antiquities to Mexico*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 24, 2012), <http://www.ice.gov/news/releases/1210/121025elpaso.htm> [<https://perma.cc/8P6T-SQHM?type=source>].

F. The National Stolen Property Act and the McClain Decision

The National Stolen Property Act (NSPA)⁹¹ has been the basis of nearly every criminal prosecution of art theft in the United States in the last eighty years.⁹² The NSPA was not originally intended for this purpose—it was passed in 1934 as an extension of the National Stolen Motor Vehicle Act of 1919,⁹³ and its primary purpose was to reach those who stole property and moved it across state lines.⁹⁴ Before this statute, neither states nor foreign countries could prosecute individuals after the property had moved across state lines or national borders.⁹⁵ The NSPA prohibits the transportation or receipt, in interstate or foreign commerce, of any goods knowingly stolen and worth \$5,000 or more.⁹⁶ Violators of the NSPA will be subject to fines, imprisonment not to exceed ten years, or both.⁹⁷ The NSPA essentially “makes it illegal for an individual to possess, receive, transfer, or otherwise deal in valuable stolen property that has traveled in interstate or foreign commerce if the individual knows that the property was obtained by theft.”⁹⁸

The application of this law to foreign art theft has been very effective, but only after the sticky issue of proving knowledge is dealt with.⁹⁹ The scienter requirement is a particularly tough hurdle for the successful litigation of stolen-art cases. This difficulty is due to the fact that the exchange of art objects is usually made through art dealers and auction houses, most of which take very few measures to verify the provenance of the artwork.¹⁰⁰ This lack of diligence by intermediaries makes it difficult to show a legitimate chain of title, which means that stolen artwork often resurfaces on the legitimate market with little evidence to point to its illicit

91. 18 U.S.C. §§ 2314–15 (2012).

92. Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1206 (2005).

93. 18 U.S.C. § 2312 (2012).

94. George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 89–90, 89 n.57 (1978).

95. *McClain I*, 545 F.2d 988, 994 (5th Cir. 1977).

96. 18 U.S.C. §§ 2314–15 (2012).

97. *Id.*

98. Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1851 (2009).

99. See *infra* notes 103–21 and accompanying text.

100. Claudia Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 233 (1993).

background.¹⁰¹ Until 1974, prosecuting possessors of stolen art was only a theoretical deterrent because of the immense challenge of proving scienter.¹⁰²

This all changed with a string of cases applying the federal law of source nations to solve the scienter requirement. The first case to successfully apply the NSPA to international art theft was *United States v. Hollinshead*¹⁰³ in 1974. In this case, the scienter requirement was satisfied by the court's finding that "[t]here was overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the stele [from the country,] and that the stele was stolen."¹⁰⁴ The court went on to posit that "[i]t would have been astonishing if the jury had found that [the defendants] did not know that the stele was stolen," regardless of any confusion over the controlling law.¹⁰⁵ The defendants had bribed officials and used false marks on the stele's packaging to smuggle it into the United States, which was pretty strong evidence that they knew they were smuggling stolen property into the United States.¹⁰⁶ Essentially, the strong export restrictions on the Guatemalan pre-Columbian artifact provided the evidence necessary to satisfy the NSPA's scienter requirement.

The second case to successfully apply the NSPA to a theft of foreign artifacts—and satisfy the scienter requirement by applying the foreign nation's broad antiquities laws—was *United States v. McClain*¹⁰⁷ in 1977.¹⁰⁸ In this case, five defendants were found guilty of violating the NSPA for stealing pre-Columbian artifacts from Mexico, importing them into the United States, and subsequently selling them.¹⁰⁹ The United States government was able to successfully charge the smugglers under the NSPA because Mexico had both a valid patrimony law for pre-Columbian antiquities, the 1972 Federal Declaration,¹¹⁰ and a restriction on exportation of pre-Columbian antiquities—the two requirements for triggering the

101. *Id.*

102. *Id.*

103. 495 F.2d 1154 (9th Cir. 1974).

104. *Id.* at 1155.

105. *Id.* at 1155–56.

106. *Id.*

107. *McClain I*, 545 F.2d 988 (5th Cir. 1977).

108. *See id.* at 997–98 (evaluating the application of Mexican antiquities law by the trial court).

109. *Id.* at 991–93. The court actually reversed the convictions and remanded for further proceedings in *McClain I*. *Id.* at 1004. It upheld the convictions for conspiracy to violate the NSPA in *United States v. McClain (McClain II)*, 593 F.2d 658, 671–72 (5th Cir. 1979), but reversed the substantive convictions because of the possibility that the jury improperly characterized Mexican statutes earlier than 1972 as ownership laws.

110. *See supra* subpart II(D).

NSPA.¹¹¹ These two requirements took the place of requiring the owner to have been in actual control of the stolen object at some point. Under the definition given for the word “stolen” in *McClain*, one must take without permission and “with the intent to deprive the benefits of ownership and use.”¹¹² Generally, in order to have benefits of ownership and use for the thief to deprive, the owner must have had the ability to exert some control over the item before it was taken.¹¹³ If the illegally exported pre-Columbian artifacts have been looted from an undiscovered archeological site, then this control doesn’t exist. However, the court in *McClain* ruled that Mexico’s unequivocal nationalization of all pre-Columbian antiquities and the complete restriction on export of those antiquities without a license can operate in lieu of actual control to satisfy the NSPA’s requirement that the foreign property be “stolen.”¹¹⁴ The court stated that it is “the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures.”¹¹⁵

This holding meant that all pre-Columbian artifacts that had left Mexico after 1972 were “stolen” for purposes of the NSPA.¹¹⁶ An amicus brief filed with the case expressed concern that the court’s validation of foreign state patrimony laws would result in dealers and museums facing charges of receiving and transporting stolen property “[m]erely by dealing in art work that ha[d] originated—albeit many years earlier—in countries whose laws include broad declarations of national ownership in art.”¹¹⁷ The court put this fear to rest by finding that illegal exportation after Mexico’s 1972 Federal Declaration constituted an act of conversion, so that only exports after that point could be considered a “theft.”¹¹⁸

The third case to deal with the issue of scienter was *United States v. Schultz*.¹¹⁹ In this case, a New York art dealer conspired to smuggle antiquities out of Egypt in contravention of an Egyptian law nationalizing

111. See *McClain I*, 545 F.2d at 996 & n.14 (“The general rule today in the United States . . . is that it is not a violation of law to import simply because an item has been illegally exported from another country.” (quoting Paul M. Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 295, 300 (Leonard D. DuBoff ed., 1975))).

112. *McClain I*, 545 F.2d at 993–94.

113. See *id.* at 992 (explaining that a sovereign may declare ownership of property within its jurisdiction; however, “possession is but a frequent incident, not the *sine qua non* of ownership”).

114. See *id.* at 996 (rejecting appellants’ argument “that the NSPA cannot apply to illegal exportation of artifacts declared by Mexican law to be the property of the Nation”).

115. *Id.* at 992.

116. Vitale, *supra* note 98, at 1853.

117. *McClain I*, 545 F.2d at 991 n.1.

118. *Id.* at 1003 n.33.

119. 333 F.3d 393 (2d Cir. 2003).

antiquities with provisions similar to Mexico's 1972 Federal Declaration.¹²⁰ The court held that the jury did not have to find scienter for the actual crimes he committed under the NSPA, but allowed the jury to consider the conspirators' knowledge of Egyptian law and expertise in Egyptian antiquities as evidence of knowledge that the antiquities were stolen.¹²¹

The result of these three cases is that because the

NSPA is used to recognize a foreign state's right to its cultural property through patrimony and exportation laws—regardless of whether there is a U.S. importation law in place—it “convert[s] a crime against the people [of a foreign state] into a crime against the people of the United States.”¹²²

This makes the enforcement of these nationalization laws incumbent on the U.S. courts, which increases the effectiveness of the laws, and this in turn makes the return of the nationalized antiquities that much easier. For this reason, the NSPA is actually more effective than any other law currently used to effectuate the return of pre-Columbian antiquities to Mexico. However, this and every other law currently dealing with the protection and return of these artifacts suffers a serious flaw. They focus on return after the damage is done rather than preventative measures that will best protect the scarce and fast-disappearing resources.

III. Why the Current Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities Are Ineffective and How a Policy of Education Can Effectively Improve Them

Each of the laws and remedies discussed in Part II suffers a serious flaw—they do not focus on preventing the destruction of pre-Columbian antiquities directly, but only on remuneration and return of these artifacts. Part I suggests why it is not just Mexico but also the United States that should work to prevent the destruction and looting of these irreplaceable relics. This Part suggests how to do that. The only real way to prevent the looting of these artifacts before it occurs is through education. Both nations must refocus the goals of the laws, regulations, and policies currently in place in order to educate the people of Mexico and the United States about the damage that this illicit trade causes and the penalties for those involved in this destruction. Specific groups of people that are or could be involved

120. *Id.* at 398 (“[Egyptian Law 117] provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt. The law makes private ownership or possession of antiquities found after 1983 illegal.”).

121. *See id.* at 414–16 (noting that “even an ignoramus in this field would know at least about patrimony laws,” and so as “an acknowledged expert in the field of Egyptian antiquities, with many years of experience[,] [i]t would have been natural for Schultz to know about [the Egyptian law]” (internal quotation marks omitted)).

122. Vitale, *supra* note 98, at 1854 (alterations in original).

in the trade should be targeted for this education. Many of the laws and agreements currently in place could be revised to reach a diverse set of people groups under this new educational goal. Under a revised bilateral treaty between the United States and Mexico using the CPIA, an educational directive for both countries could help reach rural people in Mexico who may find or help transport stolen antiquities, looters, and museum personnel in the United States who do not understand the consequences of the illicit trade, and companies involved in transportation in both countries. Regulations promulgated under the Pre-Columbian Act of 1972 could be revised to provide extra education for border agents and tourists on the U.S.–Mexico border in identifying restricted antiquities, and perhaps even provide for specialists at high-risk border stations. Finally, museums and dealers could be educated on the criminal ramifications of fencing stolen pre-Columbian antiquities under the NSPA.

A. A Revised Bilateral Treaty Using the U.S.–Peru Bilateral Treaty as an Example

A revised bilateral treaty between the United States and Mexico with an educational directive for both countries could help deter the looting of ruins and historical sites. This hypothetical directive would require both nations to maintain educational programs to reach those people who might be involved in the illicit trade of antiquities to educate them about the destruction caused by actions and the legal ramifications of those actions. The goal of this education would be to stop the destruction and theft of Mexican pre-Columbian antiquities before it occurs by deterring those responsible from taking part. Also, by educating people that otherwise may not understand the illegality of this trade, the program could encourage whistle-blowing and increase the cost of business for those who smuggle the antiquities.

There is precedent for this type of bilateral educational directive. The United States entered into a bilateral agreement with Peru in 1981 with provisions very similar to the 1970 bilateral treaty between the United States and Mexico.¹²³ Mexico and Peru share a similar cultural heritage, they are both considered source nations, and like Mexico, Peru “has also experienced a drastic depletion of its cultural heritage as a result of” looting and smuggling.¹²⁴ However, the U.S.–Peru Agreement of 1981 also provides that the parties are to inform travelers of the laws respecting archaeological, historical, or cultural properties by means of media

123. Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.–Peru, Sept. 15, 1981, 33 U.S.T. 1608 [hereinafter U.S.–Peru Agreement of 1981]; Potter & Zagaris, *supra* note 7, at 640.

124. Potter & Zagaris, *supra* note 7, at 640.

dissemination such as signs, pamphlets, and billboards.¹²⁵ It is difficult to determine whether this clause was implemented effectively or at all, as this language was struck from the next iteration of the treaty, the U.S.–Peru Agreement of 1997.¹²⁶ The educational directive in this updated agreement was softened and made unilateral.¹²⁷ Article II(I) requires that the “Government of Peru will use its best efforts, through education and implementation and enforcement of its laws, to improve protection of its Colonial ethnological patrimony as well as its archaeological patrimony.”¹²⁸ An amendment in 2012 further alters this language to require only that the government of Peru “continue its efforts in public awareness and professional training programs.”¹²⁹ Even with these revisions, the current version of the U.S.–Peru bilateral treaty still treats education and public awareness as a priority. This commitment to the education and awareness of the general public provides an important preventative function that is missing from Mexico’s bilateral agreement. It is commonly accepted that raising public awareness about a criminal activity can lead to a reduction of that crime.¹³⁰

There are several bilateral, cooperative diplomatic programs initiated by the Public Affairs Section of the American Embassy in conjunction with the Ministry of Foreign Affairs of Peru and the Ministry of Culture of

125. U.S.–Peru Agreement of 1981, *supra* note 123, art. II(5).

126. *Compare id.* (requiring both parties to inform persons entering or leaving their territories of the laws of each of the parties with respect to archeological, historical, or cultural properties), *with* Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, art. II(C), U.S.–Peru, June 9, 1997 [hereinafter U.S.–Peru Agreement of 1997] (requiring both parties to encourage various institutions to “cooperate in the interchange of knowledge and information about the cultural patrimony of Peru, and to collaborate in the preservation and protection of such cultural patrimony through appropriate technical assistance, training and resources,” but making no mention of requirements to inform travelers of the laws concerning archaeological, historical, or cultural properties).

127. *Compare supra* note 125 and accompanying text, *with infra* note 128 and accompanying text.

128. U.S.–Peru Agreement of 1997, *supra* note 126, at art. II(I).

129. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru rev. art. II(J), U.S.–Peru, May 30, 2012.

130. *See Lambert v. California*, 355 U.S. 225, 228–29 (1957) (finding that the requirement of notice is “[e]ngrained in our concept of due process” and that a law cannot stand where people do not have the “opportunity either to avoid the consequences of the law or to defend any prosecution brought under it”). A person cannot avoid a crime that he does not know he is committing. But if a person is put on notice of a crime, that person has the opportunity to avoid the criminal activity and will be less likely to commit the crime as a result. This is the underlying justification for the notice requirement set forth in the U.S. Constitution.

Peru.¹³¹ These collaborative programs have been “aimed at training specialists, improving museum conditions, educating, and creating museum exhibitions.”¹³² It is difficult to quantify how effectively the educational directives in the U.S.–Peru bilateral treaty have been implemented because there is very little data available regarding the relevant programs in Peru. More research is needed in this area to discern the effectiveness of these particular programs.

An educational program that reached people in rural areas of Mexico could be especially effective at prevention by providing information this group of people may not have previously had access to. These people will likely be the first to discover pre-Columbian antiquities or to be a part of these artifacts’ looting and transport, which makes reaching this group important. Also, it is important to educate those people involved in transportation on both sides of the border. A program designed to reach trucking companies, bus drivers, barge operators, and pilots could allow more laypeople to recognize and report the illicit trade of antiquities.

B. Revised Border Regulations Under the Pre-Columbian Act of 1972

Regulations promulgated under the Pre-Columbian Act of 1972 allow border agents to seize Mexican pre-Columbian artifacts that are not accompanied by required export permits.¹³³ These regulations have been effective at screening some of the smuggling of antiquities into the United States—in 2012, ICE was able to repatriate over 4,000 artifacts to Mexico, many of which were seized at the border.¹³⁴ However, increased education along the border could expand this success even further. The customs seizure regulations owe their success at least partly to the fact that the illicit trade of antiquities necessarily bottlenecks at border stations along the U.S.–Mexico border. This bottleneck could also be used for an educational directive to reach more people in a faster manner. An educational program designed to educate tourists and commuters who cross the border would allow more people to recognize and report the illicit trade of antiquities, or deter these people from participating by advertising the penalties they might face if caught. This could be accomplished through the use of pamphlets or flyers, posters, and signage.

131. See Tracey J. Bell, *Cultural Heritage and Diplomatic Partnerships Between the United States and Peru 25* (June 7, 2014) (unpublished Master’s capstone project, University of Oregon) (on file with the University of Oregon), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/18632/Tracey_Bell_mastersresearch2014SB.pdf?sequence=1 [https://perma.cc/2C8N-K2AS] (pointing out that the United States and Peru have “several collaborative programs” and elaborating on one program created by the U.S. Embassy in Lima).

132. *Id.*

133. See *supra* subpart II(E).

134. See *supra* subpart II(E).

C. *An Educational Program Advising Museums and Dealers of Criminal Implications for Receiving and Selling Stolen Property Under the NSPA*

The NSPA, as interpreted under the *McClain* decision, creates criminal liability for any museum or dealer in antiquities that conspires to possess or sell any Mexican pre-Columbian antiquity exported from Mexico after 1972.¹³⁵ A deterrent effect might be realized through an educational program directed at informing these purchasers and intermediaries in the trade of antiquities about the penalties they could face for a violation of the NSPA. Attempting to educate possible smugglers and those complicit in this illicit trade may seem like an ineffective solution, as these people already know they are breaking the law. To some extent, this is true. There will be no deterrent effect for the hardened criminals and stubborn or motivated smugglers. However, education could be very effective at reducing this illicit trade at the margins. For example, by better educating would-be smugglers and fencers that may not have previously understood the criminal implications of their actions, some percentage of these people would choose not to smuggle or fence illicit artifacts. This would serve to shrink the market demand for these antiquities, thus decreasing the incentive for looters and smugglers in Mexico to operate. A program like this might be implemented by circulating the penalties that past violators of the NSPA have suffered for illegally trading in pre-Columbian antiquities. A violator of the NSPA is subject to a fine, up to ten years in jail, or both.¹³⁶ Additionally, circulating advertisements of penalties frequently would create an appearance of vigilance by law enforcement that would also have some deterrent effect on the market for pre-Columbian artifacts. This tactic has been used successfully to deter crime in other areas, such as gun crimes.¹³⁷

IV. Conclusion

The illicit trade of Mexican pre-Columbian antiquities represents a serious threat to the cultural and historical heritage of not only Mexico, but also the United States and ultimately the historical record of the North American continent. The global community recognizes this problem, but past and present efforts to deter and prevent the looting and destruction of

135. See *supra* subpart II(F).

136. 18 U.S.C. § 2314 (2012).

137. Emmanuel Barthe, *Crime Prevention Publicity Campaigns: Response Guide No. 5*, CTR. FOR PROBLEM-ORIENTED POLICING (2006), http://www.popcenter.org/responses/crime_prevention/print/ [<http://perma.cc/8JRU-376K>] (“Boston’s efforts to reduce gun crimes included a publicity component that proved to be quite effective because the campaign’s message ‘delivered a direct and explicit message to violent gangs and groups that violent behavior will no longer be tolerated, and that the group will use any legal means possible to stop the violence.’”).

these antiquities have been less than effective. This is likely due to a misplaced focus on punishment and remediation. Instead, policies to restrict the illicit trade of Mexican pre-Columbian antiquities must focus on prevention through education. The most important goal of any law on this subject is to prevent the destruction of these irreplaceable artifacts. There are many opportunities to encourage this prevention through the education of people at every point in the trade: the education of rural peoples in Mexico, those involved in transportation, those crossing the border, and those involved in purchasing and dealing in antiquities. Public awareness can reduce the illicit trade of Mexican pre-Columbian antiquities, and should be the focus of future reform.

—*Ryan D. Phelps*

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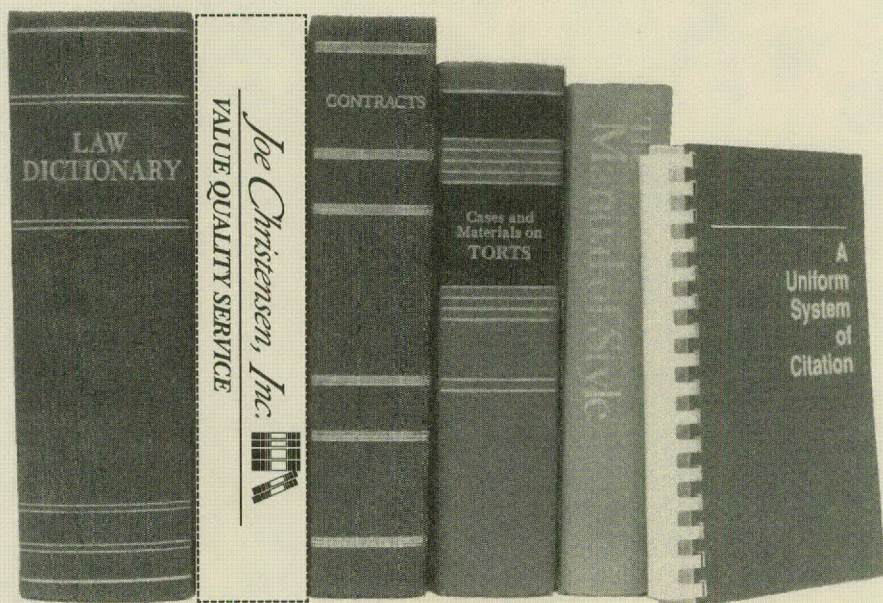
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