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## ARTICLES

### **BEYOND EINSTEIN AND EDISON: CLAIMING SPACE FOR NON-FACULTY INVENTORS IN TECHNOLOGY TRANSFER**

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#### ABSTRACT

The Bayh-Dole Act, often credited with the explosion of university technology transfer, requires universities to incentivize invention disclosure by sharing the royalties generated by licensing. Many scholars have debated the effectiveness of university implementation of this requirement, and indeed, the low rate of disclosure of inventions by academic researchers to the university is often a bottleneck in technology transfer process. Unfortunately, most discussions focusing on inventor compliance with Bayh-Dole requirements have explored faculty-inventor motivations. Similarly, many university intellectual property (IP) policies are drafted specifically toward incentivizing faculty-inventors to comply with invention disclosure requirements. However, in most cases, university inventions are joint products of a group of university members including not only faculty but also post-doctoral researchers or graduate students. This collaborative nature of scientific research seems to have been lost in the design of the technology transfer system.

This Article contrasts the motivations and pressures of faculty with those of other members of the university research community, explores the conflicts that arise when faculty and non-faculty members are co-inventors, and explains why better incentives directed at non-faculty inventors could increase disclosure compliance. Furthermore, the Article explores the ways in which current university IP policies fail to address the issues surrounding non-faculty inventors and thus fail to fully incentivize invention disclosure by that group of university inventors.

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## INTRODUCTION

The lone scientist, toiling away over a Bunsen burner at midnight or huddled in the corner of his garage with a few tools, has long held a place in the American psyche.<sup>1</sup> As tempting as this noble image is, the truth is often much more mundane. Scientists typically work in groups, with ideas flowing among members in an often unaccounted for manner, each idea building on the one before. Thus, inventions often have multiple inventors, each responsible for a minor aspect of the final product.

Thomas Edison, although best known for inventing the light bulb, did not work alone—his greatest invention may have been the research and development laboratory.<sup>2</sup> At his Menlo Park and West Orange laboratories, he hired “muckers” to help perfect his ideas and develop new inventions.<sup>3</sup> The collaboration with others worked well; Edison was a named inventor on 1093 U.S. patents, as well as 500-600 unsuccessful patent applications.<sup>4</sup>

This system of invention is the same model used in the laboratories of research universities, colleges, and non-profit research institutions across the country.<sup>5</sup> A faculty member, called a principal investigator, leads a research team composed of a mix of research scientists, post-doctoral fellows, graduate students, and technicians.<sup>6</sup> These research teams are responsible for thousands of new inventions across the country each year.<sup>7</sup> In order to commercialize these

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1. From mythologized versions of Thomas Edison’s invention of the light bulb to the fictional mad scientist intent on ruling the world, the idea of scientists as lone inventors pervades the way Americans think about the inventive process. See, e.g., EVAN I. SCHWARTZ, *THE LAST LONE INVENTOR: A TALE OF GENIUS, DECEIT, AND THE BIRTH OF TELEVISION* 5-6 (2003) (containing Edison’s obituary, calling Edison a “solitary genius” and a “lone Titan,” and contrasting him with “the corporation research laboratory” “directed by a scientific captain”); DR. HORRIBLE’S SING-ALONG BLOG, <http://www.drhorrible.com>, archived at <http://perma.cc/7EUA-43RQ> (last visited May 21, 2014) (portraying a mad scientist intent on ruling the world by inventing transmitter/freeze/death rays).

2. See generally THERESA M. COLLINS & LISA GITELMAN, *THOMAS EDISON AND MODERN AMERICA: A BRIEF HISTORY WITH DOCUMENTS* (2002).

3. See *id.* at 16.

4. For a complete list of and access to Edison’s patents, see *Edison’s Patents*, THE THOMAS EDISON PAPERS, <http://edison.rutgers.edu/patents.htm>, archived at <http://perma.cc/DB8W-J2DM> (last visited May 21, 2014).

5. For brevity, “university” as used in the remainder of the Article will include research colleges and non-profit research institutions.

6. Even Albert Einstein, often characterized by his lack of social skills and wild hair, employed a series of research assistants. Many of those assistants, though generally unrecognized in the development of Einstein’s theories, went on to become successful scientists in their own right. For example, Peter Bergmann was a post doctoral research assistant for Albert Einstein who was later help found the field of quantum gravity. Paul Halpern, *Peter Bergmann: The Education of a Physicist*, 7 *PHYSICS IN PERSPECTIVE* 390, 390 (2005).

7. NATIONAL RESEARCH COUNCIL, COMMITTEE ON MANAGEMENT OF UNIVERSITY

inventions, universities often work with commercial entities to provide a means for the further development of the university inventions in a process called technology transfer.<sup>8</sup>

Technology transfer is a complicated dance involving numerous players and varied influences. Many universities have created technology transfer offices (TTOs) tasked with choreographing and expediting this process.<sup>9</sup> During the last three decades, technology transfer has become an economic powerhouse, and universities have become essential partners with industry, supplying innovative ideas and ground-breaking concepts—and often, patented inventions.<sup>10</sup> Technology transfer from 188 surveyed universities produced \$2.5 billion in royalties from licensing academic research innovations in 2008, likely representing fifty to seventy billion dollars in commercialized products.<sup>11</sup>

Even in the midst of such economic success, relatively few technologies are responsible for much of the income to universities, and according to some studies only about 50% of inventions are disclosed to the TTOs for licensing consideration.<sup>12</sup> To understand the reasons for the lack of disclosure, we need to look to the research team described above. Social norms, lack of education about technology transfer, and improper incentives have all been described as reasons for lack of disclosure.<sup>13</sup> However, analyses of these problems have, to date, focused mainly on the duties and attitudes of the faculty principal investigator—in large part because the majority of incentives are directed to faculty inventors.<sup>14</sup> Because graduate students, post-doctoral fellows, and other non-faculty researchers are also inventors, their role in the technology transfer process should not be overlooked. In fact, the lack of disclosure incentives and education directed at non-faculty inventors may be a large inefficiency in the university technology transfer process. Compounding the failures of university

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INTELLECTUAL PROPERTY, LESSONS FROM A GENERATION OF EXPERIENCE, RESEARCH, AND DIALOGUE: MANAGING UNIVERSITY INTELLECTUAL PROPERTY IN THE PUBLIC INTEREST 20 (Stephen A. Merrill & Anne-Marie Mazza eds., 2010).

8. For the purposes of this Article, “technology transfer” is the process by which innovations from university researchers are licensed or otherwise conveyed to entities that will eventually commercialize the innovation. The Association of University Technology Managers defines technology transfer as “the process of developing and commercializing scientific findings and fundamental discoveries into relevant applications.” ASS’N OF UNIV. TECH. MANAGERS, AUTM U.S. LICENSING ACTIVITY SURVEY: FY2008, at 7 (Rich Kordal et al. eds., 2010) [hereinafter AUTM FY2008], available at [http://www.autm.net/FY\\_2008\\_Licensing\\_Activity\\_Survey/8916.htm](http://www.autm.net/FY_2008_Licensing_Activity_Survey/8916.htm).

9. *Id.*

10. Jerry G. Thursby et al., *Objectives, Characteristics and Outcomes of University Licensing: A Survey of Major U.S. Universities*, 26 J. TECH. TRANSFER 59, 59 (2001) [hereinafter Thursby et al., *Objectives*].

11. See AUTM FY2008, *supra* note 8, at 3.

12. See *infra* note 99 and accompanying text.

13. See *infra* Parts II.B, III.

14. *Id.*

policies, conflicts between faculty and non-faculty inventors are not uncommon,<sup>15</sup> potentially resulting in many non-faculty inventors deciding to opt out of the technology transfer system rather than face such conflict.

In light of this complexity of research and invention in the university setting, the recent Kauffman Foundation proposal is particularly perplexing.<sup>16</sup> That proposal vests control of inventions created in the university laboratories to the *faculty* inventor.<sup>17</sup> Robert E. Litan, vice president for research and policy at the Kauffman Foundation, characterizes the proposal as “[o]ne simple amendment to the Bayh-Dole Act [that] would allow faculty members to choose their own licensing agents/experts and bring these discoveries to market quickly.”<sup>18</sup> While the relative efficiency of technology transfer by the university TTO versus a faculty inventor is debatable, the proposal fails to analyze, or even mention, the potential for conflict between the different types of inventors.<sup>19</sup>

This Article puts forth the idea that universities often overlook one very important group of university inventors—the non-faculty inventors, including graduate students, post-doctoral fellows, and technicians. Part I overviews university technology transfer history and process. Part II describes the research into the effectiveness of various incentives for disclosure. Part III introduces the idea that there are special problems with universities’ implementation of the Bayh-Dole Act when inventors are not faculty and analyzes recent Bayh-Dole reform proposals to determine if they address incentives directed at this group. Part IV concludes that the problem is not with the Bayh-Dole Act itself, but with university policies based thereon, and offers a few modest proposals for universities to consider when developing or revising intellectual property policies and procedures.

#### I. RISE OF THE BAYH-DOLE ACT AND THE DEVELOPMENT OF UNIVERSITY TECHNOLOGY TRANSFER

Scientific research is at heart a speculative venture. Obviously, great advancements have developed through scientific research, but the monetary cost is high. Basic scientific research often has no direct consumer application and simply contributes to base knowledge that can be built upon in future works and innovations.<sup>20</sup> Much of this basic research is funded through government grants

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15. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 32.

16. Robert E. Litan & Lesa Mitchell, *A Faster Path from Lab to Market*, Jan.-Feb. HARV. BUS. REV. 52 (2010).

17. *Id.*

18. *Kauffman Foundation Experts’ Solution for University Technology Licensing Reform Named to List of ‘Ten Breakthrough Ideas for 2010’ by Harvard Business Review*, PR NEWSWIRE (Dec. 17, 2010), <http://www.prnewswire.com/news-releases/kauffman-foundation-experts-solution-for-university-technology-licensing-reform-named-to-list-of-ten-breakthrough-ideas-for-2010-by-harvard-business-review-79556367.html>, archived at <http://perma.cc/5K9F-NMQY>.

19. *Id.*

20. As used in this Article, “basic scientific research” is that research designed to improve

and performed at universities.<sup>21</sup> Because of this high cost to the tax-paying public and lack of obvious, immediate application for the research, recent decades have seen a push toward rapid commercialization of basic research by means of technology transfer.<sup>22</sup>

#### A. A Short History

The rationale most commonly referred to for the existence of patent rights is the encouragement of invention and concomitant disclosure to the public, argued to be most efficiently done by giving the inventor patent rights to the invention in exchange for disclosure.<sup>23</sup> Prior to 1980, however, federally funded academic research did not reward either inventors or the universities with ownership of these patent rights.<sup>24</sup> No uniform federal policy existed defining the ownership of innovations resulting from federally funded research,<sup>25</sup> and the presumption of many funding agencies was that ownership of such innovations belonged with the funding agency itself.<sup>26</sup> For researchers using federal funds, this resulted in an apparent lack of incentives to innovate or disclose any innovations.<sup>27</sup> Many in Congress felt that innovations from basic research were therefore being vastly under-utilized, resulting in a “technology gap” against other countries.<sup>28</sup> The Bayh-Dole Act, passed in 1980, was designed to correct this inefficiency in part through creating incentives to drive the commercialization of academic

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understanding of fundamental principles, relationships, and workings of the natural world. The main goal of basic scientific research is understanding, rather than the creation of a commercial product.

21. “The federal government provided 59% (\$32.6 billion) of the \$54.9 billion of academic spending on S&E R&D in FY 2009.” National Science Board, *Science and Engineering Indicators 2012*, available at <http://www.nsf.gov/statistics/seind12/c5/c5h.htm> (last visited May 21, 2014).

22. JENNIFER WASHBURN, UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION 49-72 (2005); see also Part I.A.

23. Jerry G. Thursby & Marie C. Thursby, *University Licensing*, 23 OXFORD REV. ECON. POL’Y 620, 623 (2007) [hereinafter Thursby & Thursby, *University Licensing*].

24. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 16.

25. See, e.g., John E. Tyler III, *Advancing University Innovation: More Must be Expected—More Must Be Done*, 10 MINN. J. L. & SCI. 143, 146 (2009) (“Prior to the passage of the Act, there were twenty-six different federal agency policies about using the results of federally funded research.”).

26. See, e.g., Bhaven N. Sampat, *Patenting and US Academic Research in the 20th Century: The World Before and After Bayh-Dole*, 35 RES. POL’Y 772, 776-77 (2006).

27. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 17.

28. See, e.g., *id.* at 38 (“Prior to the passage of the Bayh-Dole Act, the United States government held over 30,000 patents, but of those only 5% were licensed out to private industry.”); Birch Bayh et al., *Universities, Inventors and the Bayh-Dole Act*, 3 LIFE SCI. L. & IND. RPT. 1266 (2009), available at [http://webcache.googleusercontent.com/search?q=cache:http://b-d30.org/app/webroot/doc/Life\\_Sciences\\_Inventors\\_universities\\_and\\_Bayh-Dole.pdf](http://webcache.googleusercontent.com/search?q=cache:http://b-d30.org/app/webroot/doc/Life_Sciences_Inventors_universities_and_Bayh-Dole.pdf) (last visited Apr. 30, 2011). *But cf.* Sampat, *supra* note 26, at 779-80.

innovations.<sup>29</sup>

The Bayh-Dole Act provides a uniform federal patent policy for agencies that fund research by entities such as universities.<sup>30</sup> The stated policy of the Bayh-Dole Act is to “promote the utilization of inventions arising from federally supported research or development” and to promote university and industry collaboration, particularly with small businesses.<sup>31</sup> To promote the commercialization of inventions, the Bayh-Dole Act gives universities the right to “elect to retain title to any subject invention” and commercialize those inventions through licensing.<sup>32</sup> Through this process, the Bayh-Dole Act incentivizes universities to commercialize inventions by allowing them to retain much of licensing royalties. The Bayh-Dole Act also attempts to incentivize the inventors by requiring that universities share those royalties obtained from the licensing.<sup>33</sup>

Some commentators have praised the Bayh-Dole Act for providing an efficient and effective framework for technology transfer that produced considerable benefits for the public, private industry, and universities.<sup>34</sup> The Bayh-Dole Act has been famously described as “[p]ossibly the most inspired piece of legislation to be enacted in America over the past half-century.”<sup>35</sup> The growth of the academic technology transfer industry seems to bear out this assertion.

The passage of the Bayh-Dole Act in 1980 created, or at least coincided with, impressive acceleration in academic technology transfer. In 1980, there were only about two dozen technology transfer offices (TTOs) at universities and other research institutions across the U.S., but today almost every major research institution has a TTO.<sup>36</sup> The Association of University Technology Managers’ survey of 179 technology transfer offices in 2009 revealed that the offices executed more than 5300 licenses and filed 12,109 new patent applications.<sup>37</sup> This

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29. Bayh-Dole Act of Dec. 12, 1980, Pub. L. No. 96-517 § 6(a), 94 Stat. 3019-29 (codified at 35 U.S.C. §§ 200-12 (2006)). For a full description of the history leading up to the implementation of the Bayh-Dole Act, see Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663, 1671-95 (1996).

30. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 16.

31. 35 U.S.C. § 200 (2006).

32. *Id.* § 202(a).

33. *Id.* § 202(c)(7)(B).

34. See, e.g., Rebecca Zacks, *TR University Research Scorecard*, TECH. REV., July-Aug 2000, at 88, available at <http://www.technologyreview.com/business/12577/>, archived at <http://perma.cc/EU6L-U8WU> (last visited May 21, 2014).

35. *Innovation’s Golden Goose*, ECONOMIST, Dec. 12, 2002, available at <http://www.economist.com/node/1476653>, archived at <http://perma.cc/J7W-ZDEP>.

36. See Gideon D. Markman et al., *Entrepreneurship From the Ivory Tower: Do Incentive Systems Matter?*, 29 J. TECH. TRANSFER 353, 353 (2004).

37. See ASS’N OF UNIV. TECH. MANAGERS, AUTM U.S. LICENSING ACTIVITY SURVEY: FY2009, at 25, 34 (Rich Kordal et al. eds., 2010) [hereinafter AUTM FY2009].

same survey revealed gross licensing revenues of approximately 2.3 billion dollars in 2009, as opposed to a similar survey conducted nine years previously that demonstrated about a billion dollars of total licensing revenue.<sup>38</sup>

However, in recent years a number of authors have suggested that the benefits attributed to the Bayh-Dole Act may be overstated.<sup>39</sup> Furthermore, these authors often contend that the framework developed by the Bayh-Dole Act produces economic inefficiencies and damages the basic research primarily funded by the federal government.<sup>40</sup>

### *B. The Technology Transfer Process Involves Complex Interactions*

*1. Process Overview.*—Operating in the shadow of the Bayh-Dole Act, the academic technology transfer process consists of three main categories of parties involved: university researchers/inventors, the university itself, and private industry. Each party has a distinct, yet interdependent, role in the technology transfer process.

The technology transfer process begins in the university research laboratory, which itself has a large cast of players. Faculty researchers who manage and direct laboratories are often termed “principal investigators” and are the lead scientists or engineers for their research group or laboratory.<sup>41</sup> Principle

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38. *Id.* at 37.

39. *See, e.g.,* Sampat, *supra* note 26, at 783-84. For an overview of the debate, see Charles R. McManis & Suheol Noh, *The Impact of the Bayh-Dole Act on Genetic Research and Development: Evaluating the Arguments and Empirical Research to Date*, in PERSPECTIVES ON COMMERCIALIZING INNOVATION (F. SCOTT KIEFF & Troy A. Paredes eds. 2012).

40. *See, e.g.,* Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663, 1666 (arguing that the structure of technology transfer encouraged by the Bayh-Dole Act requires that the public pay twice for each innovation); Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, in UNIVERSITY ENTREPRENEURSHIP AND TECHNOLOGY TRANSFER: PROCESS, DESIGN, AND INTELLECTUAL PROPERTY 93 (Gary Libecap ed. 2005) [hereinafter Strandburg, *Curiosity-Driven Research*] (examining potential alterations of basic research driven by university technology transfer). *But cf.* McManis & Noh, *supra* note 39.

41. *See* Jennifer Carter-Johnson, *Unveiling the Distinction Between the University and Its Academic Researchers: Lessons for Patent Infringement and University Technology Transfer*, 12 VAND. J. ENT. & TECH. L. 473, 478-80 (2010); *Principal Investigator*, WASHINGTON UNIV. IN ST. LOUIS OFFICE OF THE VICE CHANCELLOR FOR RES., <http://research.wustl.edu/Resources/Roles/Pages/PI.aspx>, archived at <http://perma.cc/GPL4-4XM6> (last visited May 21, 2014) (“The Principal Investigator (PI) is charged to conduct objective research that generates independent, high quality, and reproducible results. The Principal Investigator is responsible for the management and integrity of the design, conduct, and reporting of the research project and for managing, monitoring, and ensuring the integrity of any collaborative relationships. Additionally, the Principal Investigator is responsible for the direction and oversight of compliance, financial, personnel, and other related aspects of the research project and for coordination with school, department, and central administration personnel to assure research in is conducted in accordance with Federal

investigators are ultimately responsible for the management of the laboratory and the proper use of any grant funding. Research associates often have a terminal degree and may be considered non-tenure track faculty.<sup>42</sup> While working under the principal investigator, research associates often direct nearly-independent research projects within the laboratory.<sup>43</sup> Post-doctoral fellows are most often recent terminal degree recipients. Like research associates, they often direct their own research projects, though generally in a slightly less independent manner.<sup>44</sup> Students within a research group or laboratory are generally investigating an aspect of the principal investigator's larger project and tend to be much less independent than the positions described above.<sup>45</sup> Student researchers may be pursuing undergraduate or graduate degrees, and their research within the laboratory is used by the graduate student to create a thesis in addition to any publications produced.<sup>46</sup> Finally, many research groups employ one or more research technicians who often perform general laboratory maintenance and administrative tasks and may conduct scientific research under the direction of others within the laboratory.<sup>47</sup>

Once a principle investigator receives funding and begins oversight of a resulting project, work within that project may produce inventions that the academic researcher as the inventor must recognize as potentially having a commercial market. Upon such recognition, the inventor has a duty to disclose the invention to the university's TTO.<sup>48</sup> Generally, the inventor is required to fill out a disclosure form providing basic information about the invention, relevant

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regulations and University and sponsoring agency policies and procedures.”).

42. See *Excellence in Graduate Education*, ARIZ. STATE UNIV., <http://graduate.asu.edu/grow/pff/faqs>, archived at <http://perma.cc/3CQL-EM48> (last visited May 21, 2014) (describing how the terminal degree (i.e., Ph.D.) is the highest degree awarded in most scientific fields).

43. See Carter-Johnson, *supra* note 41, at 479 (describing how research assistants direct their own research within the laboratory).

44. *Id.*

45. *Id.*

46. See *id.* at 480 (describing how “a mix of academic researchers” work for the principle investigator).

47. See *The Graduate School—Policies and Procedures*, MONT. STATE UNIV., [http://www.montana.edu/wwwdg/cat\\_grad\\_assist.html#gra](http://www.montana.edu/wwwdg/cat_grad_assist.html#gra), archived at <http://perma.cc/Y5WB-L6D2> (last visited May 21, 2014) (describing how graduate research assistants use research projects to create a thesis).

48. See *Intellectual Property Policy*, WASHINGTON UNIV. IN ST. LOUIS, <http://wustl.edu/policies/intelprop.html>, archived at <http://perma.cc/BPX4-8ZBW> (last visited May 21, 2014) [hereinafter *Wash U IP Policy*] (describing an invention disclosure as: “Typically used to describe a formal (written) description of an Invention that is confidentially made by the Inventor to his/her employer. At Washington University an Invention Disclosure should be an enabling one, should include details as to co-inventors and funding sources and should be sent to the Office of Technology Management by an Inventor. Such a Disclosure is the ‘first alert’ to the University that an Invention has been made.”).



funding, and inventors.<sup>49</sup>

Once the TTO receives the disclosure, it then begins a decision-making process to determine if the invention is one that can be patented and licensed.<sup>50</sup> The TTO often conducts market analysis to determine demand and patentability searches to determine the likelihood of receiving intellectual property protection.<sup>51</sup> Alternatively, the TTO often relies on the inventor to determine whether the product can be commercialized in various ways, including discussions of marketability, licensing partners or technical feasibility.<sup>52</sup>

Once the TTO determines that patent protection is appropriate, it then attempts to license the invention, generally to private industry entities for further development into a commercial product.<sup>53</sup> Licensing to industry at an early stage is desirable to the university since licensees often assume the costs of patent prosecution.<sup>54</sup> Licensees often continue to rely on the inventor during the development of the final products due to the basic science nature of university research and technologies.<sup>55</sup> Alternatively, faculty inventors often create “spin-out” companies to license and commercialize the very inventions the inventor disclosed to the university TTO.<sup>56</sup> In such cases, the university may continue to pay the patent prosecution costs but take a financial stake in the spin-out

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49. There are two types of disclosure often mentioned in relation to university research: (1) disclosure by the inventor to the university and (2) disclosure by the university to the relevant governmental funding agency. For the purposes of this Article, “disclosure” will refer to disclosure by the inventor of an invention to the university TTO. For an example of a disclosure form and how disclosure is made, see *Disclosing an Invention*, UNIV. OF CAL., <http://www.ucop.edu/ott/faculty/disclose.html>, archived at <http://perma.cc/Z6JW-E3LK> (last visited May 21, 2014).

50. See AUTM FY2008, *supra* note 8, at 10 (“Once the technology transfer office receives the innovations in the form of disclosures, it assesses each disclosure for commercial potential, novelty, potential for startup opportunity, and pre-existing obligations.”).

51. *Wash U IP Policy*, *supra* note 48.

52. Anne C. Di Sante, *The Role of the Inventor in the Technology Transfer Process*, ipHandbook of Best Practices, available at <http://www.iphandbook.org/handbook/ch05/p05/> (last visited June 9, 2014); Stanford University’s Office of Technology Licensing, *OTL and the Inventor Roles in Technology Transfer*, [http://otl.stanford.edu/inventors/resources/inventors\\_otlandinvent.html](http://otl.stanford.edu/inventors/resources/inventors_otlandinvent.html) (last visited June 9, 2014).

53. See Carter-Johnson, *supra* note 41, at 489 (describing how TTO’s “coordinate patent applications, promote technologies, and negotiate licenses”).

54. *Wash U IP Policy*, *supra* note 48 (describing how licensing agreements create income for the university).

55. See Richard A. Jensen et al., *Disclosure and Licensing of University Inventions: ‘The Best We Can Do with the S\*\*t We Get to Work with,’* 21 INT. J. INDUS. ORG. 1271, 1272 (2003) (describing how it is estimated that 71% of the technology licensed from a university requires further development before commercialization).

56. *Commercialization via Start-up Company*, THE FLA. STATE UNIV. OFFICE OF COMMERCIALIZATION, <http://www.research.fsu.edu/techtransfer/commercialization.html>, archived at <http://perma.cc/MM26-X9PQ> (last visited May 21, 2014).

company.<sup>57</sup>

Revenues from the licenses flow back to the university at many levels. Such revenues to the university can be viewed as returns on the taxpayer investment because the university uses part of the obtained licensing revenue to fund further research and other university educational and administrative functions.<sup>58</sup> A portion of the licensing revenue is also apportioned to the inventor as incentive to encourage invention and the disclosure of the invention to the university.<sup>59</sup> Because invention disclosure by the researcher is an early step in the chain, inefficiencies at that point will propagate through the system. The failure of an inventor to disclose her invention means that the licensing process never begins, and the university never realizes revenues based on that invention.

While this process seems very linear, it contains a number of feedback loops, making influences often hard to pick apart. For example, the private industry entities that may take licenses at the end stage often sponsor the initial research at universities or collaborate with university researchers.<sup>60</sup> Such sponsored research agreements often include rights of first refusal for future licenses of any resultant inventions, and many corporate sponsors push for outright ownership of inventions produced under the sponsored research agreement.<sup>61</sup> Many scholars, scientists and observers have expressed worry over whether such agreements influence the direction of university research today, shifting research from uncovering basic scientific truths needed to underpin technological advancements to more directly commercial work.<sup>62</sup> When the work to be accomplished is funded both by an industry sponsor as well as federal government grants and rights of first refusal are included in the sponsorship agreement, concerns should arise as to whether the public is receiving the proper amount of compensation for its investment in the initial research since the sponsor is able to negotiate the resulting license without any outside competition.

Other problems in the technology transfer process arise when faculty

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57. Jeff Stewart, *The Nanotech University Spinout Company: Strategies for Licensing, Developing, Commercializing, and Financing Nanotechnology*, 2 NANOTECHNOLOGY L. & BUS. 365, 367 (2005).

58. Elliot C. Kulakowski & Lynne U. Chronister, *Research Administration and Management* 795 (1st ed. 2006), available at <http://www.cs.unc.edu/~quigg/spring2013/Spring%202013%20Establishing%20a%20Spin-Off%20Company.pdf>, archived at <http://perma.cc/FJ42-ENYR>.

59. See The Bayh-Dole Act, 35 U.S.C. § 202(c)(7)(B) (requiring non-profit organizations, such as universities, to share with the inventors some portion of the royalties obtained by the licensing of federally-funded inventions).

60. *Guidelines on University-Industry Relations*, UNIV. OF CAL., <http://www.ucop.edu/ott/faculty/disclose.html>, archived at <http://perma.cc/AT7U-EH7M> (last visited May 21, 2014).

61. *Id.*

62. JENNIFER WASHBURN, UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION (2005). Cf. John P. Walsh et al., *Where Excludability Matters: Material v. Intellectual Property in Academic Biomedical Research*, 36 RES. POL'Y 1184, 1188 (2007) (noting that commercial potential was important for only 8% of respondents as a reason for choosing a research project).

members blur the line between university and private research and fail to disclose inventions to the university but rather use inventions created in the university setting in the faculty member's independent company.<sup>63</sup> John B. Fenn, a Yale University professor from 1967 to 1994 and a Nobel Laureate, was a co-inventor with two graduate students of a mass spectrometry technology.<sup>64</sup> The inventors failed to disclose the invention to the university until ten months after publicly presenting the technology, leaving the university with only two months to elect to file for a patent, a deadline that Fenn noted in the disclosure.<sup>65</sup> Fenn further informed the university that he believed there was little commercial value in the invention and that he had little time to assist in the production of any patent application.<sup>66</sup> Based on the information provided by the faculty inventor, Yale elected not to pursue the patent.<sup>67</sup> During these discussions, and without the knowledge of Yale University, Fenn filed for a patent on the invention and licensed the invention to a company in which he had a 49% stake.<sup>68</sup> Eventually, after much litigation, the patent ownership and licensing revenue were awarded to Yale University.<sup>69</sup>

2. *Importance of Inventorship to Universities.*—Additional problems in the technology transfer process arise due to ambiguities in inventorship. Under U.S. patent law, ownership of a patent initially vests in the inventor.<sup>70</sup> Therefore, the naming of the inventor on a patent defines who can transfer the rights to the patented technologies.<sup>71</sup> As stated above, the Bayh-Dole Act gives universities the right to “elect to retain title to any subject invention.”<sup>72</sup> Until recently, many assumed this provision implied automatic vesting of ownership of federally funded inventions to the university rather than through assignment by the inventor.<sup>73</sup> This assumption was rejected recently in *Stanford v. Roche*.<sup>74</sup>

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63. See, e.g., *Fenn v. Yale Univ.*, 283 F. Supp. 2d 615, 621 (D. Conn. 2003), *aff'd*, 184 F. App'x 21 (2d Cir. 2006).

64. *Id.* at 620-25.

65. *Id.* at 625.

66. *Id.* at 625-26.

67. *Id.* at 626.

68. *Id.* at 626-27.

69. *Id.* at 640.

70. See generally DONALD S. CHISUM, CHISUM ON PATENTS ch. 2 (Matthew Bender 1978).

71. See DONALD S. CHISUM, AMERICA INVENTS ACT OF 2011: ANALYSIS AND CROSS-REFERENCES 42 (2011), available at <http://www.chisum.com/wp-content/uploads/AIAOverview.pdf>, archived at <http://perma.cc/5CNZ-7AE6> (describing how previously only the inventor could file a patent application; however, section 4 of the America Invents Act provides that applications filed after September 16, 2012 may be filed by the inventor, the inventor's assignee or anyone to whom the inventor is obliged to assign the patent, even if the assignment has not yet been executed.).

72. 35 U.S.C. § 202(a) (2006).

73. See, e.g., Joseph Friedman & Jonathan Silberman, *University Technology Transfer: Do Incentives, Management, and Location Matter?*, 28 J. TECH. TRANSFER 17, 18 (2003) (“The Bayh-Dole act requires university's faculty members, students or staff members who recognize or

In *Roche*, Mark Holodniy, hired as a research fellow at Stanford University, had signed Stanford's "Copyright and Patent Agreement," obligating him to assign any inventions and related intellectual property to Stanford University.<sup>75</sup> To learn to perform a relatively new procedure, polymerase chain reaction (PCR), Holodniy made regular visits to Cetus, a biotechnology company that was later sold to Roche.<sup>76</sup> Soon after his arrival at Cetus, Holodniy signed a "Visitor's Confidentiality Agreement" that provided that he "will assign and do[es] hereby assign" to Cetus the "right, title and interest in each of the ideas, inventions and improvements" that he developed "as a consequence of [his]" work at Cetus.<sup>77</sup> After returning to Stanford, Holodniy went on to develop and assign to Stanford a PCR-based assay to detect HIV infection.<sup>78</sup>

Years later, Stanford sued Roche for patent infringement based on the Holodniy patents.<sup>79</sup> Roche countered that Stanford did not own the patents because Holodniy's Visitor's Confidentiality Agreement contained an assignment of the PCR-based invention because the assay was based on technology that Holodniy learned while at Cetus.<sup>80</sup> The Federal Circuit agreed with Roche, noting that Stanford's prior Copyright and Patent Agreement merely held a contractual obligation to assign rather than an actual assignment.<sup>81</sup> Holodniy may have breached his contractual obligation to Stanford, but the first assignment of the technology went to Cetus. The Supreme Court held that the source of funding did not affect ownership of the resulting patent and that, even though the PCR assay was developed with federal funding under the Bayh-Dole Act, ownership rights continued to vest initially with the inventor.<sup>82</sup> Therefore, because Holodniy first assigned his patent rights to Cetus, he had no rights left to assign to Stanford. As a result of this holding, universities must acquire a valid patent assignment agreement in order to have the authority to transfer ownership rights.

In light of the *Roche* decision, universities must rely on inventors to sign patent applications and assignments. Without inventor cooperation, the university cannot procure the needed patents or oversee the licensing of technologies created within its walls.<sup>83</sup> Additionally, if the TTO fails to list a co-

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discover a new technology or invention that has commercialization potential to disclose the invention to their institution's *Technology Transfer Office* (TTO).").

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

75. *Id.* at 2192.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 2193.

80. *Id.*

81. See Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 583 F.3d 832, 841 (Fed. Cir. 2009). This issue was not reviewed by the Supreme Court in *Roche*, 131 S. Ct. 2194.

82. *Roche*, 131 S. Ct. at 2195-99.

83. 35 U.S.C. § 202(a) (2006).

inventor on a patent and get an assignment, that co-inventor may later sue to claim her patent rights<sup>84</sup> and potentially license those rights in competition with the university.<sup>85</sup>

Unfortunately, inventorship is a central and somewhat slippery concept in U.S. patent law, making it difficult for universities and inventors to comply. Under U.S. law, an inventor is a person who conceptually creates at least part of the invention as defined in the claims.<sup>86</sup> A patent usually contains multiple claims, each relating to a different aspect of the invention.<sup>87</sup> Therefore, a patented invention can be, and often is, attributed to several inventors, each of which must have contributed conceptually to at least one of the claims in the patent.<sup>88</sup>

Joint inventorship has been defined as “the product of a collaboration between two or more persons working together to solve the problem addressed.”<sup>89</sup> However, it is not always easy to determine if two researchers are co-inventors. Multiple researchers can be co-inventors on a patent even if “(1) they did not physically work together or at the same time, (2) each did not make the same type or amount of contribution, or (3) each did not make a contribution to the subject matter of every claim of the patent.”<sup>90</sup> Inventors within universities may be any of the laboratory members mentioned in Part I.B.1—faculty researchers, research associates, post-doctoral fellows, students or staff conducting research.

Due to the definition of inventorship and the complexities of the modern university research environment, inventions often include conceptual and creative contributions by many people building on an initial idea.<sup>91</sup> Unfortunately, universities often leave the determination of inventorship, especially during the disclosure stage, to the researchers themselves.<sup>92</sup> Because these researchers lack

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84. “[I]n the context of joint inventorship, each co-inventor presumptively owns a pro rata undivided interest in the entire patent, no matter what their respective contributions.” *Ethicon v. U.S. Surgical Corp.*, 135 F.3d 1456, 1465 (Fed. Cir. 1998). If a co-inventor is not initially named on the patent, the co-inventor may sue to have the patent inventorship information corrected. 35 U.S.C. § 256 (2011).

85. In the absence of an assignment agreement, the newly named co-inventor would be an owner of the patent and thus allowed to license the patent independently of the other co-inventors. 35 U.S.C. § 262 (2006).

86. *See Burroughs Wellcome Co. v. Barr Labs, Inc.*, 40 F.3d 1223, 1227-28 (Fed. Cir. 1994) (explaining how “[c]onception is the touchstone of inventorship”).

87. Dennis Crouch, *The Rising Size and Complexity of the Patent Document*, Legal Studies Research Paper Series Research Paper No. 2008-04, available at <http://ssrn.com/abstract=1095810> (last visited May 21, 2014).

88. *See* 35 U.S.C. § 116 (2006); *Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1460 (Fed. Cir. 1998) (explaining how “each joint inventor must generally contribute to the conception of the invention”).

89. *Burroughs Wellcome*, 40 F.3d at 1227.

90. 35 U.S.C. § 116(a) (2006).

91. *See id.* § 116.

92. *See, e.g., Technology Transfer Policy*, UNIV. OF MICH., <http://www.techtransfer.umich.edu/resources/policies.php>, archived at <http://perma.cc/CJL2-GYFZ> (last visited May 21, 2014).

patent law training, their designation of co-inventors may be legally incorrect, resulting in improper patent prosecution and assignments.<sup>93</sup>

In this set of simplistic examples, it is easy to see how inventorship of the same invention, a specialized antibody for a diagnostic assay, could be very different depending on the circumstances of its development. Each example results in a different set of inventors responsible for disclosure to the TTO and required to assign any patent rights to the university.

In the first scenario, the principal investigator has an idea to make a special set of antibodies for use in an assay. The principle investigator tells a graduate student exactly what type of antibody to make, and the graduate student uses fairly common materials and techniques to create the antibodies. The principle investigator is likely the sole inventor because the principle investigator conceived of the specialized antibody and the graduate student carried out routine work at the principle investigator's direction to produce the antibody.

In a second, slightly more complex scenario, the principal investigator again has an idea to make antibodies for use in an assay and tells the graduate student to do so. However, in this case, it is the graduate student who determines that a special type of antibody would be most effective and creates materials to make a specially directed antibody. Here, our principal investigator and the graduate student are likely co-inventors because both contributed conceptually to the final invention.

Finally, in a fairly common scenario, the assay development is part of the graduate student's project, and it is the graduate student who recognizes the need to create the specialized antibody for the assay and plans how to make it. The graduate student goes to the principal investigator for approval to spend grant money and discusses the antibodies and the procedures for production. The principal investigator thinks it over and approves the project and expenses but makes no changes to the development plan. Here, the graduate student should be the sole inventor of the specialized antibody, but the principal investigator is likely to try to take some credit for the invention.<sup>94</sup>

The Bayh-Dole Act created incentives for universities and researchers as inventors to engage in commercialization efforts. In many ways, these incentives have proven to be quite effective. The rise of the TTO at most major universities and the billions of dollars in licensing revenue underscore that success. The incentives might prove to be more successful if all inventors understood the incentives to which they were entitled. These incentives are necessary because the commercialization process has proven a costly endeavor in terms of both university and inventor resources. However, despite the diversity of people at all levels who may be innovating within the university, universities tend to take a blanket approach to incentivization of these inventors—usually focusing on

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93. See John Villasenor, *Intellectual Property Awareness at Universities: Why Ignorance Is Not Bliss*, FORBES (Nov. 27, 2012, 8:37 PM), <http://www.forbes.com/sites/johnvillasenor/2012/11/27/intellectual-property-awareness-at-universities-why-ignorance-is-not-bliss/>, archived at <http://perma.cc/X5Q5-ZRR2>.

94. See *infra* Part III.B for discussion of faculty disbelief of student inventorship.

faculty incentives.

## II. INCENTIVES AND DISINCENTIVES TO DISCLOSURE BY ACADEMIC RESEARCHERS

The framework of technology transfer developed by the Bayh-Dole Act and by universities' policies is completely reliant on the desire of the researchers as inventors to disclose patentable and licensable innovations.<sup>95</sup> Any inefficiency at the disclosure stage is necessarily perpetuated throughout the technology transfer process. The duty to disclose and assign title to inventions is generally included in university policies to which universities require researchers to agree as a term of employment.<sup>96</sup> Non-employee researchers, such as graduate students and sometimes even undergraduate students, are generally subject to similar policies in which the university claims title to any inventions developed using university resources.<sup>97</sup>

Despite this duty to disclose no matter the source of funding, current evidence suggests that as many as 50% of patentable innovations are not being disclosed by researchers to their university's TTO.<sup>98</sup> To many authors, this suggests an imbalance between incentives to disclose and other influences on researchers.<sup>99</sup> The disclosure incentive is generally monetary—a slice of the licensing revenues, as is required by the Bayh-Dole Act for federally funded inventions.<sup>100</sup> Some

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95. See Bayh-Dole Act of Dec. 12, 1980, Pub. L. No. 96-517 § 6(a), 94 Stat. 3019-29 (codified at 35 U.S.C. §§ 200-12 (2006)); see, e.g., *Technology Transfer Policy*, *supra* note 92; James D. Clements, *Improving Bayh-Dole: A Case for Inventor Ownership of Federally Sponsored Research Patents*, 49 IDEA 469 (2009).

96. See, e.g., Clements, *supra* note 95; *Technology Transfer Policy*, *supra* note 92.

97. See, e.g., *Wash U IP Policy*, *supra* note 48. There is debate as to the ability of the university to claim ownership of student-created inventions in certain contexts, such as inventions created during a class. This Article is limited to inventorship in the context of a university research laboratory, which typically means that the student is also acting in many ways as an employee of the university and using substantial university resources. For more information on the debate, see Anthony J. Luppino, *Fixing a Hole: Eliminating Ownership Uncertainties to Facilitate University-Generated Innovation*, 78 UMKC L. REV. 367, 377-78, 383-84 (2009); Sean B. Seymore, *My Patent, Your Patent, or Our Patent? Inventorship Disputes Within Academic Research Groups*, 16 ALB. L. J. SCI. & TECH. 125, 137 (2006).

98. See Jensen et al, *supra* note 55, at 1272; Jerry G. Thursby & Marie C. Thursby, *Pros and Cons of Faculty Participation in Licensing*, 16 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP INNOVATION AND ECON. GROWTH, UNIV. ENTREPRENEURSHIP AND TECH. TRANSFER: PROCESS, DESIGN, AND INTELL. PROP. 187, 189 (Gary D. Libecap ed., 2005) [hereinafter Thursby & Thursby, *Pros and Cons*]; Albert Link et al., *An Empirical Analysis of the Propensity of Academics to Engage in Informal University Technology Transfer*, 16 INDUS. & CORP. CHANGE 641, 642-43 (2007).

99. See Thursby & Thursby, *Pros and Cons*, *supra* note 98, at 189.

100. See Bayh-Dole Act of Dec. 12, 1980, Pub. L. No. 96-517 § 6(a), 94 Stat. 3019-29 (codified at 35 U.S.C. §§ 200-12 (2006)).

studies have found that monetary incentives to researchers in the form of royalty-sharing or equity positively affect both innovation and licensing outcomes, though other factors act in opposition to monetary incentives.<sup>101</sup>

#### A. Monetary Disclosure Incentives

University intellectual property policies generally provide for inventors, both faculty and non-faculty, to receive a share of the licensing revenue derived from their invention as incentive for disclosure.<sup>102</sup> Most policies from major research universities also reserve portions of the revenue for the academic department or college in which the inventor works, for the inventor's laboratory for future research funding, and sometimes for the TTO itself.<sup>103</sup>

The policies differ greatly on the percentage awarded to each party and whether those percentages are stable or change according to the amount of licensing revenue generated by the invention. At Washington University in St. Louis, for instance, all direct technology transfer expenses are subtracted from the gross licensing revenue, and the resulting net revenue is distributed as: 25% to the TTO, 35% to the creator(s), and 40% to the creator's school or college (which may further split this portion between the school, the department of the creator, and the creator's laboratory).<sup>104</sup> Michigan State University's policy is a staggered policy according to the amount of revenue.<sup>105</sup> The first \$5000 of net revenue (gross revenue minus direct technology transfer costs) goes to the inventor, and the next \$100,000 is split in thirds between the inventor(s), the inventor's college, and the university.<sup>106</sup> The next \$400,000 is split with 30% going to the inventor(s), 40% to the university, and 30% to the inventor's college.<sup>107</sup> These stages continue until net revenue is more than \$1,005,000, at which time the split becomes 15% to the inventor(s), 15% to the inventor's college, and 70% to the

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101. See Thursby & Thursby, *Pros and Cons*, *supra* note 98, at 192-93, 102.

102. See Thursby et al., *Objectives*, *supra* note 10, at 61 (finding that the average research university in the author's study provides a 40% share of net license revenue to the inventor). For examples of revenue sharing for university inventors, see, e.g., *Intellectual Property Policy*, JOHNS HOPKINS UNIV. § V.B., [http://jhuresearch.jhu.edu/JHU\\_Intellectual\\_Property\\_Policy.pdf](http://jhuresearch.jhu.edu/JHU_Intellectual_Property_Policy.pdf), archived at <http://perma.cc/CA4J-8PCN> (last visited May 21, 2014); *Patent and Tangible Research Policy*, N. C. STATE UNIV. § 8, [http://www.ncsu.edu/project/botbook/public/2011/06/Patent-Policy-to-BOT-7-2011\\_1.pdf](http://www.ncsu.edu/project/botbook/public/2011/06/Patent-Policy-to-BOT-7-2011_1.pdf), archived at <http://perma.cc/3WPV-3YWX> (last visited May 21, 2014); *Patents-Faculty Handbook*, MICH. STATE UNIV. § VI, <http://www.hr.msu.edu/documents/facacadhandbooks/facultyhandbook/patents.htm>, archived at <http://perma.cc/CWG3-XP5Y> (last visited May 21, 2014).

103. See, e.g., *Intellectual Property Policy*, *supra* note 102; *Technology Transfer Policy*, *supra* note 92.

104. *Wash U IP Policy*, *supra* note 48.

105. *Patents-Faculty Handbook*, *supra* note 102.

106. *Id.*

107. *Id.*



university.<sup>108</sup> In each case, these policies represent the individual university's estimation of the proper incentives for disclosure and, in some cases, further assistance with commercialization attempts for the invention.

Some commentators have suggested that monetary incentives are less effective than other types of incentives in the academic research world. Daniel Greenberg states that "academic science is not heavily populated with wealth-seeking individuals."<sup>109</sup> Greenberg and others suggest that, through a process of self-selection, academic researchers are more interested in the secure employment of tenure, intellectual freedom, and recognition of their peers.<sup>110</sup> Siegel et al., describes the primary goal of research scientists as "recognition within the scientific community," with financial gain and securing research funding as secondary goals.<sup>111</sup>

The keys to attaining these non-monetary goals and interests are grant money for research and the subsequent stream of resulting publications.<sup>112</sup> The underlying incentive for publication is different for each member of the research team.<sup>113</sup> While faculty researchers are often focused on publication for promotion and tenure, publications are equally important for post-doctoral researchers and graduate students.<sup>114</sup> Post-doctoral researchers rely on a demonstrated publication record to transition to a faculty or industry position.<sup>115</sup> Graduate students often have a publication requirement in order to obtain a Ph.D.<sup>116</sup>

This focus on publications and recognition suggests that incentives in the form of a personal share of licensing revenue may not be completely aligned with the primary motivations of academic researchers at any level.<sup>117</sup> This author has previously argued that monetary prizes for disclosure directed at funding research to further develop the new technology might be a better incentive to disclosure, as such prizes would directly impact the ability of the academic researcher to

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108. *Id.*

109. DANIEL S. GREENBERG, SCIENCE FOR SALE: THE PERILS, REWARDS AND DELUSIONS OF CAMPUS CAPITALISM 22 (2007).

110. *Id.* at 22-23. See generally Strandburg, *Curiosity-Driven Research*, *supra* note 40, at 99-104. But note that any proposed incentive models centered around these interests would not be particularly applicable to non-faculty researchers, such as students and post-doctoral researchers. See *supra* Part I.B.1 for an in-depth discussion.

111. Donald S. Siegel et al., *Assessing the Impact of Organizational Practices on the Relative Productivity of University Technology Transfer Offices: An Exploratory Study*, 32 RES. POL'Y 27, 31 (2003) [hereinafter Siegel et al., *Assessing the Impact*].

112. Paul R. Sanberg et al., *Changing the Academic Culture: Valuing Patents and Commercialization Toward Tenure and Career Advancement*, 111 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 6542, 6542-43 (2014).

113. See Seymore, *supra* note 97, at 130.

114. See *id.*

115. See *id.*

116. See *id.*

117. Carter-Johnson, *supra* note 41.

continue research.<sup>118</sup> Supporting the notion that personal monetary gain is not the best incentive, interview studies with faculty research scientists have uncovered a desire for alternative incentives for invention and disclosure, such as promotion and tenure consideration.<sup>119</sup>

A large number of scholarly articles have investigated, by use of empirical data and modeling, the effect of incentivizing faculty researchers through share of licensing revenue.<sup>120</sup> In general, these studies conclude that monetary incentives have at least some positive impact on eventual numbers of licenses and gross licensing revenue.<sup>121</sup> As disclosure by the researchers to the TTO is the primary input into licensing numbers and revenue,<sup>122</sup> it can be extrapolated that these incentives also affect invention disclosure rates.<sup>123</sup> However, some studies have shown little or no positive impact of revenue sharing with researchers. A case study of eleven inventions from two major research universities found that potential financial incentives played no part in the decision to begin research projects.<sup>124</sup> Also, a survey of biomedical researchers found that only 8% of respondents described commercial potential as an important reason for choosing a research project.<sup>125</sup> Finally, incentivization of faculty researchers may also be unrelated to or actually damaging to entrepreneurial activities. Markman et al.,

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118. *Id.*

119. Siegel et al., *Assessing the Impact*, *supra* note 111, at 42-43, 44 (“The vast majority of interviewees also specifically commented on the fact that tenure and promotion decisions continued to be made almost strictly on the basis of publications and grants” and “[o]ne department chair phrased it as follows: It’s the height of hypocrisy for universities to claim that they value technology transfer, or that it’s supposed to be a top institutional priority, and then fail to reward it in their promotion and tenure decisions. At some point, we’ve got to resolve this discrepancy.”)

120. Almost no empirical data or model considers the effect of incentivization on non-faculty researchers. *See infra* Part III.

121. *See, e.g.*, Friedman & Silberman, note 73, at 29 (showing a positive but weak correlation of license revenue share incentives to faculty researchers with the number of licenses executed and a strong correlation with license income. This discrepancy may be due to a skewing of the data by one or more “blockbuster” inventions or could also be due to limits on TTO resources to execute more licenses.); Saul Lach & Mark Schankerman, *Incentives and Invention in Universities*, 39 RAND J. ECON. 403 (2008) (showing that license revenue sharing with scientists strongly affects licensing outcomes); Albert Link & Donald Siegel, *Generating Science-Based Growth: An Economic Analysis of the Impact of Organizational Incentives on University-Industry Technology Transfer*, 11 EUR. J. FIN. 169 (2005); Siegel et al., *Assessing the Impact*, *supra* note 111; Thursby & Thursby, *Pros and Cons*, *supra* note 98.

122. *See* Friedman & Silberman, *supra* note 73, at 27, 29.

123. Identifying true disclosure rates is problematic in that we can only positively know the numerator, i.e., the number of disclosures actually made by academic researchers. The denominator, i.e., the number of disclosures that *should* have been made is simply an informed estimate.

124. Jeannette Colyvas et al., *How Do University Inventions Get into Practice?*, 48 MGMT. SCI. 61 (2002).

125. *See* Walsh et al., *supra* note 62, at 1188.

for instance, found that in a sample of 128 universities, the number of executed equity licenses (commonly used in licensing to spin-out entities) was actually negatively correlated with incentive pay to faculty researchers.<sup>126</sup> However, it is unclear if the decrease in equity licensing is related to any decrease in disclosure rates.<sup>127</sup>

### *B. Disincentives to Disclosure*

Arrayed against these monetary incentives to disclose are a number of pressures inherent in the academic research environment. University scientists work in a community that was built on the free sharing of ideas through publications, conferences, and open discussion.<sup>128</sup> The social norms surrounding this community have made it difficult to convince university scientists that participating in the technology transfer process is valuable.<sup>129</sup> Additionally, scientists lack education about technology transfer generally. Many scientists do not understand the legal definition of an invention or inventorship. Similarly, the scientist who has created a new invention may not be familiar with the steps required to disclose the invention to the TTO or the potential rewards of so disclosing. These problems with education also reflect a larger time management problem. Scientists have a finite amount of time and many university responsibilities that take priority. Taken together, these problems mean that university scientists often perceive little immediate value to compensate for the time and effort involved in disclosure.

*1. Social Norms in the Research Community Inhibit Disclosure.*—Perhaps the most discussed and debated disincentive to disclosure is the conflict of academic technology transfer with scientific social norms.<sup>130</sup> Norms particular to academic researchers have been described by authors since at least the middle of the last century, and many of these norms appear at the surface to be

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126. Markman, *supra* note 36, at 359.

127. One problem with studies such as these is that the situations examined are rather static. There is no way to experiment, i.e., alter variables and examine effects, and so many of the conclusions are at best speculative.

128. Arti Kaur Rai, *Regulating Scientific Research: Rights and the Norms of Science in Biotechnology Research*, 94 NW. U. L. REV. 77, 90 (1999).

129. See McManis & Noh, *supra* note 39; Thursby & Thursby, *Pros and Cons*, *supra* note 98, at 189.

130. See, e.g., Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 LAW & CONTEMP. PROBS. 289, 289-90 (2003) (discussing the erosion of “open science” norms resulting, at least in part, from the encouragement of university patenting of basic biomedical research); Rai, *supra* note 128, at 77 (discussing changes in scientific norms within the biotechnology research community); Thursby & Thursby, *Pros and Cons*, *supra* note 98, at 189 (“[S]ome faculty may refuse to disclose for ‘philosophical’ reasons related to their notions of the proper role of academic scientists and engineers.”). For a comprehensive discussion of the debate over the existence and effects of scientific norms on technology transfer, see McManis & Noh, *supra* note 39.

antithetical to the current academic technology transfer structure. The distinguished sociologist Robert Merton described four basic scientific norms: communalism, universalism, disinterestedness, and organized skepticism.<sup>131</sup> Of these, communalism, which is the idea that there is a common ownership of scientific discoveries, and disinterestedness, which is the idea that scientists should act in ways that are selfless, i.e., they should have no financial attachment to their research, are most applicable to discussions of incentives to disclose. Both of these ideals could obviously impact the desire of the academic researcher to comply with disclosure duties.

The disinterestedness norm immediately conflicts with monetary incentivization of the researcher. The effectiveness of a monetary incentive inherently relies on a certain amount of self-interest and pride of ownership in the invention. Even indirect monetary grant incentives directed at the inventor's laboratory and further research in return for invention disclosures may be perceived as self-interested because the research money leads to publications that lead to prestige. While non-monetary incentives, such as tenure consideration for high-quality disclosures, may not conflict as directly with the financial aspects of this ideal, any type of disclosure incentive directed at the researcher's benefit indicates some degree of self-interest.

Communalism would suggest that research results should be published and that these results should be freely usable to other researchers and the public.<sup>132</sup> Communalism further suggests that the proper reward for scientific discovery is recognition and esteem.<sup>133</sup> These ideals of communalism could easily conflict with the patent monopoly and the exclusive licensing common in academic technology transfer. Scholars such as Katherine Strandburg have refined the communalism concept, applying it to specific situations within academic research and technology transfer.<sup>134</sup> Strandburg identifies the research norms of sharing research tools and materials,<sup>135</sup> as well as the preferences of academic researchers for "performing scientific research and participating in the scientific discourse" and "learning the results of the collective research project" as examples of communalism.<sup>136</sup>

Both of these norms conflict with academic technology transfer. Patents result in exclusivity rights, which may be used to restrict use of the innovation, and patent protection requires some secrecy on the part of the researcher.<sup>137</sup> Under current U.S. patent law, publication of research more than a year before

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131. ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS* (Norman W. Storer ed., Univ. of Chicago Press 1973).

132. Thursby & Thursby, *University Licensing*, *supra* note 23, at 623.

133. *Id.*

134. Katherine J. Strandburg, *User Innovator Community Norms: At the Boundary Between Academic and Industry Research*, 77 *FORDHAM L. REV.* 2237 (2009) [hereinafter Strandburg, *Community Norms*].

135. *Id.* at 2248.

136. *Id.* at 2249.

137. 35 U.S.C. § 261 (2012); *id.* § 271.

application for a patent will bar the approval of the patent.<sup>138</sup> Other countries are considerably more stringent, having a publication bar in which any publication of the innovation before the patent application results in an immediate bar of patent approval.<sup>139</sup> Therefore, academic researchers may fear that disclosure of innovations to the university TTO will result in requirements to delay publication or conference presentations so that patent applications can be timely filed.<sup>140</sup>

Empirical evidence supports this trepidation on the part of academic researchers, demonstrating that almost 20% of disclosing researchers in the life sciences have experienced publication delays of greater than six months due to TTO patenting.<sup>141</sup> While this amount of time may seem minor, the consequences could be drastic. In some fast-moving fields such as molecular biology, a six-month delay could easily be the difference between publishing the innovation in a premier journal as a pioneering work or in a lesser journal as merely a confirming work.<sup>142</sup> As indicated above, faculty academic researchers appear to place publication and tenure considerations above monetary considerations and so may strategically fail to disclose innovations in the face of publication delay fears.<sup>143</sup>

Violation of perceived norms can also have direct consequences for the academic researcher.<sup>144</sup> Many of the functions of academic researchers are dependent on the approval of peers. Tenure consideration is in large part dependent on local peer approval,<sup>145</sup> which can be damaged by perceived deviation from the social norms. Publication is also peer-reviewed, and while the reviewers are presumably anonymous to the author, the author's identity often is

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138. *Id.* § 102(B). While the America Invents Act will considerably alter 35 U.S.C. § 102, it retains an exemption that is likely to provide a similar one-year grace period for university inventors publishing or presenting their innovations before a patent application is submitted. America Invents Act 35 U.S.C. § 102(b)(1).

139. See generally *IPR Help-Desk*, EUROPEAN COMMISSION DG ENTERPRISE, available at <http://www.tecpar.br/appi/News/GracePeriodinventionLaw.pdf>, archived at <http://perma.cc/52E6-YJ4B> (describing grace periods for publication, or the lack of the same, in Europe and other states).

140. See, e.g., *Wash U IP Policy*, *supra* note 48 (“The publication of research results must not be hampered by agreements made to commercialize intellectual property. However, a minimal and defined delay to protect intellectual property through patent applications may be included.”).

141. See David Blumenthal et al., *Withholding Research Results in Academic Life Science*, 277 *JAMA* 1224 (1997).

142. Thursby & Thursby, *University Licensing*, *supra* note 23, at 633.

143. See also Carter-Johnson, *supra* note 41, at 483 (“[I]n spite of a government requirement to disclose government-funded inventions to the university for licensing and the university's considerable interest in licensing such inventions, academic researchers routinely publish their inventions in scientific journals without university disclosure rather than spending the extra time required to also disclose the inventions to the university.”); Siegel et al., *Assessing the Impact*, *supra* note 111, at 31.

144. See Strandburg, *Community Norms*, *supra* note 134, at 2249.

145. In addition to the number and quality of publications, which may be diminished due to the publication delays previously discussed.

not.<sup>146</sup> Even in situations in which the authors' names are removed from a draft submitted for peer review, authors commonly work in extremely specialized fields and are thus fairly easy for an informed reviewer to identify.<sup>147</sup> Finally, grant proposals are also often a peer-reviewed process. In the case of federal grants through the National Institutes of Health, the identity and "track-record" of an applicant is an explicit factor in the review for approval.<sup>148</sup> Each of these areas, all critically important to the career of an academic researcher, are opportunities for the research community to punish those seen as deviating from the scientific norms.

Some attitudes against technology transfer, perhaps formed in response to research norms, appear to be less well supported. As mentioned above, disclosure of an innovation to the university TTO is likely to result in the university obtaining a patent and exclusivity rights to the invention. This outcome could also be in conflict with university scientific research norms such as communalism, perhaps inhibiting some researchers from disclosing the innovation to the university. However, fears of patent right exclusivity impeding research at universities may be unfounded. In the case of patents on research tools, rights are rarely enforced against university researchers.<sup>149</sup> In fact, universities are rarely sued for patent infringement for any reason.<sup>150</sup>

Over the last three decades, the number of university patents has exploded, suggesting that university research communities have a greater acceptance of patenting research outputs.<sup>151</sup> Acceptance of these altering scientific norms is not universal, however. Different universities, even major research universities with hundreds of millions of dollars in federal research funding, may retain different

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146. Richard Snodgrass, *Single- Versus Double-Blind Reviewing: An Analysis of the Literature*, 35 SIGMOD Record 8, 8 (2006). As an example, the peer review policy of *Nature*, one of the leading scientific publications, can be found at [http://www.nature.com/authors/policies/peer\\_review.html](http://www.nature.com/authors/policies/peer_review.html) (last visited May 21, 2014).

147. Studies have shown that in double blinding studies where neither the reviewer nor the author is disclosed, the identity of the author remains unknown 53% to 79% of the time. Snodgrass, *supra* note 146, at Record 8, 15.

148. See *Peer Review Process*, NAT'L INST. OF HEALTH OFFICE OF EXTRAMURAL RES., available at [http://grants.nih.gov/grants/peer\\_review\\_process.htm](http://grants.nih.gov/grants/peer_review_process.htm), archived at <http://perma.cc/H8XH-CK74> (last visited May 21, 2014) (In listing the criteria and considerations that peer reviewers should use when evaluating a grant, the review process specifically examines the applicant researcher and asks "have they demonstrated an ongoing record of accomplishments that have advanced their field(s)?").

149. See Strandburg, *Community Norms*, *supra* note 134, at 2250; Walsh et al., *supra* note 62.

150. Chris Holman, *The Impact of Human Gene Patents on Innovation and Access: A Survey of Human Gene Patent Litigation*, 76 UMKC L. REV. 295 (2007).

151. Charles McManis and Suheol Noh reported that, in 1980, twenty-five universities received 150 patents, and the numbers had grown to 150 universities receiving 1500 patents by 1992. See McManis & Noh, *supra* note 39. By 2009, 179 universities reported filing 12,109 new patent applications while receiving approximately 20,000 invention disclosures that same year. See AUTM FY2009, *supra* note 37, at 22, 25.

cultures regarding exclusivity of basic research outputs, particularly research tools. Additionally, such cultures shift over time. Massachusetts Institute of Technology (MIT) is well known for its long history of successful technology transfer and faculty participation in commercialization of university innovations.<sup>152</sup> Other schools have become believers in technology transfer much more recently. In 1999 Johns Hopkins University President William Brody boasted about Hopkins' actions in putting revolutionary research tool technology into the public domain and avoiding pushing Hopkins' researchers into commercial activity.<sup>153</sup> By 2011, Johns Hopkins was ranked No.23 in the country in amount of licensing revenue by the Chronicle of Higher Education.<sup>154</sup>

It is, therefore, unclear what practical effect current scientific research norms have on disclosure of innovations to the university and subsequent patenting and commercialization. AUTM survey results indicate clear increases in gross numbers of invention disclosures, suggesting there is greater acceptance of university ownership of researcher innovations.<sup>155</sup> This suggests that social norm impediments to disclosure may be waning.

2. *Academic Researchers Often Fail to Disclose Due to Practical Limitations.*—Aside from scientific norms, another pressure against disclosure may be a simple balancing of the time investment necessary for disclosure and the expectations of recoupment. For many academic researchers, this balancing of time commitments may weigh strongly in favor of failing to disclose. Once a faculty researcher creates a new technology, she must determine the best use of the technology and her time in order to continue to receive more funding and job stability, such as tenure. Similarly, post-doctoral researchers and graduate students must make a trade-off between publication and its concomitant career advancement and the time needed for disclosure.

While an invention disclosure may result in monetary gain in the distant future, an academic researcher at any level may decide that publication or further grant writing is a better use of her time than filing an invention disclosure.<sup>156</sup> Academic researchers routinely publish their inventions in scientific journals

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152. See, e.g., GREENBERG, *supra* note 109, at 57-58 (“At MIT and several other universities with long experience in commercializing research, matchmaking between campus and corporation is carefully organized and systematically pursued.”); Shiri M. Reznitz et al., *University Commercialization Strategies in the Development of Regional Bioclusters*, 25 J. PROD. INNOVATION MGMT. 129, 135 (2008) (“MIT as a world-class educational institution has been very successful in fostering entrepreneurial approaches to technology transfer.”).

153. GREENBERG, *supra* note 109, at 58. (“Hopkins president William Brody asserted that ‘our scientists are by nature explorers. . . . Asking them to become managers, marketers, and accountants is unrealistic and ultimately inimical to the research enterprise.’”).

154. *Universities with the Most Licensing Revenue: 2011*, THE CHRON. OF HIGHER EDUC., available at <http://chronicle.com/article/Sortable-Table-Universities/133964/>, archived at <http://perma.cc/Q2RU-5WTA> (last visited May 21, 2014).

155. See AUTM FY2009, *supra* note 37, at 22.

156. For a more in-depth discussion of the motivations of academic researchers, see Carter-Johnson, *supra* note 41.

without university disclosure rather than spending the extra time required to also disclose the inventions to the university.<sup>157</sup> These academic researchers make the decision to forego disclosure in spite of near universal contractual requirements to disclose inventions to the university for licensing and the university's considerable interest in licensing such inventions.<sup>158</sup>

The choice to forego invention disclosures may be due to the perception by many academic researchers that no direct monetary benefit will be forthcoming. Such a perception is likely to be correct. Survey data has indicated that a minority of researchers who have disclosed and received a patent actually see any licensing revenues.<sup>159</sup> A study of academic biomedical researchers found that only 18% of the polled researchers received income from licensing.<sup>160</sup>

These studies align with recent AUTM data indicating that university inventors filed 20,309 new invention disclosures in 2009.<sup>161</sup> In contrast, only 12,109 patent applications were filed in that year—approximately 60% of the number of invention disclosures.<sup>162</sup> From a licensing standpoint the numbers are even less enticing. Only 6889 disclosures were licensed in 2009, a number approximately 34% of the invention disclosures.<sup>163</sup> Assuming the number of 2008 disclosures licensed in 2009 and the number of 2009 disclosures licensed in 2010 stayed relatively similar, the possibility that a new invention will yield a large return is fairly slim. With such data, researchers would understand that only a minority of invention disclosures will result in revenue generation for themselves.

Even if the invention disclosure is licensed, the vast majority of academic innovations that are licensed generate relatively little revenue. Of the 33,523

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157. Daniel W. Effenbein, *Publications, Patents, and the Market for University Inventions*, 63 J. ECON. BEHAV. & ORG. 688, 689 (2007); Jensen et al., *supra* note 55, at 1272.

158. *See, e.g., BCM Policies and Procedures*, BAYLOR COLL. OF MED. § III, [https://www.bcm.edu/research/office-of-research/baylor-licensing-group/search/BAYLOR\\_PATENT\\_POLICY.pdf](https://www.bcm.edu/research/office-of-research/baylor-licensing-group/search/BAYLOR_PATENT_POLICY.pdf) (last visited May 21, 2014) (“Any College Personnel who has Developed any Baylor Intellectual Property as herein defined shall promptly complete the applicable Disclosure Form”); *Statement of Policy in Regard to Intellectual Property*, HARVARD UNIV., <http://www.techtransfer.harvard.edu/resources/policies/IP/IPPolicy.pdf>, archived at <http://perma.cc/TQA4-PLJA> (last visited May 21, 2014) (“Covered persons are required to notify the University’s Office of Technology Development (‘OTD’) of each Supported Invention and Incidental Invention through a disclosure document as prescribed by OTD.”); *Patent Policy*, UNIV. OF CAL., BERKELEY, <http://www.spo.berkeley.edu/Policy/patentpolicy.html>, archived at <http://perma.cc/4F7X-MLD7> (last visited May 21, 2014) (“Those individuals who have so agreed to assign inventions and patents shall promptly report and fully disclose the conception and/or reduction to practice of potentially patentable inventions to the Office of Technology Transfer or authorized licensing office.”).

159. *See* Thursby & Thursby, *Pros and Cons*, *supra* note 98, at 190.

160. *See* Walsh et al., *supra* note 62, at 1187.

161. *See, e.g.,* AUTM FY2009, *supra* note 37, at 13-14.

162. *Id.* at 25. This author concedes that the number of patent applications and disclosures licensed is likely to include disclosures from 2008 and prior years as well.

163. *Id.* at 36.



active licenses in 2009, only 199 licenses generated revenue greater than a million dollars.<sup>164</sup> A poll of academic biomedical researchers found that only about 5% had received total licensing revenues of more than \$50,000.<sup>165</sup> Successful TTOs often have very few “blockbuster” licenses that make up the bulk of revenues, and as such, academic technology transfer often becomes a feast or famine situation.<sup>166</sup>

The low probability of income is not the only consideration inventors face when balancing time commitments. Most of the disclosed inventions are at “embryonic” stages and require considerable additional research and development before being ready for commercialization.<sup>167</sup> Current evidence suggests that successful licensing ventures often require additional input from the inventing academic researcher, as this person is the most familiar with the innovation.<sup>168</sup> Therefore, the savvy academic researcher will realize that the time invested is unlikely to produce substantial revenue, and even more time may be required if there is to be any successful licensing of the innovation at all.

Compounding time pressures, a lack of education regarding technology transfer may be an important issue contributing to the disclosure problem. Academic researchers do not instinctively understand when a patentable invention has been created or even recognize the existence of the duty to disclose an invention.<sup>169</sup> To the extent the time pressures discussed above exist, academic researchers are unlikely to find time to educate themselves if they lack an underlying understanding of the importance of technology transfer.

The extent of these education problems likely varies enormously between universities, based in large part on the outreach efforts of the university TTO and the social norms of the particular university.<sup>170</sup> Though not an active push against disclosure like those issues discussed above, ignorance of the academic researcher as to both duty to disclose and the researcher’s ability to recognize disclosure-worthy innovations may negatively affect disclosure rates and totally abrogate any incentive structure used to encourage disclosure.<sup>171</sup>

Finally, academic researchers may misunderstand the interaction between technology transfer and publication. The pressure to publish may force academic researchers to forego disclosure in favor of publication under the mistaken

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164. *Id.* at 37.

165. *See* Walsh et al., *supra* note 62, at 1187.

166. *See* Maureen Farrell, *Universities That Turn Research into Revenue*, FORBES (Sept. 12 2008), [http://www.forbes.com/2008/09/12/google-general-electric-ent-tech-cx\\_mf\\_0912\\_universitypatent.html](http://www.forbes.com/2008/09/12/google-general-electric-ent-tech-cx_mf_0912_universitypatent.html), *archived at* <http://perma.cc/WMV3-YCRR>; AUTM FY2009, *supra* note 37, at 37.

167. *See* Thursby et al., *Objectives*, *supra* note 10, at 62; Thursby & Thursby, *University Licensing*, *supra* note 23, at 625-26.

168. *See* Thursby et al., *Objectives*, *supra* note 10, at 62 (“71% of licensed inventions are viewed as requiring inventor cooperation for commercial success.”).

169. Eisenberg, *supra* note 29, at 24; Seymore, *supra* note 97, at 9.

170. Tyler, *supra* note 25, at 174-79.

171. Carter-Johnson, *supra* note 41, at 18-19.

assumption that the two choices are incompatible.<sup>172</sup> However, publication and university commercialization can and should co-exist. At least in the United States, publication is not a complete bar to obtaining a patent; rather publication triggers a one-year statutory window for filing a patent.<sup>173</sup> Coming changes in patent laws by the America Invents Act will largely leave in place a one-year grace period for filing after publications and presentations by the inventors.<sup>174</sup>

### III. SPECIAL PROBLEMS FOR NON-FACULTY INVENTORS

A flaw in current research on disclosure incentives is that the research tends to consider the academic inventors to be a monolithic block. Too often, scholarly articles have considered only faculty researchers in their analysis of incentivization impacts, and indeed, any other effects of technology transfer as well.<sup>175</sup> Specifically, these studies focus on how to best incentivize faculty inventors.<sup>176</sup>

The reality, however, is that large contingents of researchers in a university are students, post-doctoral researchers, research associates, and technicians.<sup>177</sup> These researchers may also be inventors, either alone or as co-inventors with a faculty researcher. Authors investigating incentivization of academic researchers rarely consider situations in which multiple inventors are listed or how incentivization schemes may fail when the primary inventor is a member of a laboratory and working for the faculty inventor. Due to this lack of previous interest, no available empirical data concentrates on the incentivization of non-faculty inventors.

#### *A. Importance of Non-Faculty Disclosure*

Due to the lack of research on incentives for non-faculty researchers, it is difficult to put a concrete number on the quantity of university inventions that faculty and non-faculty co-inventors create. However, it is clear that non-faculty inventors are listed on university patents, and lawsuits exist based on claims by graduate students and post-doctoral fellows who were excluded as inventors.<sup>178</sup> Therefore, non-faculty researchers are inventors in the university research system. These non-faculty inventors should be brought into the technology transfer system on a larger scale.

Hollywood tends to portray the inventor as a lone genius toiling away by himself to create the next great innovation, but today's reality is quite different.

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172. *See supra* Part II.B.1.

173. 35 U.S.C. § 102(b) (2006).

174. 35 U.S.C. § 102(b) (2006), *amended by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 284 (2011).

175. *See, e.g.,* Friedman & Silberman, *supra* note 73, at 20 (analyzing faculty incentives); Markman & Noh, *supra* note 36, at 354.

176. *Id.*

177. Seymore, *supra* note 97, at 5.

178. *Id.* at 9-10.

Most modern research performed both in industry and in academia is done within collaborative research groups.<sup>179</sup> The members of these groups may make up part or all of a single laboratory or even multiple laboratories, and this situation often results in multiple inventors associated with a single invention.<sup>180</sup>

More than 70% of licenses from TTOs rely on disclosures from the life sciences fields.<sup>181</sup> Within a standard academic biomedical or life sciences laboratory, the faculty researcher, also known as the principal investigator, determines the overall research direction of the laboratory, develops a research team, and is ultimately responsible for obtaining funding for the laboratory.<sup>182</sup> Principal investigators rarely perform experiments or are even involved in the day-to-day direction of a research project but are often involved in conceptual issues.<sup>183</sup> Research assistants, post-doctoral researchers, and graduate students most often conduct the day-to-day direction of discreet projects and experiments.<sup>184</sup>

Generally, post-doctoral fellows, research assistants, and technicians are considered employees of the university, working under the principle investigator.<sup>185</sup> Therefore, they would be subject to the same university intellectual property policies as the faculty researcher, including assignment of innovations developed with federal funding or university resources.<sup>186</sup> Students and graduate students are often required to agree to a similar or the same policy to work in the laboratory.<sup>187</sup> Therefore, all likely inventors would be under a duty

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179. See ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 1255 (Matthew Bender 3d ed. 2002); Seymore, *supra* note 97, at 130-32.

180. Seymore, *supra* note 97, at 135.

181. *The Bayh-Dole Act: A Guide to the Law and Implementing Regulations*, UNIV. OF CAL. TECH. TRANSFER, <http://www.ucop.edu/ott/faculty/bayh.html>, archived at <http://perma.cc/LFL-7CU8> (last visited May 21, 2014) [hereinafter *The Bayh-Dole Act*] (“70% of the active licenses of responding institutions are in the life sciences. . .”).

182. See Carter-Johnson, *supra* note 41, at 478-81.

183. *Id.* at 478-79.

184. *Id.* at 478-80.

185. *Id.* at 479.

186. See, e.g., *Policy on Inventions, Patents, and Technology Transfer*, DUKE UNIV., [http://olv.duke.edu/Inventors/PoliciesAndProcedures/policy\\_on\\_inventions.pdf](http://olv.duke.edu/Inventors/PoliciesAndProcedures/policy_on_inventions.pdf), archived at <http://perma.cc/8KBK-AS2Q> (last visited May 21, 2014) (“Inventions resulting from research or other work conducted by university employees in whole or in part on university time or with significant use of university funds or facilities shall be considered the property of the university.”); *Wash U IP Policy*, *supra* note 48 (“[A]ll intellectual property (including lab notebooks, cell lines, software, human samples, and other tangible research property) shall be owned by the University if significant University resources were used or if it is created pursuant to a research project funded through corporate, federal or other external sponsors administered by the University.”).

187. See, e.g., *Wash U IP Policy*, *supra* note 48 (“This Policy applies to faculty, staff (including student employees), graduate students, post-doctoral fellows, and non-employees (including visiting faculty, affiliate and adjunct faculty, industrial personnel, fellows, etc.) who participate in research projects at Washington University.”).

to assign inventions to the university.

Building on the fact that laboratory research is a highly collaborative process and even in cases where post-doctoral fellows and graduate students have no conceptual input to the invention, they are still integral to the overall process.<sup>188</sup> As the front-line laboratory workers directing the day-to-day workings of scientific projects, graduate students and post-doctoral fellows may in many cases be the most important link in the disclosure chain, recognizing and alerting the faculty researcher to potentially commercializable innovations.<sup>189</sup> However, in many cases, post-doctoral fellows and graduate students are adding conceptually and creatively to an inventive idea, making them at least co-inventors with the faculty researchers.<sup>190</sup> These determinations of inventorship are not easy for non-patent attorneys. The discussion of some basic invention scenarios in Part I.B.2 illustrates that inventorship may change based on the research path to creation. However, the inventive process is likely even more complex than those basic scenarios.

Imagine a principle investigator in a laboratory who conceives of a new electric motor for a car, including schematics. That principle investigator then enlists a post-doctoral fellow to build a prototype of the new motor. Along the way, the post-doctoral fellow changes some of the motor specifications to comply with federal safety regulations. In addition, at weekly laboratory meetings during the course of final development, two graduate students make suggestions for added ventilation to the motor prototype resulting in increased efficiency.

The inventors of the final invention disclosed to the TTO depend on the claims of the final patent and the level of contribution of each potential co-inventor.<sup>191</sup> While the changes in specification may have been necessary to comply with regulations, if the changes were routine or done under the direction of the principle investigator, the post-doctoral fellow's contributions may not rise to the level of conception.<sup>192</sup> However, post-doctoral fellows often work independently, and the changes in specification could have altered fundamental aspects of the motor; in such a case, the post-doctoral fellow might well be considered a co-inventor of at least some of the claims containing his updated specifications.<sup>193</sup> While the added ventilation may increase efficiency, the main claims may be directed toward the basic electric motor while the added ventilation may only need to be described in one or two very narrow claims. If the added ventilation is included in even one claim, the graduate student with whom that ventilation originated could be listed as a co-inventor on the patent.<sup>194</sup> Importantly, co-inventors of even one claim would have equal co-ownership of

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188. Seymore, *supra* note 97, at 136.

189. *See id.* at 146-47 (giving an example of a post-doctoral researcher disclosing an innovation to a faculty researcher).

190. *Id.* at 136.

191. *See, e.g.,* CHISUM, *supra* note 71, § 2.02(2).

192. *Id.*

193. *Id.*

194. *Id.*

the entire patent with the principle investigator.<sup>195</sup>

Therefore, universities must understand the identity of the inventors if the TTO is to receive complete assignments of the patent rights. As discussed above, ownership of all inventions, even federally funded inventions subject to the Bayh-Dole Act, initially vest with the inventors and must be assigned to the university.<sup>196</sup> Additionally, universities may be subject to substantial liability if an inventor, such as a graduate student, is intentionally excluded from a patent.<sup>197</sup>

This necessity to correctly label inventors, along with the problems with faculty disclosure to the TTOs, should lead universities to consider increasing the involvement of non-faculty inventors into the technology transfer process. As discussed above, graduate students and post-doctoral fellows employed in university research laboratories are under the same duties of disclosure as their faculty-inventor counterparts.<sup>198</sup>

To the extent that TTOs shape monetary incentives for disclosure, graduate student researchers are likely to respond to such incentives due to relatively low salaries for the work completed.<sup>199</sup> A graduate student in the sciences will work in a laboratory full-time for a principle investigator to gather research to write dissertations.<sup>200</sup> Stipends for such research are set based on the grant funding mechanism.<sup>201</sup> The National Institutes of Health (NIH) is the most common funding agency in medical sciences.<sup>202</sup> The 2012 NIH stipend level for full-time

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195. *Id.*

196. *Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2195-99 (2011).

197. *See, e.g.*, CHISUM, *supra* note 71, §§ 2.03(4)(e), 2.04(4)(a). The new America Invents Act removes the requirement that the inventorship mistake arose through “no deceptive intention” to correct inventorship of an issued patent. Donald S. Chisum, *America Invents Act Analysis and Cross-References* 124, <http://www.chisum.com/wp-content/uploads/AIAOverview.pdf>, archived at <http://perma.cc/WJ5S-9YZX> (last visited May 21, 2014). Therefore, universities may have less risk of patent invalidity due to intentionally ignoring non-faculty inventors. However, challenges based on fiduciary duties of the principle investigators may still be possible.

198. *See The Bayh-Dole Act, supra* note 181.

199. *See, e.g.*, *Why You Shouldn't Pursue a PhD*, THE PRINCETON REVIEW, <http://www.princetonreview.com/grad/why-you-shouldnt-pursue-a-phd.aspx> archived at <http://perma.cc/382N-ATGP> (last visited May 21, 2014).

200. *See, e.g.*, *Research Appointments—Graduate School of Arts and Sciences Programs and Policies 2013-2014*, YALE UNIV., <http://www.yale.edu/printer/bulletin/htmlfiles/grad/financing-graduate-school.html>, archived at <http://perma.cc/5JQF-GNSC> (last visited May 21, 2014).

201. *See, e.g.*, *Funding Mechanisms Supported by NEI*, NAT'L EYE INST., <http://www.nei.nih.gov/funding/neifm.asp>, archived at <http://perma.cc/CET3-WCGE> (last visited May 21, 2014); *Grant Mechanisms and Funding Opportunities*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/funding/grant-writing-and-application-process/grant-mechanisms-and-funding-opportunities.shtml>, archived at <http://perma.cc/446G-74TQ> (last visited May 21, 2014).

202. *About NIH*, NAT'L INST. OF HEALTH, <http://www.nih.gov/about>, archived at <http://perma.cc/5G7Y-JT6V> (last visited May 21, 2014).

graduate researchers was \$22,032 per year.<sup>203</sup> Other funding mechanisms pay approximately \$30,000 per year.<sup>204</sup> Postdoctoral fellows receive a slightly larger stipend, earning between \$39,000 and \$55,000 depending on funding mechanism and years of experience, and may also find monetary incentives valuable.<sup>205</sup>

Non-monetary incentives might also influence graduate students and post-doctoral fellows differently than faculty inventors. In most schools having one's name associated with a patent might be considered a bonus but will not likely contribute to tenure promotions.<sup>206</sup> Showing an ability to develop a patentable product might prove useful to a non-faculty inventor whose career trajectory involves industry rather than academia.

Unfortunately, while graduate students and post-doctoral fellows contribute richly to the intellectual life of the university and the creation of new inventions, little to no research has been directed to motivations of non-faculty inventors. It is possible that monetary incentives and non-monetary outreach directed at non-faculty researchers might pay benefits to technology transfer as a whole. However, non-faculty inventors face obstacles to full involvement in the technology transfer aspects of university research.

*B. Academic Research Structure Often Fails to Recognize the Contribution of Non-Faculty Researchers to the Inventive Endeavor*

In light of the importance of non-faculty researchers to technology transfer process as inventors both in creating new technologies and aiding patent procurement and transfer, universities should be embracing these researchers and ushering them into the technology transfer proceedings. In fact, the opposite seems to be true. From the top of the administrative policies to the bottom of the nitty-gritty laboratory work, policies provide incentives solely aimed at faculty

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203. Ruth L. Kirschstein National Research Service Award (NRSA) Stipends, Tuition/Fees and Other Budgetary Levels Effective for Fiscal Year 2012, NAT'L INST. OF HEALTH, <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-12-033.html>, archived at <http://perma.cc/7NFV-NEK7> (last visited May 21, 2014) [hereinafter *Ruth L. Kirschstein NRSA Stipends*]. Undergraduates can expect to receive less than half this amount.

204. The National Science Foundation's Graduate Research Fellowship pays \$32,000. *About the NSF Graduate Research Fellowship Program*, NAT'L SCI. FOUND., [http://www.nsfgrfp.org/about\\_the\\_program](http://www.nsfgrfp.org/about_the_program), archived at <http://perma.cc/VV3B-F98Y> (last visited May 21, 2014). The Department of Defense's National Defense Science and Engineering Graduate Fellowships pay \$30,500 to \$31,500 per year. *National Defense Science and Engineering Graduate Fellowships: Stipends and Allowances*, AM. SOC'Y FOR ENG'G EDUC., [http://ndseg.asee.org/about\\_ndseg/stipends\\_and\\_allowances](http://ndseg.asee.org/about_ndseg/stipends_and_allowances), archived at <http://perma.cc/S73V-HRPW> (last visited May 21, 2014).

205. NIH post-doctoral fellows earn \$39,264 dollars in year one with increases up to \$54,180 in year seven. *Ruth L. Kirschstein NRSA Stipends*, *supra* note 203. NSF post-doctoral fellows similarly make \$45,000 to \$51,000 over the life of a three-year fellowship. *2012 Administrative Guide for the Postdoctoral Fellowships in Biology*, NAT'L SCI. FOUND., [www.nsf.gov/pubs/2012/nsf12089/nsf12089.pdf](http://www.nsf.gov/pubs/2012/nsf12089/nsf12089.pdf) (last visited May 21, 2014).

206. Sanberg et al., *supra* note 112, at 3544-46.

inventors.<sup>207</sup> Within the laboratory, principle investigators, post-doctoral fellows, and graduate student researchers fail to recognize the importance and contribution of the non-faculty inventors.

1. *Faculty May Deny Co-Inventorship of Non-Faculty Researchers.*—It is not uncommon for faculty researchers to deny that non-faculty inventors, particularly graduate and undergraduate students, have any inventive input in the laboratory.<sup>208</sup> Some faculty researchers have blatantly made declarations to the United States Patent Office declaring themselves the sole inventor despite graduate student and post-doctoral researcher co-authors on the very papers at the base of the innovation.<sup>209</sup> While it seems extremely unlikely that a graduate student or post-doctoral researcher directing the day-to-day workings of a project would bring absolutely no conceptual creativity to any part of the claimed invention, this self-serving idea of sole inventorship appears all too common among faculty researchers.<sup>210</sup>

Some scholars have perpetuated this idea, suggesting that graduate students require faculty advisors for research topics, implying a lack of conceptual creativity on the part of those students.<sup>211</sup> Such a view fails to realize that advanced graduate students become faculty members in just a few years.<sup>212</sup>

This attitude of many faculty inventors causes real problems, as illustrated by *Chou v. University of Chicago*.<sup>213</sup> Joany Chou worked for Dr. Bernard Roizman as graduate research assistant and a post-doctoral fellow at the University of Chicago's Department of Molecular Genetics and Cell Biology.<sup>214</sup> During her time in the laboratory, Dr. Chou disclosed an invention to Dr. Roizman.<sup>215</sup> Although Dr. Roizman filed a patent on the invention, he informed Dr. Chou that the invention had no commercial value and was not worth pursuing patent

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207. See, e.g., Clements, *supra* note 95, at 497.

208. See Seymore, *supra* note 97, at 143.

209. See *Chou v. Univ. of Chi.*, 254 F. 3d 1347, 1362 (Fed. Cir. 2001); Seymore, *supra* note 97, at 147. This author concedes that not every author listed on a scientific paper contributed to every aspect of the paper. Therefore, it is quite possible that an invention would not list every co-author as an inventor. But it is also unlikely that an invention based on the work of several co-authors is the sole and complete conception of only one person.

210. CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 183 (2001) (quoting a faculty researcher describing inventorship in his laboratory: "I think there's rarely more than one inventor . . . [I]f you wake up and you have an idea, that's the invention. . . . [The postdoctoral researchers] contribute to the work [around the idea], but they don't do any really innovative work [such as] contributing new concepts, [or] coming up with something that, in my lab, I haven't thought about.")

211. See, e.g., Clements, *supra* note 95, at 508-09.

212. See, e.g., *id.* at 497 (suggesting that graduate students need receive no incentives to invent beyond their yearly stipend, perhaps due to the idea that faculty members are the true inventors within the laboratory).

213. 254 F. 3d 1347 (Fed. Cir. 2001).

214. *Id.* at 1353.

215. *Id.*

protection.<sup>216</sup> Dr. Chou alleged that Dr. Roizman eventually fired her for pressing her claim as inventor on the patent upon uncovering its existence.<sup>217</sup> After leaving his laboratory, Dr. Chou sued Dr. Roizman, the University of Chicago, and ARCH Development Corporation, the University of Chicago's licensing arm, for correction of inventorship in order to have her name added to the patent as a co-inventor.<sup>218</sup> The university technology transfer policy provided for inventors to receive twenty-five of the revenue from a patent license, as well as stock in any company based on the patented technology.<sup>219</sup> As a co-inventor, Dr. Chou would have been entitled to a portion of the profits that Dr. Roizman had received.<sup>220</sup> On appeal, the Federal Circuit held that Dr. Roizman had a fiduciary duty to his student with regards to giving her credit as co-inventor on the patent application.<sup>221</sup> Although the case seems to have settled after the appeal so Dr. Chou's inventorship status was never adjudicated, USPTO data indicates that "Correction of Inventorship Papers" were filed in September 2003<sup>222</sup> along with an assignment by Joany Chou to ARCH Development.<sup>223</sup>

These sorts of problems between faculty and non-faculty inventors can be viewed as power imbalances that affect the ability of the non-faculty inventor to negotiate inventorship credit and a share of the licensing revenue.<sup>224</sup> Power imbalances are common in negotiations and are particularly prevalent in situations of employee negotiations with employer.<sup>225</sup> This idea of power in negotiations can be defined as the ability to influence the decisions of the other party and can be determined by the relative dependencies of the parties on each other.<sup>226</sup> The sources of this negotiating power are myriad and include individual characteristics such as charisma and negotiating skill, or situational characteristics such as relative positions within a company, *i.e.* a job applicant and a manager.<sup>227</sup> While courts have explicitly considered negotiation power imbalances in unconscionability and duress analyses in contract law, other applications are far

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216. *Id.* at 1353-54.

217. *Id.*

218. *Id.* at 1354.

219. *Id.* at 1353.

220. *Id.*

221. *Id.* at 1362-63.

222. *Pair Database, Transaction History for Patent 5,328,688*, U.S. PATENT AND TRADEMARK OFFICE, <http://portal.uspto.gov/pair/PublicPair>, archived at <http://perma.cc/HU5S-SDT6> (last visited May 21, 2014).

223. *Patent Assignment Database for Patent 5,328,688*, U.S. PATENT AND TRADEMARK OFFICE, <http://assignments.uspto.gov/assignments>, archived at <http://perma.cc/8XWF-HA42> (last visited May 21, 2014).

224. For a detailed review of power imbalances in negotiation and legal contracts, see Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. LAW. REV. 139, 146-47 (2005).

225. See Rebecca J. Wolfe & Kathleen L. McGinn, *Perceived Relative Power and Its Influence on Negotiation*, 14 GROUP DECISION AND NEGOTIATION 3, 5 (2005).

226. See *id.*; Barnhizer, *supra* note 224, at 159.

227. See *id.* at 166-68; Wolfe & McGinn, *supra* note 225, at 4-5.



more subtle and difficult to analyze.<sup>228</sup>

While no real research has been conducted on the exact situation of non-faculty researchers bargaining over invention credit and incentive share with faculty researchers, general research on power imbalances in negotiations can be revealing.<sup>229</sup> Power imbalances exist in most relationships and are particularly evident in employment situations, though the extent of imbalance depends on numerous factors.<sup>230</sup> A low-skill factory worker may have little power in comparison to a factory manager as the worker is likely seen as easily replaceable; however, a highly skilled worker in a tight labor market has considerably more power in her relationship with her manager.<sup>231</sup>

In negotiations between faculty researchers and those non-faculty researchers working in their laboratories, this power imbalance is often exacerbated. More so than in many employment situations, the faculty researcher holds a great deal of power over the future career prospects of post-doctoral fellows and students in their laboratories.<sup>232</sup> Due to the apprentice-like structure of graduate science programs, the faculty member controls degree prospects of students and publishing abilities of both students and post-doctoral fellows.<sup>233</sup> For the non-faculty researcher, this relationship makes bargaining for inventorship credit and splits of revenue problematic as the faculty member has a great amount of perceived power over the non-faculty researcher. This extreme, perceived power imbalance may result in the avoidance of conflict and lack of disclosure by non-faculty researchers.

Negotiations can be seen as two distinct types, distributive or integrative, but many real world negotiations will have aspects of both types.<sup>234</sup> Distributive negotiations are characterized by a fixed outcome range in which both parties value the available resource equally, with the differences in outcome being which party leaves the negotiation with the majority of the resource.<sup>235</sup> Distributive

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228. Barnhizer, *supra* note 224, at 146-47.

229. Wolfe & McGinn, *supra* note 225, at 4.

230. *Id.* at 1.

231. *Id.* at 4-5.

232. Herman Aguinis et al., *Power Bases of Faculty Supervisors and Educational Outcomes for Graduate Students*, 67 J. HIGHER EDUC. 267, 268 (1996).

233. *Id.*

234. Bruce Barry & Raymond A. Friedman, *Bargainer Characteristics in Distributive and Integrative Negotiation*, 74 J. PERSONALITY & SOC. PSYCH. 345, 348 (1998). For detailed discussions of distributive and integrative bargaining, see, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (in which the authors describe a “principled negotiation” method that focuses on the integrative bargaining characteristic of searching for ways to create value in a negotiation); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (The Free Press 1986); RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (Cornell University Press 1991).

235. Barry & Friedman, *supra* note 234, at 346; Sidharth Thakur & Jean Scheid, *Comparing Distributive and Integrative Negotiation Strategies*, BRIGHT HUB PM (Apr. 15, 2011), <http://www.brighthub.com/entry/2011/04/15/comparing-distributive-and-integrative-negotiation-strategies>.

negotiations are zero-sum negotiations, often involving money, a resource equally valued by each side.<sup>236</sup> Integrative negotiation occurs when the parties are able to produce a greater outcome range by cooperating and sharing information than would be evident on the surface and is characterized by a problem solving approach by the participants.<sup>237</sup> In integrative bargaining situations, there is often an ongoing or desired future relationship of the parties.<sup>238</sup>

At first glance, a negotiation between a faculty inventor and student inventor over which party gets how much of the incoming revenue from a patent license would appear to be strictly distributive, as there is a fixed amount of licensing revenue involved. However, because the parties are likely to have an ongoing relationship if the student or post-doctoral fellow continues to work in the principle investigator's laboratory, integrative bargaining may be possible.

Unfortunately, integrative bargaining can be time and resource intensive, and the skills required for successful integrative bargaining are not intuitive.<sup>239</sup> Many studies suggest that more integrative outcomes, *i.e.* outcomes with higher joint gains, result more often in situations where power distribution in the negotiation is equal than where power is unequal.<sup>240</sup> Some studies, however, demonstrate that integrative outcomes are indeed possible in situations of power imbalance but require the lower power negotiator to push for a cooperative solution.<sup>241</sup> This would require negotiation skill and, perhaps more importantly for this discussion, a willingness to face overt conflict with the higher-powered party—neither of which the non-faculty inventor is likely to have.<sup>242</sup>

A recent case also illustrates the potential power imbalance inherent in the laboratory structure. Frederic A. Stern sued Columbia University to be added as an inventor on a patent filed after he left the laboratory of Dr. Lazlo Bito.<sup>243</sup> The Federal Circuit upheld the district court's opinion that Stern failed to produce sufficient evidence of inventorship.<sup>244</sup> Although the Federal Circuit mentioned that unwitnessed laboratory notebooks would not have been sufficient alone to

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[brighthouse.com/methods-strategies/114091-comparing-distributive-and-integrative-negotiation-strategies/](http://brighthouse.com/methods-strategies/114091-comparing-distributive-and-integrative-negotiation-strategies/), archived at <http://perma.cc/YQ4K-PDDP>.

236. *Id.*

237. Barry & Friedman, *supra* note 234, at 348, 357.

238. Thakur & Scheid, *supra* note 235.

239. *See, e.g.*, Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1324 (2008).

240. *See, e.g.*, Elizabeth A. Mannix & Margaret A. Neale, *Power Imbalance and the Pattern of Exchange in Dyadic Negotiation*, 2 GROUP DECISION AND NEGOTIATION 119 (1993); Leigh McAlister et al., *Power and Goal Setting in Channel Negotiations*, 23 J. OF MARKETING RES. 238 (1986); J. P. Sheposh, & P. S. Gallo, *Asymmetry of Payoff Structure and Cooperative Behavior in the Prisoner's Dilemma Game*, 17 J. CONFLICT RESOL. 312 (1973); Wolfe & McGinn, *supra* note 225, at 5.

241. *See, e.g.*, Mannix & Neale, *supra* note 240, at 121.

242. *See id.*

243. *Stern v. Trs. of Columbia Univ.*, 434 F.3d 1375, 1376 (Fed. Cir. 2006).

244. *Id.* at 1378.

prove inventorship,<sup>245</sup> Stern never had the chance to enter his laboratory notebooks into evidence.<sup>246</sup> Dr. Bito had destroyed them.<sup>247</sup> While the outcome may not have changed if the laboratory notebooks had been offered into evidence, the control over and destruction of the laboratory notebooks by Dr. Bito is another example of the power that the principle investigator of a laboratory holds.

2. *University Policies Do Not Fully Account for Non-Faculty Inventors.*— While the power imbalance plays a role in the involvement of non-faculty inventors in the technology transfer process, the university intellectual property (IP) policy also greatly impacts that involvement. Almost all university policies recognize that non-faculty researchers are potential inventors and provide for revenue sharing for that population.<sup>248</sup> Unfortunately, universities do not recognize any differences in the incentives for faculty versus non-faculty researchers, nor do they recognize the power imbalance between the two populations.<sup>249</sup>

University intellectual property policies often give little attention to the potential problems inherent in multiple inventor situations. For example, the policy of the University of Illinois, a large research university, indicates that in the case of multiple inventor innovations, the innovators should split the royalty allotment given as incentives to the inventor(s).<sup>250</sup> The proportions are left for the inventors to work out themselves. Alternatively, Washington University in St. Louis, another major research university, uses the presumption that co-inventors split licensing revenue shares equally but leaves open the availability of an agreement to a different revenue split between co-inventors.<sup>251</sup> As a result, the principal investigator may demand a larger share of the revenue split. Most policies do have a dispute resolution provision, but this still requires that the laboratory worker be willing to risk dispute with their principal investigator.<sup>252</sup>

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245. *Id.* (citing *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1378 (Fed. Cir. 1986)).

246. *Id.*

247. *Id.* Defendants claimed the notebook was destroyed when Dr. Bito retired. *Stern v. Trs. of Columbia Univ.*, No. 01 CIV 10086RCC 2005 WL 398495, at \*1, \*7 (S.D.N.Y. Feb. 18, 2005), *aff'd*, *Stern*, 434 F.3d 1375.

248. See *General Rules Concerning University Organization and Procedure: Article III. Intellectual Property*, UNIV. OF ILL., <http://www.bot.uillinois.edu/sites/bot.uillinois.edu/files/bot-files/General-Rules-1-24-13.pdf>, archived at <http://perma.cc/5HHU-MKFL> (last visited May 21, 2014) [hereinafter *U Illinois IP Policy*]; *Wash U IP Policy*, *supra* note 48.

249. See *U Illinois IP Policy*, *supra* note 248; *Wash U IP Policy*, *supra* note 48.

250. *U Illinois IP Policy*, *supra* note 248 (“If there are joint creators, the net income shall be divided among them as they shall mutually agree. Should the creators fail to agree mutually on a decision, the University shall determine the division.”).

251. See *Wash U IP Policy*, *supra* note 48 (“If there is more than one Creator, each receives an equal portion of the Creator’s Share, unless co-Creators agree to a different distribution.”).

252. Washington University in St. Louis, for instance, includes a rather common outline for dispute resolution among inventors. It reads:

Any disputed issues related to intellectual property, or the interpretation of the

While university IP policies cover all inventors on the surface, the policies do not address the difference among the types of inventors, but rather treat all inventors as though they have similar motivations and pressures. For instance, non-faculty inventors likely will be indifferent to some incentives directed to faculty inventors. Moreover, the university policies fail to address the power imbalance inherent in the faculty/graduate-student relationship and its impact on the co-inventor relationship.

Even though non-faculty researchers are included in the inventor revenue-sharing provisions of the university IP policies, those provisions may still have greater benefits for the faculty co-inventors. University IP policies often direct a portion of the licensing revenue to the inventor's laboratory.<sup>253</sup> Once the money is directed to the laboratory, the principle investigator is in charge of disbursement of the funds for research.<sup>254</sup> Unless use of the funds by a graduate student or post-doctoral fellow co-inventor was specifically negotiated in advance,<sup>255</sup> the co-inventor may never see the extra funds funneled to her project. In addition, the funds may not materialize until after the co-inventor has left the laboratory.<sup>256</sup> Graduate students in science average five to seven years in laboratory research spent toward the Ph.D.<sup>257</sup> Post-doctoral fellows are often limited to a set number of years through funding mechanisms.<sup>258</sup> Patent licenses,

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Washington University Intellectual Property Policy, shall first be reviewed by the OTM. Any disputed issues that cannot be resolved with the assistance of the OTM shall be referred to the Vice Chancellor for Research. The Vice Chancellor for Research may refer disputed issues to a Faculty Oversight Committee on Technology Transfer for its recommendations and advice. The Vice Chancellor for Research is the final arbiter of any disputed issues related to intellectual property, income distribution or the interpretation of the Policy.

*Wash U IP Policy*, *supra* note 48.

253. See *U Illinois IP Policy*, *supra* note 248; *U Wash IP Policy*, *supra* note 48.

254. For example, in defining the term Laboratory and Laboratory Share in its technology transfer policy, the University of Chicago acknowledges that the laboratory is "supervised by a Principal Investigator who may or may not be an INVENTOR." The University of Chicago License Revenue Sharing Policy, [http://tech.uchicago.edu/docs/revenue\\_distribution\\_policy.pdf](http://tech.uchicago.edu/docs/revenue_distribution_policy.pdf) (last visited June 9, 2014).

255. Such negotiation for use of laboratory funds would also involve the power imbalance discussed above. See Aguinis et al., *supra* note 232, at 268.

256. Inventors who leave the university may continue to receive individual portions of the revenue sharing, but the laboratory share is often defined as the laboratory where the research took place and thus stays with the university. The University of Chicago License Revenue Sharing Policy, *supra* note 254.

257. Jessica Stoller-Conrad, *The 5-Year PhD: An Endangered Species?*, FIGURE ONE (Jan. 22, 2013), <http://figureoneblog.wordpress.com/2013/01/22/the-5-year-phd-an-endangered-species/archived-at-http://perma.cc/5W9E-GD6R>.

258. For example, "[t]he Kirschstein-NRSA for Individual Predoctoral Fellows will provide up to five years of support for research training which leads to the PhD or equivalent research degree." *Ruth L. Kirschstein National Research Service Awards for Individual Predoctoral*

especially ones negotiated with small start-up companies, may not bear revenue for several years after execution.<sup>259</sup> Assuming that the invention takes some amount of time to create, disclose and negotiate a license, a non-faculty co-inventor may have moved to the next stage of her career before that money would return to the laboratory.

In addition, the university IP policies do not give specific attention to situations in which one inventor, such as a graduate student, may work in the laboratory of another inventor, such as a faculty researcher. Instead, most policies leave it to the inventors to divide the licensing revenue share among all co-inventors, either initially or in lieu of a default equal split.<sup>260</sup> In either situation, the graduate student would be in an extremely weak bargaining position.

As discussed above, the principal investigator of a laboratory wields considerable influence over a graduate student in the principal investigator's laboratory. To advance in her career, the primary need of a graduate student is to attain her Ph.D.<sup>261</sup> In scientific academia, the Ph.D. is the key to the kingdom, giving access to the premier jobs in both industry and academia<sup>262</sup>. Furthermore, to advance in their careers, graduate students need to publish their work and receive a recommendation from their principal investigator.<sup>263</sup> Each of these potential levers adds to the power imbalance and makes it unlikely that a graduate student would challenge their principal investigator over inventorship or issues of allotment of any *potential* licensing revenue.

Conflict with their principal investigator over unrealized inventorship credit and incentives may be considered by the student an unnecessary risk, with failure to disclose and abandonment of patent protection being the wiser choice. In the case of Joany Chou discussed above, Dr. Chou alleged that she was fired when she pressed her principle investigator to include her as an inventor on a specific patent.<sup>264</sup> The tale of Petr Taborsky is far worse. As an undergraduate student,

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*MD/PhD and Other Dual Doctoral Degree Fellows (Parent F30)*, NAT'L INST. FOR HEALTH, <http://grants1.nih.gov/grants/guide/pa-files/PA-11-111.html>, archived at <http://perma.cc/GNT6-7ZF6> (last visited May 21, 2014).

259. Yumiko Hamano, *Commercialization Procedures: Licensing, Spin-offs and Start-ups*, WORLD INTELLECTUAL PROPERTY ORG. (2011), [http://www.wipo.int/edocs/mdocs/aspac/en/wipo\\_ip\\_han\\_11/wipo\\_ip\\_han\\_11\\_ref\\_t7b.pdf](http://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_han_11/wipo_ip_han_11_ref_t7b.pdf), archived at <http://perma.cc/352H-JULL>.

260. See *U Illinois IP Policy*, *supra* note 248; *U Wash IP Policy*, *supra* note 48.

261. *The Disposable Academic*, ECONOMIST (Dec. 16, 2010), <http://www.economist.com/node/17723223>, archived at <http://perma.cc/P5L3-3QV9>.

262. *Id.*

263. Robert Bochnak, *Graduate Student Guide to Publishing Your Research*, TUFTS UNIV. GRADUATE SCH. FOR ARTS AND SCIENCES (Feb. 2, 2012), <http://sites.tufts.edu/gradmatters/2012/02/08/graduate-student-guide-to-publishing-your-research/>, archived at <http://perma.cc/RT76-BZNK>. (“Publishing can help students land postdocs or tenure-track faculty positions, enhance the status of students in their field of study, and boost job prospects, especially in fields outside of academia.”).

264. See *supra* Part III.B.1.

Dr. Taborsky<sup>265</sup> worked in Dr. Carnahan's laboratory at the University of South Florida conducting research on wastewater treatment.<sup>266</sup> Both the university and Dr. Taborsky claimed ownership of his invention.<sup>267</sup> As a result of the dispute, the university filed criminal charges of theft of intellectual property,<sup>268</sup> and Dr. Taborsky's United States citizenship application was put on hold.<sup>269</sup> After trial and a refusal to sign his issued patents over to the university,<sup>270</sup> Dr. Taborsky was sentenced to three and a half years in prison,<sup>271</sup> two months of which was spent in a maximum security facility and involved work on a chain gang, and fifteen years of probation.<sup>272</sup> Such a tale serves as an example of the power imbalance between the university system and students and a warning against students fighting for the ownership of their works.

Therefore, an emphasis on creating more incentives directed toward faculty researchers will not similarly incentivize other inventors. In fact, more faculty incentives may exacerbate the problems that faculty have in acknowledging non-faculty contributions. If universities wish to develop policies with incentives directed at all inventors, those policies must address the different perspectives and problems encountered by each.

#### IV. BAYH-DOLE ACT AND TTO REFORM PROPOSALS SHOULD ACCOUNT FOR THE DIVERSITY OF INTERESTS OF THE POTENTIAL INVENTORS

##### *A. Current Proposals to Reform Bayh-Dole Act Generally Fail to Account for Non-Faculty Inventors*

In recent years, numerous authors have proposed reforms to correct perceived ills in the current academic technology transfer system.<sup>273</sup> Only a few of these

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265. Dr. Taborsky went on to earn his Ph.D. in chemistry and is now an assistant professor at Masaryk University in the Czech Republic. See *Mgr. Petr Táborský, Ph.D.*, MASARYK UNIV., <http://www.muni.cz/people/13423>, archived at <http://perma.cc/QDF4-BMA5> (last visited May 21, 2014).

266. *Taborsky Case Study: Wastewater Treatment*, IPADVOCATE.ORG (Jan. 6, 1989), <http://www.ipadvocate.org/studies/taborsky/Taborsky.pdf>, archived at <http://perma.cc/62GS-KVCT>.

267. *Id.*

268. *Id.*

269. Lisa Holewa, *Patent Dispute Puts Scientist on Chain Gang*, L.A. TIMES (July 7, 1996), [http://articles.latimes.com/1996-07-07/news/mn-21853\\_1\\_chain-gang](http://articles.latimes.com/1996-07-07/news/mn-21853_1_chain-gang), archived at <http://perma.cc/JH4R-UC9W>.

270. Based on his research, Dr. Taborsky was awarded patent numbers 5,082,813, 5,304,365 and 5,162,276. *Inventor: Petr Taborsky*, PATENTSTORM, [http://www.patentstorm.us/inventors-patents/Petr\\_Taborsky/2315154/1.html](http://www.patentstorm.us/inventors-patents/Petr_Taborsky/2315154/1.html), archived at <http://perma.cc/3636-WVN2> (last visited May 21, 2014).

271. Holewa, *supra* note 269.

272. *Id.*

273. For example, some authors have recommended that all university innovations should

proposals are directed, even in part, at the methods of incentivizing non-faculty academic researchers to disclose to the TTO and assist in the commercialization of their inventions. Some discussions go so far as to insist that such considerations are unnecessary.<sup>274</sup>

Some authors and courts have discussed the role of faculty researcher and members of their labs as a fiduciary relationship.<sup>275</sup> A fiduciary duty places a burden on the faculty researcher to refrain from acting selfishly at the expense of members of her laboratory. Anthony Luppino has suggested that a solution to faculty/student ownership disputes is added emphasis and training of faculty members about their potential fiduciary duties.<sup>276</sup> Unfortunately, this solution concentrates solely on faculty and ignores training of students and other laboratory members in their own rights and responsibilities, such as disclosure to the TTO. Luppino's solution further neglects to address the idea that there may be honest disagreement as to inventorship between faculty and non-faculty inventors. The complexity of patent law on inventorship and the lack of training make it difficult to believe that faculty members will always reach the correct solution, even if acting with complete openness and integrity. In the event of either an intentional or non-intentional fiduciary failure on the part of the faculty researcher, the laboratory member must still engage in open dispute with the faculty inventor, endangering their career prospects in the process.

A proposal that has received much attention in recent years is that of eliminating TTOs and vesting full control and ownership of the patentable invention with the inventor.<sup>277</sup> The rationale is that the inventor best understands the invention and its potential, and therefore, the inventor is in the best position to exploit this potential.<sup>278</sup> Supporters claim that this "Inventor-Ownership" proposal would reduce transaction costs, allowing the inventor control of the

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become public domain, as was accomplished by researchers developing the Human Genome Project. See Jorge L. Contreras, *Data Sharing, Latency Variables, and Science Commons*, BERKELEY TECH. L. J. 1601 (2010); Rebecca Goulding et al., *Alternative Intellectual Property for Genomics and the Activity of Technology Transfer Offices: Emerging Directions in Research*, 16 B. U. J. SCI. & TECH. L. 194, 212-14 (2010). Other authors have proposed the use of only non-exclusive licensing by TTOs. See Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663 (1996); Martin Kenney & Donald Patton, *Reconsidering the Bayh-Dole Act and the Current University Invention Ownership Model*, 38 RES. POL'Y 1407, 1417-18 (2009).

274. See, e.g., James D. Clements, *Improving Bayh-Dole: A Case for Inventor Ownership of Federally Sponsored Research Patents*, 49 IDEA 469, 497 (2009).

275. See, e.g., *Chou v. Univ. of Chi.*, 254 F.3d 1347, 1362-63 (Fed. Cir. 2001); Seymore, *supra* note 97, at 149-51.

276. Luppino, *supra* note 97, at 424-25.

277. For variations of this proposal, see, e.g., Clements, *supra* note 95; Martin Kenney & Donald Patton, *Reconsidering the Bayh-Dole Act and the Current University Invention Ownership Model*, 38 RES. POL'Y 1407, 1414 (2009); Robert E. Litan & Lesa Mitchell, *A Faster Path from Lab to Market*, Jan-Feb HARV. BUS. REV. 52 (2010).

278. See Kenney & Patton, *supra* note 277, at 1414.

process to continue commercial development herself or to license the invention.<sup>279</sup> Some variations of the proposal suggest that the inventor could also choose a third-party agent for licensing purposes.<sup>280</sup>

One outlier that does at least consider the role of non-faculty inventors is the American Association of University Professors (AAUP). The AAUP has recently issued final version of a report proposing sweeping new guidelines for the relationship between the university and faculty in response to an invention made using university resources or grants.<sup>281</sup> In many ways the report mirrors the Inventor-Ownership proposal in that it champions the faculty member's control and ownership of inventions created in her laboratory; however, the report does at least acknowledge non-faculty IP interests in limited ways.

The AAUP proposal is set forth as a list of Principles for universities to follow in dealing with research. Principle Eleven champions the Inventor-Ownership model and the "faculty member's fundamental rights to direct and control . . . invention management, licensing, commercialization, dissemination and public use."<sup>282</sup> Furthermore, the Principle 12 of the proposal encourages universities to use faculty senates to draft the procedures for technology transfer, giving the utmost control of such procedures to the faculty inventors.<sup>283</sup>

Within this framework emphasizing the faculty ownership, the report does acknowledge non-faculty contributions. Principles 10 and 13 recommend that non-faculty researchers have access to grievance procedures if "they believe their inventor or other IP rights have been violated."<sup>284</sup> The report further recommends that students not be required to give up IP rights as part of admission to a degree program.<sup>285</sup> Finally, if there is a conflict of interest, including a financial conflict of interest, Principle 9 calls for impartial academic evaluation while Principles 8 and 10 recommend disclosure of the conflict and a grievance procedure.<sup>286</sup>

Even these references to student and non-faculty rights are not entirely without bias. While Principle 13 acknowledges that there will be disputes that need to be adjudicated, it charges the licensing agent to take into account the interests of the "faculty inventors," the institution and even the broader public.<sup>287</sup> Furthermore, the proposal advocates the faculty senate as the body to adjudicate disputes—certainly not a completely unbiased body as to inventorship disputes between faculty and students.<sup>288</sup> The Inventor-Ownership proposal may indeed

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279. See Martin Kenney & Donald Patton, *Reconsidering the Bayh-Dole Act and the Current University Invention Ownership Model*, 38 RES. POL'Y 1407, 1408 (2009)

280. See, e.g., Litan, *supra* note 277.

281. American Association of University Professors, *Recommended Principles to Guide Academy-Industry Relationships* (Univ. of Ill. Press 2014) [hereinafter *Recommended Principles*].

282. *Id.* at 8.

283. *Id.*

284. *Id.* at 7, 9.

285. *Id.* at 9.

286. *Id.* at 7.

287. *Id.* at 9.

288. *Id.*



eliminate some impediments to disclosure, such as a distrust of the competency and motivations of the TTO, fear of TTO-imposed publication delays, and failures to disclose due to inadequate monetary incentive.<sup>289</sup> However, the Inventor-Ownership proposal would not alter, and indeed may exacerbate, issues of failure to disclose or commercialize due to philosophical reasons related to communalism.<sup>290</sup>

The Inventor-Ownership proposal may also increase the conflicts developed in multiple-inventor situations. This would be particularly true when one of the inventors is a faculty researcher and others are non-faculty researchers. To the extent that the Inventor-Ownership model explicitly focuses on *faculty* inventor ownership, it does nothing to address the problems related to faculty inability to acknowledge non-faculty inventorship and may exacerbate the problem. Now the faculty and non-faculty inventor are not fighting over a split of small share of revenue but over ownership of the patent and all revenue associated with it. Some supporters of this Inventor-Ownership proposal have alluded to this issue. But they have not provided a resolution, preferring instead to proclaim that it would not actually *increase* the “exploitation of students.”<sup>291</sup> This notion is incorrect because discarding the TTO would remove the current primary possibility of a neutral arbitrator and educator of non-faculty researchers as to their rights and obligations in academic technology transfer. The AAUP report acknowledges disputes that need to be adjudicated but its primary adjudication body is the faculty senate.<sup>292</sup>

It is perhaps surprising that the AAUP, a group dedicated to faculty governance and composed primarily of faculty members, is the best promoter of the concept that faculty are not the sole inventors—especially in light of the fact that the other proposals discussed above are based upon mostly disinterested parties looking into the university system. However, the AAUP took input on a draft version of the report from numerous parties, some of whom were interested conflicts between students and faculty mentors.<sup>293</sup> Therefore, based on the

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289. This assumes that the inventor will retain more licensing revenue share than is currently allotted. Some proposals have suggested that these rents could be divided between the inventor and the university. For example, Litan and Mitchell propose that faculty could choose their licensing agent at which time the fee for licensing would be negotiated between the university and the faculty member. Robert E. Litan & Lesa Mitchell, *A Faster Path from Lab to Market*, Jan-Feb HARV. BUS. REV. 52 (2010).

290. See *supra* Part II.B.

291. See Kenney & Patton, *supra* note 277, at 1415 (“Inventor ownership might result in the exploitation of students, but there is no evident reason that this exploitation would be more prevalent than it is today.”).

292. Recommended Principles, *supra* note 281, at 9.

293. Several research organizations have recognized that conflicts of interest occur between students or post doctoral fellows and their mentors. See, e.g., AMERICAN ASSOCIATE OF MEDICAL COLLEGES, COMPACT BETWEEN BIOMEDICAL GRADUATE STUDENTS AND THEIR RESEARCH ADVISORS (2008), available at <https://www.aamc.org/download/49870/data/gradcompact.doc> (last visited July 11, 2014); CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE

structure of the university research laboratory and the role of non-faculty researchers in the inventive endeavor, it is unclear as to why the discussion is only framed around faculty interests.

### *B. A Modest Proposal*

1. *Education.*—Academic researchers are often woefully under-educated regarding issues surrounding invention and the duty to disclose. To encourage disclosure by non-faculty researchers, the TTO should take an active role in educating non-faculty *and* faculty researchers about incentives to disclose and about each group's rights as inventors or co-inventors. Obviously, a non-faculty inventor must fully understand her rights in order to advocate for herself. But faculty education can also enhance non-faculty participation. Although a faculty member's knowledge of the patent system's requirements in regards to inventorship will not change the perceived power imbalance in negotiations, the faculty member who understands inventorship may enter the negotiations with a better attitude toward non-faculty contributions to inventorship. Additionally, education regarding very basic patent issues such as the definition of inventor and invention, as well as the consequences of failure to name inventors, would clarify who should be named in a disclosure, making it easier to comply with TTO obligations.

Not only would this education improve the ability to comply on a practical basis and increase awareness of incentives, education also combats the entrenched social norms against technology transfer generally. Once a principal investigator buys into the concept of invention disclosure and commercialization, other members of the laboratory, especially graduate students, become far more accepting of the concept.<sup>294</sup> Education of graduate students and post-doctoral fellows trains the next generation of faculty members in their rights and responsibilities as to technology transfer.

2. *University Policy Proposal.*—In addition to education, universities should put in place clear guidelines in the IP policies that recognize the possibility of non-faculty inventors. These policies should address the power imbalance between non-faculty and faculty co-inventors. They might also develop different monetary incentives for non-faculty researcher disclosure.

One such proposal would task the TTO with the responsibility of actively investigating inventorship of those disclosures involving a non-faculty member of a research group or laboratory upon the decision to proceed to the patent-filing step. Doing so would help protect the university from potential non-joinder issues,<sup>295</sup> as well as relieve some of the burden from non-faculty inventors to dispute inventorship. The TTO could ask for the disclosure to contain a narrative

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(Bernard Lo et al. eds., 2009).

294. Janet Bercovitz & Maryann Feldman, *Academic Entrepreneurs: Organization Change at the Individual Level*, 19 ORG. SCI. 69, 84-86 (2008).

295. In patent law, non-joinder occurs when an actual inventor is not named on a patent. Need citation.

of how the research proceeded, including the identity of any person associated with the research. Inventorship could then be determined by the patent attorney prosecuting the patent.<sup>296</sup> Patent prosecutors have a duty of candor to the USPTO.<sup>297</sup> They are aware of issues that could arise should an inventor come forward later so are unlikely to omit inventors given correct information.

Although patent ownership is equally divided among all inventors, not every inventor makes the same contribution to the conception of the invention. It is reasonable to assume that the inventor who conceives of a piece of the invention present in only one claim out of forty may receive a smaller share of the revenue than her co-inventor. Thus, the rules for determining how the revenue should be split are likely to be more complex than determining inventorship.

The default rule for division of licensing revenues between co-inventors should be equal division between all inventors. While this default could be protested by any of the inventors, it would set a baseline rule that would give a greater bargaining position to non-faculty inventors. If an inventor wanted to protest the equal division of licensing revenue, policies should be in place for either mediation or arbitration procedure.

Mediation would not alleviate the unequal bargaining power of the non-faculty member. However, a mediator specially trained in integrative mediation could help the parties find a solution where both parties could be satisfied. For instance, although the faculty inventor might feel she deserved a larger share of revenue, she might be willing to divert any of the revenue returned to the laboratory to the non-faculty inventor's project. Extra research money might enable the non-faculty inventor to finish his project faster, travel to conferences, or receive specialized training, which might be worth the reduced share of revenue.

Arbitration would more directly alleviate power imbalance between the two parties, though it would not cure it. The non-faculty inventor would still need to challenge the faculty inventor's request for more revenue, but the final apportionment would be based on the university invention disclosure detailing the invention process as well as any testimony. Parties undergoing arbitration would be less likely to find an integrative solution to the revenue problem but should be happy with an equitable split of the inventor revenue.

The identity of this arbitrator or mediator is also problematic. As noted above, the faculty senate would not be a good source due to the faculty's bias against non-faculty inventors. The TTO could be a source for a neutral third party because the university administration should be interested in making the technology transfer process run in such a way that all parties have incentives to take part. Therefore, the desire for a reputation for fairness might make the TTO a good source for the neutral third party. However, pushing against that reputational pressure would be faculty pressure. If the TTO perceives the faculty

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296. For example, the University of California system disclosure form specifies that the patent attorney prosecuting the patent will make final determination of inventorship. *Disclosing an Invention*, *supra* note 49.

297. 37 C.F.R. § 1.56(a) (2012).

inventors as repeat customers with whom the TTO hopes to do business on multiple occasions, it is possible the TTO might not be as unbiased as originally deemed. Therefore, the neutral third party should not be affiliated with the university in any way.

Finally, universities should feel free to experiment with policies that are directed at non-faculty inventors. Perhaps direct monetary incentives for the disclosure itself would be more successful than the small, future possibility of licensing revenue. Of course, policies would have to be put in place to make sure the TTO did not waste resources on half-baked ideas submitted solely for the disclosure reward. On a more extreme scale, perhaps the portion of the revenue to the laboratory could be split among the individual inventors, even if the graduate student or post-doctoral fellow moved to another university. In academic hiring, the ability to bring in money for research is often key because faculty without funding cannot conduct research nor get publications.<sup>298</sup> Therefore, a new faculty hire with start-up funds from a past patent might have the advantage.

#### CONCLUSION

University research is at heart a collaborative endeavor. Scientific papers have multiple authors, often from different departments or laboratories. Similarly, inventions typically name several co-inventors. The myth of the lone inventor is dead.

Unfortunately, this idea of the lone inventor still informs the education and policies surrounding university technology transfer. The Bayh-Dole Act requires incentives to be directed to university inventors in return for disclosure of inventions with university funds. For the vast majority of universities, those incentives are directed primarily at faculty inventors. To the extent that incentives are directed at faculty and non-faculty inventors, power imbalances impede non-faculty inventors from realizing the full benefit.

The mismatch between incentives directed toward faculty and non-faculty inventors may account for some of the problems in the technology transfer system. Universities often suffer from low rates of disclosure due to time pressures on faculty and research social norms. Those rates could be elevated if more people in the invention stream were a part of the process.

Universities would be well served to increase outreach to non-faculty inventors through a combination of education and policy changes. Education of faculty combats social norms that push against technology transfer generally as well as non-faculty inventorship. Non-faculty education encourages participation in the technology transfer process and empowers the non-faculty inventor to advocate for her rights. Technology transfer policies should then support that education. With a little effort, technology transfer could become the same collaborative endeavor as the science that feeds it.

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298. See Carter-Johnson, *supra* note 41, at 478-80.

# PERMISSIVE JUSTIFICATION

ERIC J. MILLER\*

## INTRODUCTION

Often, practical decision presents us with a zero-sum choice, so that whatever is gained by choosing one option is lost by choosing the others. A parent must choose which child gets to ride first on the bicycle; a doctor must determine which among some range of courses of treatment to follow; an architect must pick which style of structure best suits a site; a judge must decide which side wins in a dispute before her. In each case, the decision-maker must select one from a menu of options and reject the others. Where the results are all-or-nothing in this way, an agent does not have the option of endorsing multiple outcomes all at once. Her choice separates the options into two categories: winners and losers.

Sometimes reason is decisive, so that the reason for favoring the winner is also the reason for rejecting the loser. But sometimes reason is indecisive: all the reasons prevail (every option is a winner), or none do (every option is a loser). Rational indecision presents a problem for zero-sum decisions: the range of available reasons for decision is greater than the range of available options or outcomes.<sup>1</sup> Reason alone does not select the winners and losers. The decision-maker, rather than reason alone, is ultimately responsible for the outcome.

Agent responsibility for decision-making raises problems for practical justification. In zero-sum decisions, if all the reasons are winning reasons, it is difficult to justify to the loser why he or she lost. When all the reasons are losing reasons, justifying losing is easy; justifying why one of the losers gets to win is hard. In either case, when called upon to justify her decision, the decision-maker cannot simply point to some decisive reason as requiring the outcome. In such cases, reason is indecisive, and under-determines the outcome of practical conflicts.<sup>2</sup>

Much easier, we might think, are those conflicts in which the answer is clear-cut because reason is decisive. Decisive reasons provide the decision-maker with a unique justification for their decision. Call this the *decisive justification thesis*. Some theorists, most notably Ronald Dworkin, go further and endorse what he calls the “bivalence thesis.”<sup>3</sup> For Dworkin, a decision is justified only if the

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1. See Ronald Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1, 3 (1978).

2. *Id.*

3. *Id.* at 2 (introducing his “bivalence thesis”). The problem does not arise when there are multiple winning parties or winning options for the decision-maker to choose among. In such circumstances, the decision-maker may be able to favor them all; or where there are multiple losing parties or losing options, the decision-maker might be able to reject them all. See *id.* at 2-4. Furthermore, if the stakes of practical choice are trivial, the decision-maker may be absolved from justification. See *id.* Trivial choices, we might think, do not need much, or any, justification, and

reason the winner wins also provides the loser with a reason why she lost.<sup>4</sup> When reasons conflict, Dworkin believes, they always separate outcomes into winners and losers.<sup>5</sup> The bivalence thesis holds that justification is decisive because the rational world is decisive, too.<sup>6</sup>

In the professional sphere, two features of institutional decision-making may drive the demand for decisive justification. First, a variety of professions, including law, medicine, and so on, typically throw up the sorts of non-trivial, high-stakes circumstances that press decision-makers to seek decisive justifications to insulate them from charges of arbitrariness or bias.<sup>7</sup> Second, some professions, including the law, may require decision-makers to present certain of their choices as all-or-nothing.<sup>8</sup> For example, legal justification sometimes demands that the judge act as if the parties can be neatly separated into winners and losers.

These professional pressures might be thought to recommend a *defeat model* of rational conflict, one that entails decisive justification.<sup>9</sup> The defeat model holds that our practical choices are justified just in case they are supported by reasons that prevail over all the eligible competing reasons for action. The defeat model preserves the zero-sum aspect of decisive justification: there are only two categories of reasons, those that win and those that lose.<sup>10</sup> Among legal theorists, Ronald Dworkin famously adopts a version of the defeat model—his “one right answer” thesis.<sup>11</sup> A strong version of the defeat model, comparativism,<sup>12</sup> goes one step further, to hold that justification requires not only that the prevailing reasons defeat their competitors, but that they do so by outweighing them on some unitary scale of value.<sup>13</sup>

The defeat model responds to the worry that justification is a very serious business.<sup>14</sup> Decision-makers often enter justifications because losers demand an

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so it may suffice to resort to a variety of more or less arbitrary procedural devices to deal with indecisive options (such devices as tossing coins, splitting differences, declining to decide, or changing goals).

4. *Id.* at 2.

5. *Id.*

6. *Id.*

7. *See id.*

8. *Id.*

9. *See, e.g.*, JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 46-66 (2002) [hereinafter RAZ, ENGAGING REASON].

10. *Id.*

11. *See* Dworkin, *No Right Answer*, *supra* note 1, at 2.

12. *See* RUTH CHANG, INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1-22 (Ruth Chang ed., 1997) [hereinafter CHANG, INCOMMENSURABILITY]; RUTH CHANG, MAKING COMPARISONS COUNT 43-45 (2002) [hereinafter CHANG, MAKING COMPARISONS]; Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PENN. L. REV. 1569, 1569-98 (1998).

13. CHANG, INCOMMENSURABILITY, *supra* note 12, at 9-10; CHANG, MAKING COMPARISONS, *supra* note 12, at 46-48.

14. *See, e.g.*, RAZ, ENGAGING REASON, *supra* note 9, at 46-66.

accounting of the reasons why they lost, and so justifications stave off charges of wrongdoing or claims that the decision is rationally unintelligible.<sup>15</sup> To satisfy the losers, the defeat model contends, justification must be “unqualified”<sup>16</sup> and decisive, rather than ambiguous, permissive, or indecisive. Only decisive reasons, ones that defeat competing reasons, are sufficiently weighty (so the story goes) to demonstrate that reason required the loser to lose.<sup>17</sup>

In competition with the defeat model is the one this Article endorses, which shall be called (following Raz<sup>18</sup>) the eligibility model of rational conflict, one that introduces the possibility of *permissive* justification. It holds that our practical choices may be justified even if supported by indecisive reasons, that is, ones that though not defeated themselves, do not prevail over all competing reasons. In such circumstances, this Article claims, the decision-maker has a normative permission to select any one of the competing options and would be rationally justified in so doing.

An account of permissive justification, however, only gets one so far. It could be that, even if the demand for decisive justification is inappropriate in the ordinary course of practical action, it nonetheless applies in the law. The law could be a sufficiently high-stakes enterprise that only decisive justifications count,<sup>19</sup> or the law could be the sort of enterprise in which the outcomes are always all-or-nothing:<sup>20</sup> either way, there will be a winner and a loser. Or it could be that the law is a zero-sum game all the way down: legal argument is just structured as a battle between premise and counter-premise, such that asserting a premise necessarily rejects the paired counter-premise.<sup>21</sup> In any of these scenarios, the defeat model asserts that the judge needs some prevailing reason to justify her argument or decision, so as to make it intelligible to the parties and

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15. See, e.g., *id.*

16. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 89-96 (2011) [hereinafter DWORKIN, JUSTICE].

17. See, e.g., *id.*

18. RAZ, ENGAGING REASON, *supra* note 9, at 47 (Raz describes what I call the “eligibility model” as the “classical” conception of human agency).

19. See William Lucy, *Adjudication*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 206-67 (Jules L. Coleman & Scott Shapiro eds., 2002); see generally THOMAS NAGEL, MORTAL QUESTIONS (2000).

20. See TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 58-75 (Timothy A.O. Endicott ed., 2000) [hereinafter ENDICOTT, LAW] (calling this phenomenon “juridical bivalence”); JOHN M FINNIS, NATURAL LAW AND NATURAL RIGHTS 280 (1980) [hereinafter FINNIS, NATURAL LAW]; Timothy A. O. Endicott, *Vagueness and Legal Theory*, 3 LEGAL THEORY 37, 61-62 (1997) [hereinafter Endicott, *Theory*].

21. See, e.g., Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 1 (1991) [hereinafter Kennedy, *Argument*]; Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology Contemporary Legal Theory*, 36 J. LEGAL EDUC. 518 (1986) [hereinafter Kennedy, *Adjudication*]; 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, 401-06 (1949).

avoid wronging the loser.

This Article shall suggest that though, on occasion, the law may require judges to select one or another outcome, the law may do so despite the underlying reasons proving indecisive. Furthermore, indecisive reasons are enough for full-blown justification, even in high-stakes enterprises such as legal adjudication. On this permissive model, demands for decisive justification set the bar too high. When faced with a range of indecisive reasons for decision, a decision-maker may be permitted to pick one among them as a reason for decision, and be fully justified in whichever one she picks (even if she is, on occasion, rationally precluded from presenting her decision in this fashion).

According to the eligibility model of rational conflict, indecision turns out to be a virtue for liberal professions (like the law) that value a diversity of professional perspectives and styles in working through the various options that the world throws at us.<sup>22</sup> Yet the dominant understanding of the practice of adjudication is that judges are not allowed the normative space afforded to other liberal professionals.<sup>23</sup> Even if lawyers *can* adopt different practice styles—black-letter lawyer, legal reformer, commonsense practitioner<sup>24</sup>—judges, so the dominant position goes, *cannot*—or at least, cannot do so expressly, and so must present their reasons as producing decisive justifications.<sup>25</sup> The permissive model suggests that matters are yet more complex at the level of adjudication, and raises important questions about judicial styles and institutional structures of legal justification.<sup>26</sup>

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22. See RAZ, *ENGAGING REASON*, *supra* note 9, at 47 (Raz describes what I call the “eligibility model” as the “classical” conception of human agency).

23. See Kennedy, *Adjudication*, *supra* note 21, at 519-20.

24. See Introduction to Law Precedent Lecture 4 2000, <http://users.ox.ac.uk/~lawf0013/PrecedentLecture2.htm>, archived at <http://perma.cc/74CA-93GP> (quoting Lord Reid).

25. See Kennedy, *Adjudication*, *supra* note 21, at 519-20.

26. See *id.* (describing the complexity at the adjudication level). The point of this Article is to provide a formal rather than substantive account of rational justification. Substantive questions are primarily addressed by the theory of value. See, e.g., *id.* at 56-57 (describing value). For example, one claim about the relationship between reasons and value is that decision on the basis of a reason should be distinguished from decision on the basis of *reason*. This seems to equivocate between two different meanings of “reason”: one in which reasons, no matter how weak, can provide rational justification for a given action; and another that considers actions or beliefs rational and justified only if they pass some more-or-less weighty threshold for the justification of an action. See, e.g., RAZ, *ENGAGING REASON*, *supra* note 9, at 73 (breaking down reason into categories: substantive and procedural). These two meanings are compatible if the former is a formal description of the relation between reasons and rational justification, or if the standards of rationality are sufficiently low. The two meanings conflict if it is not true to say that just any reason satisfies the standards of rationality. See *id.* Thus, on the latter picture, a decision on the basis of a reason may not be reasonable: the reason may not satisfy the relevant standards of rationality. My interest is a different one. I propose to describe the ways in which permissions and reasons interact and justify action, and identify two different senses of “complete” justification. One sense defines a “complete” justification as a decisive justification, such that reasons fully



## I. DECISIVE JUSTIFICATION

Suppose (to use an example suggested by William Lucy<sup>27</sup>) that a patient is suffering from a medical condition that requires immediate treatment. Each available treatment has grave consequences and requires her doctor to undertake some serious and invasive medical procedure. The doctor, however, can pursue the treatments only one at a time, rather than in concert. In such a circumstance, one might think, a doctor ought to produce some decisive reason to justify whichever treatment she decides to pursue.<sup>28</sup>

More difficult yet is the case in which a doctor must choose which of two patients, *A* and *B*, should receive some life-saving treatment. In that case, if one patient receives the treatment, the other does not (and so dies). One limit on justification might be this: if the doctor's decision is to count as justified, she must be able to provide some reason to select *A* to receive the treatment that is also a reason why *B* ought not to receive it. That is, we might suppose that justification, in its central case, is all-or-nothing, so that the reason for favoring the winner is also a reason for rejecting the loser.

A comparable legal example is contained in the thought experiment suggested by Ronald Dworkin:

Imagine a judge sending an accused criminal to jail, perhaps to death, . . . and then conceding in the course of his opinion that other interpretations of the law that would have required contrary decisions are just as valid as his own. Or a friend who insists that you keep a burdensome promise though he concedes that a different interpretation of what you said, which contains no promise, would be an equally successful report of your meaning.<sup>29</sup>

Dworkin thinks that indecision undermines justification (and that we can see that it does by imagining what it would be like to offer a permissive justification for the judge's or the friend's choice).<sup>30</sup> Justification, Dworkin believes, is aimed at consoling losers. Only a decisive reason, he believes, provides the sort of reason that could count for the losing party.<sup>31</sup> Where reasons conflict and are in equipoise, what the judge needs is some reason that could tip the scales to provide her with some decisive reason for sentencing the offender.

The challenge presented by the decisive justification thesis is thus a narrow

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determine what an agent ought to do or to believe. Another sense identifies justification as "complete" even if indecisive, so long as the justifying reason is a rationally adequate one, that is, undefeated. In each case, some theory of rationality could hold that a formally complete justification proves substantively inadequate because of insufficient weight.

27. Lucy, *supra* note 19, at 244.

28. *Id.*

29. See DWORKIN, JUSTICE, *supra* note 16, at 125-26.

30. *Id.*

31. *Id.*

one. It does not address, for example, substantive questions regarding the grounds of legal justification.<sup>32</sup> Nor does it particularly address the circumstances that call for justification.<sup>33</sup> It is simply that any attempt to justify a practical decision must provide a reason not only for the winner winning *but also* for the loser losing.<sup>34</sup> The thesis does, however, have a significant payoff: it requires rejection of permissive justification.<sup>35</sup>

The decisive justification thesis states a claim about the sort of reasons rationally sufficient to support some act. The claim is that, not only does an agent have undefeated reasons for some act, but also that those reasons defeat any and all reasons another agent might have to not act.<sup>36</sup> Accordingly, we might define decisive justification in the following terms:

**Decisive Justification:** an act is rationally justified only if the reasons to act are undefeated and the reasons to not act are all defeated.<sup>37</sup>

The defeat model of practical conflict which undergirds decisive justification does not require that the reason for action be absolute.<sup>38</sup> As Joseph Raz explains, reasons may be decisive but not absolute, and vice versa.<sup>39</sup> Reasons are absolute if there is no possible world in which they could be overridden by some other conflicting reason. Reasons are decisive if they prevail in some conflict situation.<sup>40</sup> Suppose I have an absolute reason to avoid meeting the person who will kill me on Saturday. I have promised to meet Alan in the park on Saturday, but Belinda has asked me to go to the movies at the same time. So long as Alan is not the man who will kill me, I have a decisive reason to meet Alan in the park. My reason to meet Alan defeats the reason I have to go to the movies with Belinda. However, the absolute reason I have not to meet my killer does not

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32. See Joseph Raz, *Permissions and Supererogation*, 12 AM. PHIL. Q. 161, 161 (1975) [hereinafter Raz, *Permissions*]; see also, e.g., David Lyons, *Derivability, Defensibility, and the Justification of Judicial Decisions*, 68 MONIST. 325, 325-46 (1985) [hereinafter Lyons, *Defensibility*]; see generally David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178 (1984) [hereinafter Lyons, *Justification*].

33. See, e.g., JOHN GARDNER, HARM AND CULPABILITY 1 (A. P. Simester and A. T. H. Smith eds., 1996) [hereinafter GARDNER, HARM]; John Gardner & Timothy Macklem, *Reasons*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 440-75 (Jules L. Coleman & Scott Shapiro eds., 2002) [hereinafter Gardner & Macklem, *Reasons*].

34. See, e.g., Lyons, *Justification*, *supra* note 32, at 181 (discussing choosing one answer at the exclusion of all others).

35. RAZ, EMERGING REASON, *supra* note 9, at 28.

36. See, e.g., Lyons, *Justification*, *supra* note 32, at 181 (discussing choosing one answer at the exclusion of all others).

37. The decisive justification thesis entails that our choices to act or believe thus and so are justified only if the belief or act chosen is itself justified.

38. JOSEPH RAZ, PRACTICAL REASON AND NORMS 27-28 (1999) [hereinafter RAZ, PRACTICAL REASON].

39. *Id.*

40. *Id.*

apply here. Although it is absolute, it does not operate as a ground for decision in this case.

Furthermore, as the Alan-and-Belinda example illustrates, the sort of reason that provides a decisive justification need not be an overriding reason. An overriding reason requires that the reason for action outweigh some competing reason: it requires that the winning and losing reasons are comparable on some scale of value. Decisive justification does not: it requires only that the reason that wins defeats the reasons that lose, whether they do so comparatively or non-comparatively. My reason to go to the park to meet Alan defeats my reason to go to the movies with Belinda, not because it outweighs my Belinda-based reasons (it may not; these reasons may be quite weighty), but because the act of promising *excludes* my Belinda-based reasons, and so non-comparatively defeats them. Even if my reasons to go to the movies with Belinda are, all things considered, stronger than my reasons to go to the park to meet Alan, I do not get to evaluate them in that way, because my promise precludes and replaces them as reasons for action.<sup>41</sup> Decisive justification does not entail comparison: the decisive justification thesis holds that practical decisions are justified just in case they are based upon some reason that defeats the loser's reasons for action.<sup>42</sup> Otherwise, so the thinking goes, losing is arbitrary because irrational or a-rational, and those types of practical decision are merely an expression of fiat rather than principle.<sup>43</sup>

Ronald Dworkin proposed such a standard, which he termed the principle of bivalence, in an early article defending his "one right answer" account of adjudication.<sup>44</sup> While the bivalence argument is primarily a linguistic one, Dworkin's argument applies more broadly to reasons for action as well.<sup>45</sup> His claim is that, for a decision to count as justified, the reasons that support the winner must also discredit the loser.<sup>46</sup>

The decisive justification thesis entails that justification contains no gaps in reason: if an option is justified, every reason either defeats or is defeated. There is no need for some middle term "undefeated": from the perspective of decisive justification, the world of practical accountability is rationally determinate.<sup>47</sup> Our acts are either justified or unjustified, with no hemming or hawing in between. This position is, perhaps, quite radical. It certainly has disastrous consequences

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41. *See id.* at 35-40 (discussing exclusionary reasons and promises).

42. *See* Dworkin, *No Right Answer*, *supra* note 1, at 2; *see also* Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV 376 (1945) [hereinafter Fuller, *Reason*]; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV 1, 25 (1959).

43. Wechsler, *supra* note 42, at 11.

44. *See generally* Dworkin, *No Right Answer*, *supra* note 1.

45. The principle of bivalence is often associated with the principle of non-contradiction, which asserts that there are no gluts in truth values: no sentence is both true and false. *See, e.g.*, Endicott, *Theory*, *supra* note 20.

46. Dworkin, *No Right Answer*, *supra* note 1, at 2.

47. Dworkin's bivalence thesis is thus an application of his "no gaps" thesis: the world is rationally determinate, such that there is always one right answer to any practical problem. *See id.*

for any theory of permissive justification. If justification is successful only when based on decisive reasons, then many types of normative permission, and many of our practical decisions or actions, are unjustified.

Decisive justification thus sets the bar quite high when advancing standards by which to evaluate the rational acceptability of our actions. For example, even if they do not accept the existence of incommensurable or incomparable reasons for action, most people think reasons can be of equal weight and so undefeated, so that where reasons *A* and *B* conflict, *A* does not override *B* nor is it overridden by *B*, and vice versa. If reasons can be of equal weight (and Dworkin for one, recognizes that they can be, even in the law),<sup>48</sup> then it is possible that the world of practical accountability (or the law) is rationally indeterminate.<sup>49</sup> Decisive justification thus establishes an especially high standard by which we are to justify our actions in the world.

The English or Commonwealth tradition of legal philosophy tends to adopt an institutionally limited version of the demand for decisive justification. For example, Timothy Endicott<sup>50</sup> and John Finnis<sup>51</sup> have each endorsed “juridical bivalence” as (in Finnis’s terms) an accurate “exegesis of the judgment *inter partes*.”<sup>52</sup> Finnis and Endicott argue that it is in the nature of legal justification to represent judicial decisions as a series of zero-sum choices among the available options, whether or not the arguments underlying the decision are so limited.<sup>53</sup> Finnis, for example, approvingly cites Dworkin’s “one right answer” thesis as accurately describing the “momentary legal dogma” that,<sup>54</sup> in justifying the outcome of the case to the parties, the judge must act as if there is a winner and a loser if she is to respect the losing party’s appeal to the law.<sup>55</sup> Even if the law is indecisive, the judge must act as if it is not. Accordingly, the law presents a judge engaged in the practice of legal justification with fewer resources than those available to her than her non-legal counterparts. Where reasons are indecisive, the judge cannot toss coins or split differences, but must instead provide some decisive-looking reason to justify her decision.

In the American context, the demand for decisive justification is often more expansive. Where Endicott and Finnis identify a constraint on the way in which

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48. See generally Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV 1057 (1975).

49. Unless one thinks that equally weighted reasons instantiate the same value. See, e.g., MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES 165-68 (1990).

50. ENDICOTT, LAW, *supra* note 20, at 72-73.

51. JOHN M FINNIS, IV THE COLLECTED ESSAYS OF JOHN FINNIS: PHILOSOPHY OF LAW 14 (2011) [hereinafter FINNIS, COLLECTED ESSAYS].

52. *Id.*

53. *Id.*; ENDICOTT, LAW, *supra* note 20, at 72-73.

54. See FINNIS, COLLECTED ESSAYS, *supra* note 51, at 13-14 (“the judgment that prevails in such a case (and in any hard case, as in any easy case) includes as part of its legal content or entailment the proposition that, just as the losing party’s appeal to legal rules or principles is (to the relevant extent) legally erroneous.”).

55. On this point, see, e.g., ENDICOTT, LAW, *supra* note 20, at 72-73; FINNIS, COLLECTED ESSAYS, *supra* note 51, at 13-14.

judges represent the outcome of decisions, an American jurisprudential tradition adopts the defeat model to articulate a claim about the nature of practical or legal argument. For example, Dworkin's contemporary discussion of adjudication as a process of "principled" decision-making<sup>56</sup> is just the most recent contribution to a liberal American tradition that seeks to preclude the operation of judicial "fiat"<sup>57</sup> in adjudication, and with it, the suggestion that the law is gappy.<sup>58</sup>

Thirty years before Dworkin proposed his bivalence thesis, Lon L. Fuller forcefully argued that the stringent requirements of decisive justification are appropriate because adjudication is:

a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. . . . We demand of an adjudicative decision a kind of rationality we do not expect of the results of [other types of social organization].<sup>59</sup>

In this tradition of decisive justification, the decision-maker is presented with a series of choices among arguments, and at each stage of the decision-making process, the judge is supposed to find some decisive reason to support her claim that one or other argument wins out.<sup>60</sup>

In all its various guises from Fuller, through Wechsler, to Dworkin, the idea that judicial decision must respect the rights of the parties through principled adjudication requires that the decision-maker demonstrate to the losing party that the state's exercise of power over them is non-arbitrary because decisive. The reason they lost is the reason the winner won. Accordingly, the appropriate standard for legal (or political or rational) justification is that decisions be justified, not on the basis of an undefeated or indecisive reason, but on the basis of a decisive one.

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56. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 29-31 (1985) [hereinafter DWORKIN, PRINCIPLE]; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 1 (1981).

57. Lon L. Fuller is particularly influential in this regard. See, e.g., Fuller, *Reason*, *supra* note 42, at 378; Wechsler, *supra* note 42, at 11 (citing Fuller, *Reason*, *supra* note 42, at 378); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 226 (2001) (citing Fuller, *Reason*, *supra* note 42, at 378).

58. For example, Dworkin's selection of *Riggs v. Palmer* to expound his theory of principled adjudication is strongly reminiscent of Cardozo's discussion of the same case. See DUXBURY, *supra* note 57, at 217-19 (citing BENJAMIN N CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 41-43 (1921)).

59. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367 (1978) [hereinafter Fuller, *Forms*].

60. See, e.g., Llewellyn, *supra* note 21, at 401-06 (1949) (describing a series of canons and counter-canons that are interrelated as a series of doctrinal thrusts and parries). For a modern variant of Llewellyn's argument, see Kennedy, *Argument*, *supra* note 21 (discussing legal argument as a process of selection among opposed "argument bites").

### A. Tipping

Decisive justification, if it is to get off the ground, requires the ready availability of decisive reasons.<sup>61</sup> That is, the decisive justification demands not only that decisive reasons are required but also that they are generally available to justify our practical choices. Arguments supporting the availability of decisive reasons are often associated with some form of “comparativism”:<sup>62</sup> the claim “that comparability is a necessary condition for justified choice.”<sup>63</sup> Comparativism entails that an action or belief is justified only when the reasons supporting that action or belief are comparable under some scheme of value, and outweigh or override competing reasons. Where reasons are comparable in this way, some reason, such as personal commitment to some project or goal can almost always tip the scale where reasons or values appear to be of equal weight.<sup>64</sup> On this view, small differences in value will always be able to defeat competing options.<sup>65</sup>

The tippability argument is perhaps the most famously encapsulated by the example of Buridan’s ass,<sup>66</sup> which must decide which of two equally appetizing, but equally distant bales of hay to choose.<sup>67</sup> If the bale of hay on the left is slightly larger or (if the same size) slightly closer than the one on the right, the ass has a decisive reason to choose the one on the left. Contrariwise, if the bale on the right is larger or closer, then the ass has a decisive reason to choose that one. Where the bales of hay are equidistant and of equal size, then there is a tie and neither bale is decisively more appealing. In the usual telling of Buridan’s tale, if the reasons are in complete equipoise, the ass, because indecisive, dies.<sup>68</sup>

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61. RAZ, ENGAGING REASON, *supra* note 9.

62. CHANG, INCOMMENSURABILITY, *supra* note 12.

63. Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PENN. L. REV. 1169, 1172 (1998).

64. As Joseph Raz explains, on the defeat model, “[t]here are always factors—we call them reasons—that guide the agent’s choices and decisions.” RAZ, ENGAGING REASON, *supra* note 9, at 49.

65. As Joseph Raz points out, this is not a feature of conflicts among incommensurable or incomparable reasons for action, hence the requirement of comparability and reasons of equal value if the tipping argument is to work. Raz argues that “the rationalist conception, if not committed to complete commensurability, is committed to the view that incommensurabilities are relatively rare anomalies.” *Id.* at 48. Comparativists’ abhorrence of incommensurabilities leads them to argue that “[t]here are always factors—we call them reasons—that guide the agent’s choices and decisions.” *Id.* at 49.

66. On Buridan’s ass and similar problems, see generally Nicholas Rescher, *Choice Without Preference: A Study of the History and of the Logic of the Problem of “Buridan’s Ass,”* 142 KANT-STUDIEN 51 (1960).

67. See, e.g., MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 11-12 (1987) (discussing the Buridan’s ass example); Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RESEARCH 757, 758-59 (1977) (same).

68. Another version of the problem proposes that the choice between bales of hay is trivial:

The traditional, Leibnizian solution to the Buridan's ass problem claims that "there is never an indifference of equipoise, that is [situations of choice] where all is completely even on both sides, without any inclination towards either. Instead, Leibnitz thinks, there are likely to be "*petites perceptions*"<sup>69</sup>—"unperceived impressions, which are capable of inclining the balance."<sup>70</sup> Further scrutiny will reveal which reason defeats the others by tipping the balance one way or the other.

The comparativist version of the Leibnizian solution is to claim that an agent's goals or commitments provide a way to solve problems of choice among equally weighty options. A goal or commitment can provide an agent with reasons that decisively sway the balance. When an agent chooses between satisfying her hunger or her thirst she can do so by considering her goals and commitments to determine how these might give her an additional, balance-tipping reason. If the agent is committed to the enjoyment of food, she will have a decisive reason to eat the hay before drinking the food; if she is committed to the enjoyment of drink then she has a decisive reason to choose the water first. Since such differences are usually available at the level of our personal goals and commitments, we can *always* find some decisive reason—for ourselves at least—for choosing one action over another.

Ronald Dworkin, though not a comparativist, has provided a neat example of the Buridan's ass phenomenon.<sup>71</sup> He suggests we consider a horse race in which the management of the track has purchased equipment for deciding among apparent ties, but that this equipment is somewhat imprecise. Though the equipment will narrow the cases in which a tie is a possible outcome, nonetheless on some occasions "it cannot be clearly established which horse has won, [and] they shall be deemed to have tied, in spite of the fact that superior equipment might have shown a winner."<sup>72</sup>

For Dworkin, if the initial scale is not sufficiently precise to balance the options and produce some ultimate reason for decision, that may count as a reason for switching to a more fine-grained scale. Dworkin's point is that real ties are extremely rare, so that with enough effort a decision-maker can almost always find tipping reason. Thus, while the "instruction [to eliminate ties] does not deny the theoretical possibility of a tie . . . it does suppose that a judge will,

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whichever bale the ass chooses, she gets the same thing. See, e.g., STOCKER, *supra* note 49. Confronted with equally appetizing, equally handy bales of hay, the ass should simply pick one. Things might be a little more complex if the ass has to choose between two equally balanced but significantly different options; for example, a bale of hay and a bucket of water. Here, we might think, the ass satisfies a different value in choosing either option: the value of hydration from water and of nourishment from the hay. Not so, a comparativist might argue; each of those sub-values in turn serves the further over-arching value of sustenance, and her choice can be tipped through determining how well each contributes to the overriding value.

69. Rescher, *supra* note 66, at 161.

70. *Id.*

71. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 285-86 (1977).

72. *Id.* at 286.

if she thinks long and hard enough, come to believe that one side or the other has, all things considered and marginally, the better of the case.<sup>73</sup> If we suppose the judge does not merely engage in post-hoc self-deception, the we might think that the judge could, from within her set of commitments or goals, cast around for reasons to think that her preferred outcome is the best one that she can defend.<sup>74</sup> These reasons will in fact tip the scales, such that one horse is revealed as the winner and the other as the loser, and so the outcome can be rationally defended even to the loser.

Ruth Chang, who is a comparativist, provides a more complex example: that of two musicians in a music competition who are each equally (or incommensurably) good on some evaluative scale of musical talent.<sup>75</sup> A central feature of this scale is that it is robust: it provides the grounds for justification. The competition judges cannot separate the musicians by turning to some non-musical-talent-based scale of value because the musicians demand to be judged based on the values under which they competed.<sup>76</sup> Changing the scale of evaluation misrepresents the range of justifications on which the parties relied. A judge cannot justify her decision by telling the competitors that, for example, one had been chosen because she was more attractive. They did not ask to be judged on that alternative scale of value, and would justifiably criticise the move to some alterative, arbitrary or personal reason for breaking the tie.

Dworkin similarly proposes non-arbitrary limits on the grounds of legal adjudication: justice and fit.<sup>77</sup> On Dworkin's "one right answer" account, legal justification requires the judge (or anyone engaged in legal reasoning) to produce the "best" reconstruction of the law given the judge's theory of political morality in light of the case's "fit" with pre-existing law.<sup>78</sup> Fit excludes one source of purely personal tipping reasons: it requires the decision-maker to rely on the legal materials of a given community (rather than their own views about what the law should be) to develop some threshold criteria explaining what counts as law by incorporating as many of the uncontroversial legal cases as possible, explaining why the controversial ones are controversial, and providing some way of

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73. *Id.* at 285. This injunction to think long and hard is strikingly similar to Brian Bix's antidote to the sort of paralysis presented by incommensurability. See BRIAN BIX, *LAW, LANGUAGE, AND LEGAL DETERMINACY* 105 (1993) ("after long consideration of the options . . . the decision-maker slowly begins to identify with one alternative rather than the others"). This after-the-fact form of identification does not deny incommensurability, but is consistent with it.

74. That is, what matters is the judge's ability to choose. And this ability exists, Dworkin believes, whether the judge is faced with equal or incommensurable reasons for decision. See Ronald Dworkin, *On Gaps in the Law*, in *CONTROVERSIES ABOUT LAW'S ONTOLOGY* 84-90 (Paul M. Amselek ed., 1991).

75. See CHANG, *INCOMMENSURABILITY*, *supra* note 12, at 7-9.

76. This is also Lon L. Fuller's point. See Fuller, *Forms*, *supra* note 59.

77. RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

78. *Id.* at 230-31 (using the metaphor of a chain novelist's interpretation of a preceding chapter in deciding how to write his portion of the text).



resolving them.<sup>79</sup>

Political morality provides another set of constraints upon judicial decision-making. It requires the judge to ground her decision in ‘some . . . set of principles about people’s rights and duties [and] . . . the political structure and legal doctrine of their community.’<sup>80</sup> Furthermore, these criteria—the community’s pre-existing rules of law and political morality (or justice)—are also the grounds that parties to a lawsuit would themselves propose as the applicable standards for legal decision. So the values at play non-arbitrarily limit the scope of the reasons upon which a judge can rely if she is to tip the scales one way or another.<sup>81</sup>

### *B. Relaxing Standards of Justification*

A significant challenge to the defeat model arises if reasons or values are incommensurable or incomparable. In that case, scales of values may prove robustly impervious to tipping. Where reasons or values are incommensurable or incomparable, agents cannot engage in the sort of comparative weighing that is a necessary precondition if reasons are to tip the scale of value.<sup>82</sup>

In law, as in many other institutional settings, the range of tie-breaking reasons or procedures are more limited than in everyday practical reasoning. A feature of the law as an institutional system (or games such as cricket or chess) is its prohibition on certain grounds for altering the normative status of the parties (personal predilections and so on) or certain procedures (coin tossing and so on) for doing so.<sup>83</sup> Where the available institutional reasons conflict and are in equipoise, the judge cannot turn to such procedures to break the tie.

Some versions of the decisive justification acknowledge this problem and address it head on. They do so by adopting a variety of approaches to relaxing the demand for decisive justification as the sole standard for assessing the rationality of an agent’s practical choices. One important approach is to retain decisive justification as the gold standard, but to propose that there are plural rather than singular standards for evaluating practical action.

*1. Fragmentation of Value.*—Some comparativists acknowledge that reason is conflicting and gappy, and so insert a third category of rational choice between fully justified and fully unjustified choices. Among these comparativists are value pluralists who nonetheless retain a comparativist approach to justification. That is, they accept that *justification* is decisive and based upon relative rankings of values, but nonetheless think that sometimes reasons or values are incommensurable or incomparable, and so our choices among reasons or values

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79. See DWORKIN, *LAW’S EMPIRE*, *supra* note 77, at 255; *see also id.* at 235-37, 244-45, 250.

80. *Id.* at 255.

81. *Id.* at 256-68.

82. *See, e.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) [hereinafter, RAZ, *MORALITY*]; J. J. C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

83. In the case of games, the available procedures may be somewhat more expansive not much more so. For example, many games (cricket, football) begin with a coin-toss to determine who goes first, but not to resolve who is out or when a goal is scored.

are incapable of justification.<sup>84</sup> According to Thomas Nagel, for example, where values are plural, our choices among value cannot be fully justified. At most, we can only advance a second-best standard of rational acceptability, which is that our choices reflect our good judgment.

Nagel implicitly invites us to distinguish between justifications that are complete and standards for evaluating rational action that are incomplete.<sup>85</sup> Complete justifications are simply comparativist rankings according to some scale of value: what Nagel calls “a single, reductive method or a clear set of priorities.”<sup>86</sup> Nagel’s view of what counts as total or complete justification fits the defeat model’s demand for all-or-nothing reasons for action: justification is complete when reasons fully determine the outcome, so that the reasons that the winner wins are also the reasons that the loser loses. Justification is incomplete, according to Nagel, where reason simply narrows down some range of rationally eligible undefeated reasons for action,<sup>87</sup> so that there is some “slack that remains beyond the limits of explicit rational argument.”<sup>88</sup> Nonetheless, he thinks, there remain standards of rational judgment provide “good” enough grounds for rational action.<sup>89</sup> In such cases, the reason that the winner wins does not determine that the loser loses. Reason is indecisive, and the standard of rational decision is incomplete because of the inability to mollify the losers.<sup>90</sup>

What Nagel calls “good judgment” provides a secondary standard for unjustified (that is, not completely justified) but rationally supported reasons for action.<sup>91</sup> Good judgment is necessary, Nagel claims, because values are *not* always commensurable on some common scale: Nagel thinks that incommensurable values “fragment” into five formally distinct types.<sup>92</sup> None of

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84. Thomas Nagel, for example, appears to hold onto a more-or-less comparative approach when he argues that, “there can be good judgment without total justification.” NAGEL, *supra* note 19, at 134.

85. *Id.* at 134.

86. *Id.*

87. *Id.* at 135. That is, he thinks that what Raz calls the classical model of rational action cannot provide a complete justification for action. In one sense (in the sense that reason does not completely determine what to do), Raz agrees. *See* RAZ, ENGAGING REASON, *supra* note 9, at 236-37 (discussing complete and incomplete reasons). However, I shall add that differently understood, Nagel is right to contend that, “Provided one has taken the process of practical justification as far as it will go in the course of arriving at the conflict, one may be able to proceed without further justification, [and] without irrationality either.” NAGEL, *supra* note 19, at 135. In other words, the eligibility model of permissive justification is sufficient, even without determining rational action.

88. NAGEL, *supra* note 19, at 135.

89. *Id.*

90. *Id.*

91. *Id.*

92. The five formally incommensurable categories he identifies are (1) “specific obligations to other people or institutions,” (2) “constraints on action deriving from general rights that everyone has, either rights to do certain things, or not to be treated in certain ways,” (3) utility, that is “the effects of what one does on everyone’s welfare,” (4) what Nagel calls “perfectionist ends,” that is

these values or their entailed points of view is homogenous with any of the other values or points of view and so each value is irreducible to any one of the other values.<sup>93</sup> Though the reasons for action cannot be compared and ranked, they nonetheless provide some reason for action (if not one that can separate options or outcomes into winners and losers).

For instance, our doctor may be in the position of determining which patient should receive an organ transplant, and face a variety of conflicting concerns. On one scale of value, for example, the doctor may decide based upon the ability of each patient's age or lifestyle to promote long-term health; on another scale of value, she might decide based upon the contribution of the transplant to increasing each patient's quality of life. Each scale of value demands the decision-maker's full rational attention, such that decisions made from "inside" any particular scale render appeal to the other scales of value unjustified.<sup>94</sup> Cross-scalar appeals are as meaningless as (to use John Finnis' example) 'sum[ming] up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book.'<sup>95</sup> Because there is no super-scale from which to rank and compare the five individual scales of value, Nagel's position is that there cannot be full justification when choosing among incommensurable points of view, but at best some lesser standard of rational adequacy.<sup>96</sup>

From Nagel's perspective, however, our doctor can exhibit *good judgment* in choosing among incommensurable treatment options, even if she *cannot* justify any particular outcome to the patient.<sup>97</sup> Each treatment option is one that is supported by some undefeated reason, and is to that extent rational to pursue.<sup>98</sup> It may not be the *best* course of action, because not justified by a decisive reason.<sup>99</sup> But it is a *good* or "correct"<sup>100</sup>—that is rationally "eligible"<sup>101</sup> or "adequate"<sup>102</sup> course of action because justified by an undefeated reason.<sup>103</sup> It is certainly no worse than any of the other available treatment options.

2. *High Stakes and Low Stakes.*—The core thought shared by Nagel and the comparativists is that reasons guide action just in case they require an agent to act in certain manner, and that guiding reasons justify only if some one action is

"the intrinsic value of certain achievements or creations," and, finally, (5) "private commitments to one's own projects or undertakings." *Id.* at 128, 129-33.

93. *Id.*

94. See, e.g., SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS (1982).

95. FINNIS, NATURAL LAW, *supra* note 20, at 115.

96. NAGEL, *supra* note 19, at 128; 129-33.

97. *Id.* at 135.

98. *Id.*

99. *Id.*

100. *Id.* at 128, 129-133.

101. RAZ, ENGAGING REASON, *supra* note 9, at 24.

102. John Gardner, *The Mark of Responsibility*, 23 OXFORD J. LEGAL STUD. 157, 157-71 (2003) [hereinafter Gardner, *The Mark*].

103. NAGEL, *supra* note 19, at 135.

comparatively required. Nagel relaxes the rational demands of comparativism by proposing two standards of rationally eligible<sup>104</sup> or adequate<sup>105</sup> action: decisive justification (high standards) and good judgment (low standards). One way of further undoing the comparativist demand is to claim that high-standards decisive justification applies to high-stakes decisions and that low-standards good judgment applies to low-stakes decisions. This is the approach favored by William Lucy.

Lucy's distinction between high-stakes and low-stakes circumstances places low-stakes decisions "within the personal sphere."<sup>106</sup> Low-stakes circumstances include "deciding whether to take a hiking or a skiing holiday . . . or even more important choices such as whether or not to have children or which career to pursue."<sup>107</sup> High-stakes decisions are decisions outside the personal sphere that "confer [upon some decision-maker] . . . significant power and authority over [another]."<sup>108</sup> Lucy thus restates the familiar distinction between personal and impersonal reasons for action and links them to high- and low-stakes decisions. Decisions that call for impersonal reasons are always high-stakes, and so demand decisive justification; low-stakes decisions may be resolved using personal reasons, and so do not call for decisive reasons for action (or are easily tippable).<sup>109</sup>

The doctor example, Lucy thinks, is a central case of decision calling for impersonal reasons and so decisive justification. On such occasions, Lucy proposes:

it might be thought desirable to have decisions and actions compelled by reasons. It therefore shows situations in which either the [eligibility model] adopts an uncharacteristically stringent account of rationality (weighing reason(s)) or in which the [defeat model] of practical reason, agency, and the will operates.<sup>110</sup>

Here, the problem is whether some circumstances (such as grave medical operations or denying one patient a transplant in favor of another patient) are so high-stakes that the decision-maker must eschew indecisive decision and secondary standards such as good justification. Instead, the doctor must provide the sort of decisive reasons mandated by comparativist-style complete justification.

Lucy's underlying normative proposition—that we aspire to high-standards

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104. RAZ, ENGAGING REASON, *supra* note 9, at 24.

105. See Gardner, *The Mark*, *supra* note 102, at 158.

106. Lucy, *supra* note 19, at 244.

107. *Id.*

108. *Id.* at 245.

109. *Id.* at 244-45. Joseph Raz makes a similar distinction, but rather than personal and impersonal, he distinguishes between self-interested and moral considerations. See Joseph Raz, *Hart on Moral Rights and Legal Duties*, OXFORD J. L. STUD. 123, 130 (1984) [hereinafter Raz, *Hart*].

110. Lucy, *supra* note 19, at 244.

(that is, decisive) justification in high-stakes situations<sup>111</sup>—appears broadly correct. Even in high-stakes situations, however, such justifications may not exist.<sup>112</sup> Lucy is no monist: he implicitly accepts that values and reasons are incommensurable or incomparable.<sup>113</sup> Accordingly, the high-stakes, high-standards position, like comparativism more generally, comes in stronger and weaker versions. Weak comparativism, which bifurcates the standards upon which to ground rational action into full justification and some lesser standard, might rest content with practical disappointments.<sup>114</sup> That is, weak comparativism might simply accept that when reasons are indecisive in high stakes circumstances, no (full) justification is possible.

Another tack that weak comparativism might take is, however, just plain wrong: when reasons are indecisive in high stakes circumstances, we cannot just wish away indecision and fix upon a (non-existent) decisive reason for action.<sup>115</sup> To avoid lumping Lucy with this mistaken view, we could reduce his position to the judicial bivalence thesis advanced by Endicott and Finnis: that high-stakes decisions must be *presented* as high-standards decisions (that is, based on a decisive reason) even if they are not.<sup>116</sup> So it may be the case that a decision maker must act as if justification is high-standards even if such standards are unavailable. Her decision would (using the standard of decisive justification) be not justified, though it may, given the exigencies of judicial bivalence, be presented as such to the losing party.

That is not to deny what the first version of the high-stakes, high-standard theory accepts: that where the stakes are high, or where we wish that justification could be all-or-nothing, then it would be nice if the decision-maker could rely on some decisive reasons to justify her action. In that circumstance, the possibility of justification would match the necessities of decision in a straightforward manner, and the decision-maker could represent her decision in a transparent and rationally complete manner. However, reason is not always decisive: whether or not incommensurability exists, reasons (and decisions and justifications) may be of equal or incomparable weight. The aspiration to decisive justification, though itself (under certain circumstances) rational, is sometimes incapable of satisfaction.

Nagel proposes one way around dissimulation. He thinks that the law deals primarily in one of these scales of value; that is, the law assesses our reasons and actions from the point of view of general rights.<sup>117</sup> Though he identifies four other scales, they will not count for purposes of legal justification. Nagel claims that:

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111. *Id.* at 245.

112. *Id.* Waluchow makes a similar argument against Dworkin. See Wilfrid J Waluchow, *Strong Discretion*, 33 *PHILOSOPHICAL Q.* 321, 321-39 (1983).

113. Lucy, *supra* note 19, at 206-67.

114. See Waluchow, *supra* note 112, at 321-39.

115. *Id.*

116. See *supra* note 20 and accompanying text.

117. NAGEL, *supra* note 19, at 136.

Sometimes a process of decision is artificially insulated against the influence of more than one type of factor. . . . The example I have in mind is the judicial process, which carefully excludes, or tries to exclude, consideration of utility and personal commitment, and limits itself to claims of right. Since the systematic recognition of such claims is very important (and also tends over the long run not to conflict unacceptably with other values), it is worth isolating those factors for special treatment.<sup>118</sup>

Nagel believes, then, that some schemes of value do not count in legal evaluations of action and that others inevitably tend to produce the same outcomes as general rights do.<sup>119</sup> The first claim—that some scales do not count—fits with standard accounts that seek to prevent arbitrariness by demanding that legal decisions rest on something more than the judge’s personal interests or commitments. It also jibes with Ronald Dworkin’s claim that legal decisions must rest on rights or on “integrity,” understood as limiting the sorts of reasons that a government can use to justify its actions and decisions.<sup>120</sup>

On this view, the law can provide justified answers to practical problems, but only by narrowing down the types of reasons a court may rely upon in adjudicating the questions before it. Nagel thus argues that the law’s ability to justify its outcomes depends upon excluding incommensurable points of view to produce decisive reasons from within one order of value; that of rights or (in Dworkin’s terms)<sup>121</sup> the domain of principle.<sup>122</sup> Having narrowed down the required sources of value to a unitary scheme, comparative rankings of reasons for action can, Nagel believes, produce decisive justification.<sup>123</sup>

Nagel gives no reason for thinking that rights are unitary in this way.<sup>124</sup> Competing rights may be incomparable or incommensurable, and so irreducible to some single scale of value. For example, equality and liberty are often thought to be incommensurable and so irreducible to each other.<sup>125</sup> While we could engage in some ordering of the values, such an ordering would be non-comparative and so (for the comparativists at least) arbitrary. Accordingly, we might think, “rights” does not so much provide a ‘scale’ of value as a mode of

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118. *Id.*

119. *Id.*

120. See DWORKIN, *LAW’S EMPIRE*, *supra* note 77, at 225; see also Jeremy Waldron, *Pildes On Dworkin’s Theory of Rights*, 29 J.L. STUD. 301, 301-08 (2009).

121. See DWORKIN, *PRINCIPLE*, *supra* note 56.

122. NAGEL, *supra* note 19, at 131-37.

123. *Id.*

124. In fact, he identifies a problem with this approach that applies to his vision of law: “the danger of exclusionary overrationalization, which bars as irrelevant or empty all considerations that cannot be brought within the scope of a general system admitting explicitly defensible conclusions.” *Id.*

125. Elinor Mason, *Value Pluralism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 20, 2006), <http://plato.stanford.edu/entries/value-pluralism/>, archived at <http://perma.cc/E6VL-SAGP>.

valuation: honoring values rather than promoting them.<sup>126</sup>

## II. PERMISSIVE JUSTIFICATION

In those circumstances in which we must select winners and losers, it would be ideal if our practical decisions could be justified by some decisive reason. The world, however, is not ideal in this way: sometimes we have no way to distinguish winners from losers, but must distinguish them nonetheless.

Up to this point, this Article's focus has been on the decisive justification, which holds that the reasons that are sufficient to justify some action must be rationally adequate to console the loser of some practical conflict. This Article has suggested that the defeat model, with its emphasis on decisive reasons for action, is unsatisfying. The defeat model's version of the relation between reasons and justification demands more from reason than reason can deliver.<sup>127</sup> It demands, for example, that reason provide grounds for justifying decisions to winners and losers alike. It rejects the claim that indecisive reasons—and so certain types of moral and legal permissions—could count as grounds for decision and so provide adequate reasons for action. In other ways, it demands less from reason than reason can offer. It shuts down the opportunities reason gives us for embracing the alternative possibilities that the world presents to us.

The eligibility model of permissive justification is sufficient. The permissive model is more liberal: it does not require that our undefeated reasons for action also defeat all comers.<sup>128</sup> Instead, as John Gardner puts it, “[u]nder the heading of justification . . . we claim [only] that the reasons in favour of what we did were not all defeated by conflicting reasons, and that our action was performed on the strength of some or all of the undefeated reasons in its favour.”<sup>129</sup>

Permissive justification does not start from the premise that justification is called for to console the losers of practical conflicts. Instead, permissive justification takes the narrower position that, in its central case (or “strictly speaking”),<sup>130</sup> justification is called for where reasons conflict.<sup>131</sup> On the

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126. Philip Pettit, *Consequentialism*, in CONSEQUENTIALISM (Stephen Darwall ed., 2003).

127. Proponents of the defeat model are thus the rationalist equivalent of what Hart calls “disappointed absolutists.” H.L.A. HART, *THE CONCEPT OF LAW* 139 (2d ed., Penelope A. Bulloch & Joseph Raz eds., 1994).

128. See Gardner, *The Mark*, *supra* note 102, at 158.

129. *Id.*

130. See GARDNER, *HARM*, *supra* note 33, at 107 (discussing stricter or what I call more interesting sense of justification).

131. See *id.* Absent a conflict of reasons, either anything goes (when there are no reasons) or only one thing goes (when all the reasons are on one side). In the latter case, even a very weak reason will justify an action or outcome. We might think that weak justifications provide little claim on our rational attention, and so at the margins, the difference between anything goes and only one thing goes is slight. Most of the interesting cases of permission fall somewhere in the middle, in this ‘strict’ or central case of justification. It is precisely with these cases that permissive justification is concerned.

permissive model, even though a loser may properly demand justifications when reasons conflict,<sup>132</sup> the response may often be unsatisfying. By removing losers from their central place in theories of justification, the permissive model narrows the scope that standards of rational adequacy must meet.<sup>133</sup>

Reason is not always decisive, and the rational world is neither transparent nor gapless. Reason, when indecisive, is permissive. On the model of permissive justification, the presence of an undefeated reason provides all the justification we need when choosing among plural options.<sup>134</sup>

**Permissive Justification:** an act is rationally justified only if some reason to act is undefeated.

The model is permissive because, when reasons conflict and there is no decisive reason to recommend one option as uniquely supported by reason, there is a normative permission to choose either option. A normative permission to act exists when there is no eligible reason to not act.<sup>135</sup> Normative permissions most obviously exist where there are no reasons at all: reason is absent. Normative permissions, however, also exist where reasons are indecisive: where there is no decisive reason not to undertake the permitted action.

In such circumstances, multiple (indecisive) reasons are available to justify multiple actions or outcomes. For example, John Gardner argues that “where there is a bare conflict of weight between reasons for action, it is in my view justifiable to do whatever is supported by a reason that is not outweighed, whether or not it also outweighs.”<sup>136</sup> Although Gardner has not made the connection himself, we can characterize the conflict as resulting in a permission. Where reasons are undefeated, there exists an absence of a certain sort of reason: there is no *decisive* reason for action and so, as Gardner argues in the previously quoted passage, there is a permission to do whatever is supported by an undefeated reason.

The claim that permissions can *justify* action might appear paradoxical. After all, permissions indicate the absence of reasons to act, and justification depends

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132. See Gardner, *The Mark*, *supra* note 102, at 158 (arguing that “we cannot but want our lives to have made rational sense, to add up to a story . . . of . . . *whys*. We cannot but want there to have been adequate reasons why we did (or thought or felt) what we did (or thought or felt).”).

133. See *id.* Justification is called for where reasons conflict, not where reasons are indecisive. Where there are no reasons, full stop, against doing the action there is a bare permission to act. When reasons are available and conflict, we may demand justifications, and enter reasons to assess which prevail and which do not. Sometimes, one reason decisively prevails over all the others. Sometimes, none prevail. What matters is that actions or beliefs call for justification where there is conflict, not simply indecision.

134. See *id.*

135. See, e.g., Raz, *Permissions*, *supra* note 32, at 161. See also RAZ, PRACTICAL REASON, *supra* note 38, at 85.

136. John Gardner, *Justification under Authority*, 23 CAN. J. L. & JURISPRUDENCE 71, 78 (2010).



upon reasons.<sup>137</sup> As Gardner argues elsewhere:

Unlike a duty, neither a permission nor a power is a reason (or entails or even suggests the existence of a reason) to act as one is permitted or empowered by it to do. Is one to get married just because one's marriage would be legally valid? Is one to become a vegetarian just because it is morally unexceptionable to be one? Of course not. As they stand these are not intelligible explanations of one's actions. Something else—a reason for the action—is still needed.<sup>138</sup>

There is, however, a gap between a permission that indicates the absence of a duty (a “no-duty”) and a permission that indicates the absence of any reason whatsoever (a “norm-absence”<sup>139</sup> or a bare permission). Gardner's discussion of undefeated reasons depends upon this feature of permissions, and forcefully argues that permissions are more than just the absence of reasons.<sup>140</sup>

Indeed, much of the discussion of permissions advances a simplistic understanding that acknowledges only two forms of normative permissions: strong or express permissions, supported by some rule; and weak or bare permissions, that operate in the absence of reasons.<sup>141</sup> I shall suggest, following Gardner and Joseph Raz, that the universe of permissions is much more complex than this dualism suggests, and that some permissions come with reasons attached: what I call supported permissions to complement Raz's category of exclusionary permissions.

Consider again the two medical examples sketched out so far: the doctor advising a patient who needs some invasive medical procedure, but faces a choice as to which to pick; or the doctor who has a limited supply of organs, and must pick which patient to save. In each case, the available reasons for favoring one or the other outcome may be in equipoise: of equal value, or incommensurable or incomparable as to value. In each case, the doctor has no decisive reason guiding her decision, but she does have plenty of undefeated reasons. If she is permitted to pick, and it is sufficient (under the model of permissive justification) that she acts for an undefeated reason, her decision is justified whichever option she chooses.

In each case, the final decision over which option to pick might (using the standard of decisive justification) appear whimsical or arbitrary. Without a decisive reason to defeat the competing options, the decision looks more or less non-rational. The doctor's ultimate decision, whichever it is, however, is not made in the complete absence of reasons. If there were no reasons (and so just a bare permission) there would be no need for justification. Whatever she did

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137. *Id.*

138. *Id.*

139. John Gardner & François Tanguay-Renaud, *Desert and Avoidability in Self-Defense*, 122 ETHICS 111, 120 (2011).

140. *See generally id.* (arguing that permissions are more than just the absence of reasons).

141. *Cf.* Joseph Raz, *Permissions*, *supra* note 32, at 161.

was, in Gardner's terms, unobjectionable.<sup>142</sup> Indeed, in the absence of reasons, justification is neither required nor possible. Lacking reasons, the doctor *could* just pick an outcome with a blithe "why not?"<sup>143</sup>

At the very least, then, in the doctor's situation there is *some* reason, albeit an indecisive reason, for decision that would justify the outcome. The indecisive reason fully or completely justifies the outcome *even if* some other undefeated reason justifies a different outcome. This relation of reasons to permissions both complicates the picture and requires us to add to the taxonomy of permissions to explain how reasons support permissions.

Normative permissions come in different forms, and are not simply one-size-fits-all. In organizing permissions by their relation to reasons, this Article shall argue that two types of relationships are of central importance. The dimension of support refers to the presence or absence of first-order reasons: these I call supported or unsupported reasons. The dimension of protection refers to the presence of second-order reasons. The relation of justification to normative permissions is thus complicated by the fact that permissions are a distinctive normative category, covering a variety of normative relations, and so some taxonomy of permissions is required to separate out those that are in need of justification from those that are not.

#### A. A Taxonomy of Permissions

Normative permissions are properly included in this list of things that are logically related to actions, but not all normative permissions are capable of justifying action. Indeed, as described above, the claim that permissions could justify action appears paradoxical. A normative permission to act entails the absence of some (decisive) reason to not act. Thus, a bare permission to act exists when there is no reason to act or to not act—where there are no reasons at all. In this case, no justification is required *or possible*. Anything goes, because there is nothing rationally to object to.

1. *Supported*.—For permissions to justify actions, they must be supported by first-order reasons to do the act that the agent is permitted to do.<sup>144</sup> More formally, if an agent is justified in acting, that is because, in addition to the permission to act, she has a reason to act. Permissions can be supported by first-order reasons in various ways, of which this Article has identified two: a permission is decisively supported if there is a decisive reason to act that defeats any and all reasons to not act. In that case, there a permission because there no reason to not act, and the permission is justified because of the (decisive) reason to act.<sup>145</sup>

For example, if an agent considers whether she is justified in going to the

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142. GARDNER, HARM, *supra* note 33, at 107.

143. *Id.*

144. See John Gardner, *Justifications and Reasons*, in HARM AND CULPABILITY 103, 124 (A. P. Simester & A. T. H. Smith eds., 1996).

145. See *supra* Part II.

park or staying at home, and a decisive reason to go the park (she is helping a friend from out of town who is lost in the city) defeats all her competing reasons (she wants to laze around the house), then there is no reason not to go to the park and every reason to go. Reason completely determines the outcome. Nonetheless, there is also a permission to go to the park, even though the permission is also the only rationally eligible course of action.

In the case of indecisively supported permissions, this Article has suggested, there *is* a positive reason to act. There is a conflict of reasons to act and to not act, such that the reasons are in equipoise: they are of equal, incommensurable, or incomparable value. The reason is indecisive because it does not prevail over all competing reasons. But, along with the other undefeated reasons, the *permission* to act depends upon the absence of a decisive reason to not act. The permission *is* also supported by an undefeated reason to act. Since there is more than one rationally eligible option, in the absence of a decisive reason to act, there is also a permission to not act that is supported by an undefeated reason.<sup>146</sup>

In the park example, if the agent has reasons to go to the park (she would like the fresh air) or stay at home (she needs some rest at the end of a busy week) and these reasons are in equipoise, the reason to go to the park does not defeat all comers, and so does not provide a reason why the losing option (staying at home) lost. The eligible reasons to go to the park remain undefeated, and so reason is indecisive. Nonetheless, on the account of justification sketched out, above, *either* choice is *fully* justified, because each is supported by an undefeated reason for action.

2. *Exclusionary*.—Exclusionary permissions depend upon the existence of a second-order permission to disregard (or rely upon) conflicting first-order reasons.<sup>147</sup> An exclusionary permission to act entitles the agent to ignore at least some of the reasons for not acting.<sup>148</sup> Exclusionary permissions, Raz argues, “always require a justification,”<sup>149</sup> and so require some reason or “consideration” to “establish that one may disregard conflicting reasons.”<sup>150</sup> Accordingly, a full analysis of exclusionary permissions is quite complex. These permissions depend upon a hierarchy of reasons in which higher-level reasons justify treating lower-level reasons as optional.<sup>151</sup> And, by making these reasons optional, they operate to undermine the power of reasons within their scope, and so may affect the outcome of practical inferences.<sup>152</sup>

Consider the following example: in chess, there is a rule that a pawn may move one or two squares as its first move of the game. The rule establishes an exclusionary permission: the one-or-two-square rule is a second-order reason that

146. *See supra* Part II.

147. RAZ, PRACTICAL REASON, *supra* note 38, at 89-90.

148. *See* Raz, *Permissions*, *supra* note 32, at 163; RAZ, PRACTICAL REASON, *supra* note 38, at 89-90.

149. RAZ, PRACTICAL REASON, *supra* note 38, at 90.

150. *Id.*

151. *Id.*

152. *Id.*

undercuts the usual rule for moving pawns one square at a time and replaces it with a permission to move it one or two squares as its first move.<sup>153</sup> The rule is justified by reasons of speed and strategy: it makes the openings of the game move faster and it opens up a range of possible moves that make the game more interesting. The exclusionary permission does not, however, provide the player with a reason for moving one square or two squares. But nor does it preclude the giving of further reasons. The permission does not *justify* either move; but either move may turn out to be *justifiable*.

In the chess example, either choice, moving one square or two, may in turn be justified by some further set of reasons, usually reasons of strategy (for example, it puts the pawn or some other piece at risk of being taken), and is justifiable if supported by some further reason. Such reasons are positively invited to fill the rational gap left by the permission to make the move.

Peremptory challenges provide another legal example of an exclusionary permission, and as with the chess permission, one that is unsupported. When selecting the members of a jury, the lawyer may often possess a number of peremptory challenges that permit her to strike a juror for any reason or *no reason*. That is, the lawyer may exclude a juror from the petit jury “without showing any cause . . . without reason or for no reason, arbitrarily and capriciously.”<sup>154</sup> The challenge is an exclusionary permission to strike jurors that provides a permission to disregard *all* the competing first-order reasons for seating the jurors.<sup>155</sup> When a lawyer uses a peremptory challenge to strike a juror, she is not limited to choosing between a range of eligible reasons; she is entitled to disregard reasons altogether, and act on hunch or intuition or some such thing. While the existence of the permission itself is justified by considerations of fairness or autonomy,<sup>156</sup> individual strikes need not be supported by reasons. In that case, “[t]he very essence of a peremptory challenge is that its exercise requires *no justification* or explanation.”<sup>157</sup> Exclusionary permissions may thus be unsupported or supported, depending upon whether the permission is a permission to choose among reasons or includes the permission to disregard reasons altogether.

Preclusionary permissions are second-order reasons to disregard first-order reasons that defeat those first-order reasons that are within their scope. They are

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153. See GARDNER, HARM, *supra* note 33, at 117. (This type of exclusionary permission may be distinguished from the sort of exclusionary permission that John Gardner calls “cancelling permissions.” That sort of permission cancels, rather than defeats, the conflicting second-order reasons, permitting the decision-maker to turn outside the system of practical reasons and rely on a set of reasons that are normally excluded.) Here, the decision-maker does not turn outside the institutional system of the laws of chess, but rather replaces one norm with another.

154. *Pointer v. United States*, 151 U.S. 396, 408 (1980).

155. *See id.*

156. *See, e.g., United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956). *See also* *Batson v. Kentucky*, 476 U.S. 79 (1986).

157. *R. v. Gayle*, 54 OR (3d) 36, 59 (2001) (emphasis added).

thus better known as exclusionary reasons.<sup>158</sup> This Article characterizes them as a form of permission, however, to emphasize that the operation of exclusion does not create reasons, but defeats them, and without some supporting reason, exclusionary reasons leave a rational gap.

Examples of supported preclusionary permissions are relatively easy to find, however, for supported preclusionary permissions are just “the coincidental conjunction of a reason to act and an exclusionary reason not to act for certain countervailing reasons.”<sup>159</sup> As Raz argues, exclusionary reasons “are almost invariably tied to first-order reasons and their combined application normally leads to a certain action being required.”<sup>160</sup> Thus, if I have promised to meet Jane in the park, I now have a second-order reason (keeping the promise) not to act for certain conflicting reasons—a permission to meet Jane in the park—supported by the first-order reason (the fact of the promise) to meet Jane.

Preclusionary permissions, however, may be compatible with there being no reason or a range of unexcluded, but indecisive and conflicting reasons. In that case, the unexcluded reasons may prove indecisive, and so the preclusionary permission does not result in a normative requirement, but retains the character of a permission.<sup>161</sup>

Only *supported* permissions justify doing some act. Unsupported permissions may license doing the act, if there is no undefeated reason that counsels against so doing. But, as the chess example demonstrates, merely having a rule granting a permission to move two squares does not justify making the move, unless there is some supporting reason that can fill in the rational gap left open by the permission.

3. *Bare Permissions*.—Finally, permissions may be both unprotected by some second-order reason and unsupported. In that case, in the absence of reasons, there is what this Article has called a bare permission. For example, there may be no reason for Sam to choose the black shoes or the brown ones (or any shoes at all). Here, she is permitted to pick because there is no rational conflict, no reason that could challenge or defend her selection. Her choice, though not supported by reason, is permissible. However, it neither justifies her selection nor is capable of justification.

The relation between permissions, reasons, and justifications is thus not one-size-fits all. Rather, the relationship may be quite complicated, dependent upon the manner in which reasons are present or absent, supporting or protecting, conflicting or not. This brief taxonomy is not designed to identify every permission present in morality, politics, or law. It does, however, provide enough groundwork to consider in more detail the manner in which permissions make room for indecisive reasons to operate and to justify rationally eligible courses of action.

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158. See RAZ, PRACTICAL REASON, *supra* note 38, at 89.

159. Gardner & Macklem, *Reasons*, *supra* note 33, at 440, 465.

160. RAZ, PRACTICAL REASON, *supra* note 38, at 89.

161. Gardner & Macklem, *Reasons*, *supra* note 33, at 440, 465.

*B. Permissive Justification Is Complete Justification*

This Article has suggested that a taxonomy of permissions is required to develop an adequate account of permissive justification. Justification, as previously explained, depends upon reasons for action or belief: “To claim that one has justification for doing or believing as one does is to claim, at the very least, that one has reasons for so doing or so believing.”<sup>162</sup> Where there is no reason *not to* act, in other words, justification is not called for because “[t]he unobjectionable . . . is in no need of justification.”<sup>163</sup> If there is one reason not to go to the park on Saturday, then one may go on a whim—one need not justify her choice, but *just do it*. If there is no reason not to take up stamp collecting, one need not justify selecting this choice of hobby, to others or to herself. One can simply decide to collect stamps or not, as she chooses. Accordingly, in its central case (or ‘strictly speaking’),<sup>164</sup> justification is called for where reasons conflict, that is, “when one also has some reason *not to* act, believe, etc. as one does.”<sup>165</sup>

One could perhaps consider another, even weaker, candidate for justification: justification as freedom from criticism. In this case, one is justified in acting if one is permitted to act, even if one has no reason to act. Justification simply blocks criticism. In this case, justification primarily has a negative function: “why not?” would become the central case of justification. In that case, exclusionary permissions and bare permissions would be sufficient to justify action.

One reason for not going down this weaker path is that it removes the centrality of reasons from practical life. As John Gardner puts it, “explanation in terms of reasons is what a rational being aspires to.”<sup>166</sup> An advantage of both the defeat and eligibility models is that they preserve the importance of rationality for the justification of practical action.

A second reason for not going down the criticism-blocking path is that it is unnecessary. Supported permissions can answer the call for rational justification, and do so in a central, rather than peripheral, way. Where reasons conflict and are undefeated in a manner that produce rationally supported permissions, that is sufficient for “full” or “complete” justification. Since the view this Article defends entails that there is a fully adequate reason to act so long as the action is rationally eligible,<sup>167</sup> all that is required for justification is some undefeated reason for action. If an agent has an undefeated reason to go to the park on Sunday that conflicts with an undefeated reason to stay at home, each is rationally eligible to operate as a ground of decision. Since each is eligible, each is sufficient for justification and either choice—to go to the park or to stay at home—is fully justified.

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162. GARDNER, HARM, *supra* note 33, at 103.

163. *Id.* at 107.

164. *See id.* (discussing stricter or a more interesting sense of justification).

165. *See id.*

166. Gardner, *The Mark*, *supra* note 102, at 159.

167. RAZ, ENGAGING REASON, *supra* note 9, at 24.

Accordingly, under the eligibility model of permissive justification, there is a complete justification for acting just in case there is an undefeated reason to act.<sup>168</sup> Unlike decisive justification, permissive justification does not go the extra step to require a decisive reason to act because, on the eligibility account, the standard is simply that “one has reasons”<sup>169</sup> for what one does and those reasons are undefeated.

At the same time, we should be careful to distinguish this definition of complete justification from the variety of other ways in which to measure completeness. One way is to define complete justification in terms of the extent to which reason determines the outcome.<sup>170</sup> On this account, indecisive reasons *are* incomplete, but only because they do not fully determine the agent’s course of action. However, they are not incomplete in the sense of being less than whole<sup>171</sup> or otherwise provisional.

Supported permissions have sufficient rational heft to justify an agent’s decision to act or not act. Furthermore, each justification provides as much reason to act as any other eligible justification. In this sense, it is as “full” of justification—as a rationally acceptable basis for action—as any of the competing, eligible justifications.<sup>172</sup> The justification may not be determinative of the agent’s choice of one option over another.<sup>173</sup> Nonetheless, the justification is as rationally complete as we could expect (and as the world allows).

### III. JUSTIFICATION IN A LIBERAL PROFESSION

Consider once more an example introduced by William Lucy and which I have relied upon to this point: a doctor, confronted with indecisive reasons for selecting between one or other serious and invasive medical procedure, must justify her choice option to her patient. In such a circumstance, Lucy thinks, the doctor ought not to “resort to [the doctor]’s will as the driving force of decision and action.”<sup>174</sup> Instead, Lucy thinks, the doctor ought to produce some decisive

168. GARDNER, HARM, *supra* note 33, at 103.

169. *Id.*

170. *See generally* GARDNER, HARM, *supra* note 33; RAZ, ENGAGING REASON, *supra* note 9.

171. *See generally* Gardner & Macklem, *Reasons*, *supra* note 33; RAZ, ENGAGING REASON, *supra* note 9, at 24.

172. RAZ, ENGAGING REASON, *supra* note 9, at 47.

173. In this sense of “complete,” the decision-maker need not turn outside reason to determine her choice, because there is a decisive reason for action. In this case, a (rationally) incomplete justification is one in which reasons only partly explain the agent’s choice of one option over another. Reason is indecisive, and the agent must do more than simply ratify the verdict of reason that a particular action is required. Something in addition to reasons (for example, “will”) is required to help the agent’s selection. *See, e.g.*, RAZ, ENGAGING REASON, *supra* note 9, at 47. There are other versions of the distinction between complete and incomplete reasons for action as well. *See, e.g.*, Gardner & Macklem, *Reasons*, *supra* note 33; GARDNER, HARM, *supra* note 33; RAZ, PRACTICAL REASON, *supra* note 38.

174. Lucy, *supra* note 19, at 245.

justification for her decision.<sup>175</sup>

Here, the doctor faces a high-stakes choice between competing significant medical procedures. In such a circumstance, Lucy asks:

[i]f it can be said that [the doctor] has adequate reason to do either [one treatment or another], would it be acceptable that [the doctor's] will—which is “informed and constrained by reason but plays an autonomous role in action”—determines which treatment is adopted? It seems unlikely that it would.<sup>176</sup>

But does it? It is unlikely only on the assumption that (1) the patient cannot participate in the decision-making process; and (2) the patient has no choice among doctors—that she cannot seek a second opinion.

But an ordinary understanding of the doctor-patient relationship is not so rigid and authoritarian. Rather, contemporary liberal medical practice operates under a norm of shared or devolved choice: while a doctor may choose her preferred treatment based on her style of practice, patients can choose their doctors. There may be a separate duty of candor from the doctor in a doctor-patient relationship, so that while the doctor may recommend one treatment first, and counsel waiting until after trying that treatment before trying the others, the doctor should nonetheless also advise the patient that she *could* try them the other way around.

On this view, doctors are not just blind appliers of reasons independent of ideological investment. Instead, doctors—and other professionals, from architects and accountants to web-designers and zookeepers—have choices among the different ways of practicing their profession and honoring the conflicting values that underlie those choices. The values are sometimes of equal weight, or incommensurable or incomparable. A liberal profession is one that includes these different values, ideologies, and the plural styles of practice they produce.<sup>177</sup>

To ensure that the patient can make her own choice and is not simply forced to accede to the doctor's decision, the duty of candor may also require counseling the patient to seek second opinions. Accordingly, the doctor should encourage the patient to shop around and try out other advice and other doctors. In that case, some of the worries raised by permissive justification disappear. The patient is not at the mercy of the doctor's whims, but gets to decide herself which among different doctors adopting plural treatments to select. The patient has an option to decide which style of treatment she prefers, and so participates in the decision.

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175. *Id.* Here, the real problem is at what point to resort to the will or some other deadlock-breaking device. That is, the point is not one about haste or deliberation. Proponents of indecision, such as myself, and of will-based theories of decision, such as Joseph Raz, would, along with Lucy and along with decisive-justification theorists, reject any “hasty resort” to either the will or reason to break the deadlock among indecisive reasons.

176. *Id.* at 244.

177. See Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV 761, 780-81 (1989).



*A. Professionalism: Liberal and Dogmatic*

Permissions help us distinguish between liberal and dogmatic approaches to professions. It is part of the ethics of many professions that there is more than one permitted way to perform them. There is more than one way to treat the patient, to account for one's profits, or to design a building. Accordingly, in professional settings, permissions might create a route for diverse approaches to be reflected within the range of reasons that operate to justify discrete, rationally eligible courses of action.

Part of the justification *for* permissions may be precisely to fit these diverse ways into the profession.<sup>178</sup> Permissions provide ways in which second opinions and appeals to other authorities and ways of doing things enter the professional realm. Accordingly, permissions can liberate us from the threat of rational domination, where (because of the high-stakes nature of the choices) agents demand decisive justifications before engaging in action.<sup>179</sup> Given the right institutional structure, permissions allow a plurality of reasons and projects to flourish as eligible justifications for action.

Permissions, however, do not liberate agents from responsibility for their commitments, and it is this type of liberation that can appear decisive. For example, if the doctor can produce a decisive reason, one that defeats all competing reasons, then she can demonstrate that her choice is the best, rationally, that she could do.<sup>180</sup> Reason requires the doctor to act this way rather than another way; therefore, she is decisively justified in selecting a particular course of treatment.

On this view of rationality, reasons liberate by freeing one from moral blame for one's rationally justified decisions.<sup>181</sup> On this view, decisive justification gets one off the hook for the various choices she makes.<sup>182</sup> When one asks, in this blame-avoiding mode, what is an adequate reason for action, it is one that will prevail over all other reasons. On this view, the negative consequences of one's actions are not "hers to bear" but reason's alone.<sup>183</sup> Lacking decisive reasons, the doctor is back on the hook. No matter what she does, she is personally answerable for any harm she does.<sup>184</sup>

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178. *See supra* Part III.

179. William Lucy, *Adjudication*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, 206, 244 (Jules L Coleman et al. eds., 2002).

180. Douglas N Husak, *Conflicts of Justifications*, 18 *L. & PHIL.* 41, 41-68 (1999).

181. *Id.*; RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 287-90 (2000) [hereinafter DWORKIN, *SOVEREIGN VIRTUE*].

182. DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 181, at 287-90.

183. Gardner, *The Mark*, *supra* note 102, at 157.

184. A different explanation, mentioned and rejected in Raz's, *Incommensurability and Agency*, which is that the worry is rational bewilderment. The agent lacks the means to explain why she undertook one rather than any other course of action. RAZ, *ENGAGING REASON*, *supra* note 9, at 49.

The “deeper” view, this Article suggests, following Gardner, is that rational justification rests upon arguments about the intelligibility of our lives as rational beings.<sup>185</sup> Because we wish our lives to make rational sense, we want to follow rationality rather than simply avoid its unwelcome consequences.<sup>186</sup> However, reason is not always decisive, and the world is neither transparent nor rationally complete. Reasons, as well as decisions and justifications, may be of equal, incommensurable, or incomparable weight. The aspiration for decisive justification, though rational and psychologically compelling, is sometimes incapable of satisfaction.

*1. Practice and Projects.*—One way of thinking about liberal practice is as a practice including different styles, perspectives, or projects as a means of maximizing the range of available or eligible reasons for decision. Styles of practice—doctoring, accounting, and so on—are much like personal goals.<sup>187</sup> These styles of practice are rationally underdetermined when selected.<sup>188</sup> However, once the professional has committed herself to a particular style of practice, she answers to reason, and further, actions in line with that style of practice are determined in part by the initial choice because the professional’s project-related commitments and goals constitute reasons for action.<sup>189</sup>

In this way, we might think of a style of practice as one form of what Bernard Williams calls *projects*.<sup>190</sup> Projects, according to Williams, are goal-oriented and temporally extended practical or intellectual enterprises, such as an idea, value, or activity, that agents can generate or participate in, either individually or in groups.<sup>191</sup> One way in which individuals pursue projects is by committing themselves to those projects. Commitments are thus attitudes or activities that express an agent’s adoption and endorsement of certain projects as her own. Williams emphasizes the value of practical commitments to individuals’ understanding of the structure and value of their lives.<sup>192</sup> A commitment is thus something more than a whimsical or faddish engagement with some project.<sup>193</sup> A commitment requires dedication.

For Williams, projects and commitments are interrelated concepts. Projects are enterprises that require the sort of extended engagement characteristic of commitments: They may not be treated as “dispensable” or as simply “one satisfaction among others.”<sup>194</sup> Instead, Williams understands the pull of our projects in terms of continuity or stability.<sup>195</sup>

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185. Gardner, *The Mark*, *supra* note 102, at 158.

186. *Id.*

187. Gardner & Macklem, *Reasons*, *supra* note 33, at 440-75.

188. *Id.*

189. *Id.* (“goals do not merely reflect reasons but also constitute them”).

190. SMART & WILLIAMS, *supra* note 82, at 100, 103-06.

191. *See id.* While imprecise, the definition of project is serviceable for current purposes.

192. *Id.* at 100.

193. *Id.* (calling this type of engagement “tastes” or “fancies”).

194. *Id.*

195. *See* Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, in

However, continuity or stability alone is insufficient to explain the normative and rational force of commitments. Continuity and stability are consistent with a non-normative account of commitment as habitual behavior.<sup>196</sup> Without more, Williams' concept of commitment merely records, describes, or predicts the agent's conduct in terms of regularly repeated acts,<sup>197</sup> without seeking to include the normative reasons why the participant acts as she does.<sup>198</sup>

For our commitments to be rationally goal-oriented practical enterprises or to engage the intellect, they must do more than identify stable and regular patterns of conduct. They must provide reasons that do or would support the agent's claim that she is rationally justified in pursuing her projects such that others must respect her commitments (even if not adopt them for themselves).<sup>199</sup> Commitments, like practices more generally, provide second-order reasons for action that pre-empt some of the agent's other reasons for action.<sup>200</sup> This feature helps explain the categorical character of commitments: they "are not hostage to the [other] prevailing personal goals of the agent to whom they apply [and so do] not bend to the changing winds of one's ambitions."<sup>201</sup> Given the categorical and exclusionary nature of our commitments, we might characterize them, following Gardner and Macklem<sup>202</sup> and Raz,<sup>203</sup> as generating a protected reason for action.

This conclusion, that our commitments are normative and provide reasons for action, fortifies Peter Railton's critique of Williams' criteria of stability and seriousness.<sup>204</sup> Railton suggests that some projects *should* be defeasible.<sup>205</sup> An agent may have misjudged the value of her projects, or their value may have changed; therefore, she should immediately abandon them. In that case, Williams' criteria of seriousness and stability misrepresent the nature of commitment: if the agent's reasons for commitment are cancelled or defeated,<sup>206</sup> the act of committing to the project no longer provides her with rationally eligible reasons for continuing to pursue her project or goal.<sup>207</sup> The commitment reasons

CONSEQUENTIALISM AND ITS CRITICS 93-135 (Samuel Scheffler ed., 1988).

196. HART, *supra* note 127, at 89.

197. *Id.* at 54-56; 89; *see also* NEIL MACCORMICK, H.L.A. HART 30-34 (1981) (The major impact of the external perspective is to avoid characterizing the observed conduct as rule-following).

198. HART, *supra* note 127, at 89.

199. Gardner & Macklem, *Reasons*, *supra* note 33, at 440-75.

200. *Id.*

201. *Id.*

202. *See generally id.*

203. *See generally* RAZ, PRACTICAL REASON, *supra* note 38.

204. Railton, *supra* note 195, at 93-133.

205. *Id.*

206. *Id.* at 101. Railton appears to equate defeasibility with various sorts of cancelling conditions: either internal to one of competing reasons or due to changes in the world. *Id.* Here, it is not the case that one reason defeats the other. Where reasons are cancelled, one reason drops out of the rational calculus.

207. *Id.*

are no longer justified, even by the relaxed standard of permissive justification.<sup>208</sup>

Discarding a commitment may happen relatively quickly. Tomorrow, the doctor's style of professional practice may no longer be rationally defensible, given a change in medical practice today. This change does not mean that, when she adopted the particular mode of treating patients, she was not seriously committed to that treatment. Despite the parlous impact on her patients' health from persisting with such treatments, the doctor may still be irrationally committed to that style of practice moving forward. Although she *ought not* to be committed to this treatment in the future, the fact that she may desist using the treatment tomorrow does not negate her commitment to the treatment today.

The normative force of commitments and projects can also explain how one's choices can generate reasons and goals. It may be that one's adoption of projects is—from the perspective of the defeat model—arbitrary: an agent picks a project, for no reason or for no decisive reason, such as a career in law over a career in teaching.<sup>209</sup> She may reject professionalism altogether and head off to a kibbutz.<sup>210</sup> In any case, picking that project is a rationally permissible course of action, one that is more or less justified because it is supported by reasons. Having picked a project, her commitment to that project now gives her further reasons to continue.<sup>211</sup> Her choices create reasons that operate to justify her subsequent actions.

Any of these permissible human projects—the practice of law, the vocation of teaching, working on a kibbutz, or even taking up a hobby such as stamp collecting—is an activity that has or can generate value. Any of these occupations could be personally meaningful, financially profitable, a form of recreation, or so on. While the agent may initially have equivocal or no reasons for taking up one of these projects, the way in which she commits herself can provide reasons that justify her project-relevant actions both to herself and to others.<sup>212</sup>

Once normatively committed to a permissible human project, the agent cannot just abstain from the project absent some good reason. If her commitment is genuine, she has placed herself under an obligation to persist.<sup>213</sup> So long as her reasons for engaging in stamp collecting remain undefeated or un-cancelled, her choice of career or hobby is one that others are bound to respect.<sup>214</sup> That is, her

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208. *See id.*

209. *See* RAZ, MORALITY, *supra* note 82, at 341-45 (suggesting that having to choose between a career in law or a career in teaching would be an incommensurable decision).

210. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 136 (1996).

211. RAZ, MORALITY, *supra* note 82, at 388.

212. *Id.*

213. Gardner & Macklem, *Reasons*, *supra* note 33.

214. One way of developing this thought would be to consider Joseph Raz's discussion of social forms, which are socially developed, valuable activities. Social forms depend, however, for their creation and sustenance, on practical and affective features of social interaction that go beyond the individual or even the small group. Accordingly, not just any attempt to commit to a project

hobby provides reasons for others to give her stamps instead of coins as a gift. As an additional example, the agent's choice to pursue a career as a lawyer is one that her parents are bound to respect, even if they think that there are reasons why she should have followed the family profession and become a doctor.

In this case, reason and choice<sup>215</sup> interrelate. The agent's will is just the ability to choose among projects and is expressed by selecting a project or goal. The initial act of choosing may be more or less supported by reasons. Permissions may exist where reasons are absent or conflicting. In any case, having normatively committed herself to that project or goal, she now has reasons to continue down her chosen path, and these are reasons that others should respect.<sup>216</sup> In this way, our choices can create reasons, both for ourselves and for others.

But if others have reason to respect an agent's project, even to the extent of acting to support it, they are not bound to *choose* it for themselves. The stamp-collector's decision does not commit other agents to become stamp-collectors themselves or even to taking an interest in her hobby.<sup>217</sup> Her decision to become a stamp-collector generates reasons for others, not obligations.<sup>218</sup> Reasons are advisory only, and they can be overridden, ignored, and so on.<sup>219</sup> Obligations cannot. They are mandatory (and categorical) and, therefore, are not so easy to dismiss.<sup>220</sup> Stamp collecting (or the practice of medicine), unlike law, does not depend upon the exercise of a normative power over others. That is, the doctor's and the stamp collector's decisions do not put others under some duty to obey.

Thus, when a patient seeks out a doctor and asks why this treatment rather than that, the doctor can perfectly reasonably say: "[the reason is] because I'm that kind of doctor." The patient has reason to respect the doctor's choice, even though the patient is not bound to choose it for herself. In other words, the doctor may justify her choice of treatment for the patient by pointing to her commitment to this style of practice.<sup>221</sup> But the commitment reasons only operate as a justification for *the doctor* to engage in this style of practice. They do not require *the patient* to accede to having the doctor treat her in this way. In some circumstances, for example, where no other doctors are available, the treatment cannot wait, and the doctor is able to treat in multiple styles, the patient's commitment to a particular form of treatment may trump the doctor's commitment and may require the doctor to give up her insistence on a particular style of treatment.

2. *Egalitarian and Inclusive Professionalism.*—So far, I have argued that

is socially valuable, and not just any project can demand the rational respect of other members of the community. See RAZ, MORALITY, *supra* note 82, at 388.

215. Lucy, *supra* note 19 (calling choice "will").

216. RAZ, MORALITY, *supra* note 82, at 388.

217. See Gardner & Tanguay-Renaud, *supra* note 139, at 120.

218. See *id.*

219. See *id.*

220. See *id.*

221. See RAZ, MORALITY, *supra* note 82, at 388.

practical choices can produce reasons and that an agent's commitments to certain projects can generate reasons for action, both for herself and for others.<sup>222</sup> Nonetheless, this Article suggests that the relation between reasons and projects that proves compelling for one agent may or may not be compelling for another.<sup>223</sup> Often these commitments express themselves as a matter of personal and professional style. In the institutional context, these commitments and projects may figure as a style of professional practice. A liberal professionalism encourages a multiplicity of styles to flourish.

Permissive justification thus provides a different vision of the relation between liberation and responsibility than does decisive justification.<sup>224</sup> On the one hand, permissive justification keeps the decision-maker on the hook for her choices.<sup>225</sup> In the doctor example, it shifts much of the responsibility for the consequences of a decision onto the patient. When the doctor presents the patient with a range of undefeated options, the doctor may also identify the style of practice she pursues, and the patient decides whether that treatment style fits the patient. If not, the patient should shop around.

Two features of liberal professionalism stand out here. First, this shifting of responsibility for choosing among rationally eligible practice styles works best when the patient *can* shop around; therefore, it works best if the patient has the opportunity or ability to access different styles. Second, this sort of decision only works if the patient has the information she needs to choose. Accordingly, liberal professionalism imposes an independent duty of candor on the doctor to make clear that there is a range of treatment options and to disclose which style the doctor prefers.<sup>226</sup> In this way, under liberal professionalism, responsibility for ensuring rationally adequate decision-making becomes shared among decision-makers.

This view stands in contrast to Lucy's account of the doctor faced with a decision between incommensurable and conflicting courses of treatment.<sup>227</sup> One of Lucy's justifications for his high-stakes, high-standards positions is that, unless justification is decisive, the doctor will engage in some "hasty resort to [her] will as the driving force of decision and action."<sup>228</sup> However, the eligibility model *also* rejects a too-quick turn to the first available reason. Permissive justification *also* counsels deliberation to ensure that plural practice styles are included in the decision-making process. Permissions to choose, as this Article has described

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222. See *supra* Part III.A.1.

223. This feature of agent-centered projects forms the basis for one of Joseph Raz's critique of Hart. See Raz, *Hart*, *supra* note 109, at 129-30.

224. See *supra* Parts I, II.

225. Gardner, *The Mark*, *supra* note 102, at 158.

226. I do not suggest that liberal professionals always, or ever, live up to this duty. For example, lawyers might rarely suggest to their clients that another firm across the way would better serve her needs. Nonetheless, the duty of candor operates as a standard by which to criticize the profession even when absent.

227. See Lucy, *supra* note 19, at 245.

228. *Id.*

them, counsel seeking second opinions and devolving decisions onto those most directly impacted by their choices.

Furthermore, egalitarian and inclusiveness reasons support the independent duty of candor in urging the patient to shop around. In such circumstances, we might hope that doctors adopt a personal tone, advising a patient that the options are equally balanced, but that if the doctor in the patient's situation, the doctor would pick one option over the other. This personal tone emphasizes that the patient and the doctor are on an equal footing in determining what treatment is appropriate. The final decision is not the doctor's alone (though she may insist on her style of treatment); it also rests with the patient to choose among styles and therefore among doctors. The patient ought to be included in the decision-making process as an equal, not excluded as a subordinate.

If Lucy's claim is that the doctor will (or should) dictate some course of action to the patient, then he has placed himself in the dogmatist's camp. Here, Lucy supposes, the doctor retains ultimate decision-making authority, and so justification must be decisive in "contexts in which it might be thought desirable to have decisions and actions compelled by reasons."<sup>229</sup> Liberal professionalism, under the more egalitarian model of shared and deferential decision-making outlined above, generally seeks to avoid this form of authoritarianism.

Diversity among professional approaches or styles allows a multiplicity of professional practice styles to compete for our rational attention. James Bohman suggests that what he calls "perspectives"<sup>230</sup>—"different social positions primarily emerging from the range and type of experience" afforded by different practical points of view—are necessary for the deliberative process, because they open up the decision-maker's deliberative possibilities, expose individuals to competing points of view, and enable practical decision-makers to more accurately assess the range and weight of reasons open to them.<sup>231</sup>

These perspectives make room for a panoply of different ideologies of professional practice that may not be reducible to simple proxies, such as conservative or liberal agendas.<sup>232</sup> That is, rather than assert that professional ideologies (and perhaps political ideologies more generally) fall into two or three broad categories, we could consider that judges, doctors, and other professionals are as ideological as the wind. Their arguments are likely to be loosely formed and shifting, drawing upon a number of different sources dependent upon the judge's background, reasoning style, and the circumstances. The concept of a perspective thus permits us to describe more complex relations

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229. *Id.* at 244.

230. James Bohman, *Deliberative Democracy and the Epistemic Benefits of Diversity*, 3 *EPISTEME* 171, 171-91 (2006); *see also* IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2002).

231. Bohman, *supra* note 230, at 171-91.

232. *See generally* CASS R. SUNSTEIN, *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) [hereinafter *SUNSTEIN, POLITICAL*]. *See also* Cass R. Sunstein, *Deliberating Groups Versus Prediction Markets (or Hayek's Challenge to Habermas)*, in *SOCIAL EPISTEMOLOGY: ESSENTIAL READINGS* 315, 327 (Alvin I Goldman & Dennis Whitcomb eds., 2011) [hereinafter *Sunstein, Deliberating*].

between values, reasons, and experience, and thus accommodates less predictable approaches to law (or medicine, or zoo-keeping).

My position contrasts with at least one prominent explanation of judicial ideology in legal decision-making. Cass Sunstein, for example, has argued that ideological factors can skew judicial deliberation towards extremist positions.<sup>233</sup> His arguments extend more broadly to identify a major problem infecting group deliberation: that deliberators often respond to interpersonal signals rather than to the merits of the available reasons, and so lack the sort of rational independence necessary to arrive at the best solution.<sup>234</sup> Collegiality among deliberators can cause them to second-guess their evaluations of the weight of the available reasons,<sup>235</sup> to avoid the stigma of dissent,<sup>236</sup> to over-emphasize shared reasons,<sup>237</sup> and so on. These interpersonal factors, Sunstein argues, produce ideological patterns of voting among the American federal judiciary that can, if not checked, lead to polarizing and overconfident positions.<sup>238</sup>

However, Sunstein too hastily equates ideology, outcomes, and reasons. To a large extent, Sunstein's view of ideology is party political, rather than perspectival. He identifies the judge's political ideology as adequately expressed by that of the appointing president, characterized as liberal or conservative.<sup>239</sup> But such a broad characterization ignores the culture of the legal profession, in which a perspectival account of judicial ideology could provide a way of thinking about adjudication otherwise than as the acts of mere political functionaries. What Sunstein misses, then, is the reason-production aspect of professional opinions, and the manner in which the profession allows for the expression of a range of complex understandings of the law.

Consider once more the medical example. Though the appointment of doctors can be quite political (though not predominantly party political), we do not normally think of the doctor as a mere political functionary, following the ideology of particular departments. Rather, an individual doctor's medical decisions are rarely ideological in that crude sense, but instead differ in ways that are connected to kinds of doctors that they are. A physiotherapist and a surgeon may have a different set of responses when confronted with the same set of symptoms. And doctors may disagree over whether conservative or invasive treatment options are warranted.

In that case, in medicine and in the law, we may want a plurality of practitioners advancing a plurality of perspectives—temperamental, stylistic, educational—though that may make the range of opinions more volatile and more

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233. SUNSTEIN, POLITICAL, *supra* note 232, at 9.

234. *Id.* at 14.

235. *Id.* at 338; *see also* Sunstein, *Deliberating*, *supra* note 232, at 317.

236. SUNSTEIN, POLITICAL, *supra* note 232, at 338; Sunstein, *Deliberating*, *supra* note 232, at 317.

237. SUNSTEIN, POLITICAL, *supra* note 232, at 341-42; Sunstein, *Deliberating*, *supra* note 232, at 317.

238. *See* SUNSTEIN, POLITICAL, *supra* note 232, at 10, 148.

239. *Id.*



fertile. Furthermore, mutual engagement between these different opinions may generate temporary alliances that release different problem and solutions into professional discussion, freeing up topics for debate. In that case, the public good of the law, of medicine, or even of zoo keeping needs to feed of an interplay of different strands of reasons. And this is a justification, *pro tanto*, for wanting less than decisiveness among categorical reasons.

In the face of plural styles, values, reasons, and so on, dogmatism risks overlooking or misrepresenting the range and nature of our reasons for decision.<sup>240</sup> Liberal professionalism, on the other hand, respects the diversity of perspectives or practice-styles rationally eligible for adoption by professionals. It counsels inclusiveness as essential to accurately assessing the nature and weight of all the reasons that apply. That is particularly the case if, as Bohman suggests,<sup>241</sup> perspectives shape what reasons people find compelling.

Dogmatism among professionals over styles of practice risks discounting the rational force of competing perspectives of practice styles. The permissive approach to liberal professionalism requires professionals to acknowledge that others who adopt conflicting perspectives may *also* be justified in recommending different options, or adopting different practice styles and points of view.<sup>242</sup> Including the full panoply of diverse perspectives allows a decision-maker to recognize the range of competing eligible undefeated reasons, to respect other options as permissively justified and so rationally eligible for selection, and (when appropriate) to defer to others' choice among permissibly justified options.<sup>243</sup>

The danger of dogmatism lies in promoting an authoritarian and narrow view of professional decision-making.<sup>244</sup> In terms of the doctor-patient relationship, Lucy's version of the doctor-patient relationship presents too judicial a view of doctors. It enshrines the professional's point of view over the client's, and sponsors a fruitless search for decisive justifications even when the world is indecisive. Permissive justification, by contrast, permits different professionals' discrete practice styles or perspectives to tame each other's excesses and check each others' views.<sup>245</sup>

Liberal professionalism thus makes the case for permissive justification. Permissive justification is inclusive, ensuring that all the reasons, values, and

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240. See, e.g., FINNIS, COLLECTED ESSAYS, *supra* note 51, at 252 (discounting that dogmatism is credible).

241. Bohman, *supra* note 230, at 171-91.

242. See Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 780 (1989).

243. See, e.g., *id.*; Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 8-22 (2007); Hélène Landemore, *Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives*, 190 SYNTHÈSE 1209, 1209-31 (2012).

244. See, e.g., FINNIS, COLLECTED ESSAYS, *supra* note 51, at 252 (rejecting dogmatism as credible).

245. See generally Sunstein, *Deliberating*, *supra* note 232.

perspectives that ought to count *do* figure in decision-making.<sup>246</sup> Not only do they count, but they are properly weighted—as undefeated, incommensurable, incomparable, and so on—rather than being squeezed into some single scale of value. Finally, the spreading of responsibility for decisions and deference to the full range of available justifications promotes an egalitarian understanding of professionalism, one that allows professional and client to look the other in the eye in a non-authoritarian manner.

### *B. Law as a Liberal Profession*

Like the practice of medicine, the practice of law, for the most part, adheres to the values of liberal professionalism. If one thinks of law as a facilitative<sup>247</sup> or as a problem-solving profession, then lawyers operate as liberal professionals in much the same way as I have described a general practitioner in medicine. That is, the lawyer is more or less often in the position of having to explain to a client the range of different incommensurable or incomparable options. The various members of the bar adopt different perspectives and practice styles. Lawyers are expected to suggest that the client shop around to find someone else who will defer to the client's wishes or adopt a suitable practice style if this lawyer will not. In this way, clients may find the sort of representation that they find most congenial, both for themselves and for their problems, and so participate in decision-making in an egalitarian and inclusive manner.

While accepting that law, at this level, is a liberal profession, at a more fundamental level, we might think that the law is dogmatically authoritarian. While the majority of legal practice may occur in the lawyer's office, the courtroom and the judge's chambers deservedly occupy an outsized place in legal theory. Courts are the definitive institutions of the legal system.<sup>248</sup> The liberal legal practice of solicitors and advocates is derivative of the adjudicative practice of the courts. Plausibly, even if at the level of legal practice law is a liberal profession, at the level of litigation and of judicial decision-making the law is a zero sum game. On that view, judges must announce decisive reasons when deciding against a party. In adjudication, so the claim goes, for every winner there must be a loser, and the judgment of the court must speak to both.<sup>249</sup>

At the level of judicial decision, the sorts of stylistic reasons that are good enough in the non-legal sphere or at the level of the solicitor are not good enough for the judge. The attorney can tell the client, "I think the law grants a right here, but others do not," or "You might win here, but then again, you might not", and so on. Lawyers may adopt particular practice styles, so that they may permissibly say, "My goal is to avoid going to trial and negotiate on your behalf for the best solution, whereas another firm will seek to try the case and adopt a highly adversarial style of practice." These modes of candor about practice do not

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246. See generally Raz, *supra* note 242.

247. HART, *supra* note 127.

248. RAZ, PRACTICAL REASON, *supra* note 38, at 159.

249. See Dworkin, *No Right Answer*, *supra* note 1, at 2.

appear to be available to the judge.

Were the judge to say: “I’m plumping for this result because I am a strict constructionist, but a living constitutionalist could permissibly decide a different way,” one would think she has failed to articulate the right sort of reason for her decision.<sup>250</sup> Because the judge *is* an authority with (on occasion) normative power over the parties, we want categorical reasons that apply to the parties as well, not judge-dependent reasons that apply only to her.<sup>251</sup> What we want, following Dworkin (and Finnis, Endicott—and Raz<sup>252</sup>) is the judge to say that strict constructionism *is the best justification of her decision*, not simply the judge’s preferred practice style.

In most contemporary legal systems, when judges decide cases they must do more than provide reasons of the sort that would justify a private commitment to some personal project (following Raz, we can call these private reasons “prudential” reasons for decision).<sup>253</sup> Instead, Raz thinks, the judge must provide impersonal reasons for her decision that apply, not only to the judge, but also to the parties affected by it.<sup>254</sup> Impersonal reasons permit agents to make claims on one another,<sup>255</sup> by asserting that the agent has some reason to do the act mandated by the decision-maker. What the argument so far establishes is that not any reason will do. The judge, if she is to satisfy the institutional demands of legal justification, must avoid relying on reasons of practice style if she is to adequately justify her decision. One straightforward way of providing style-independent reasons is to find some reason for decision that is both impersonal *and* decisive.

Here, the worry is that permissive justification turns impersonal reasons into prudential ones. As Raz suggests, prudential reasons cannot provide a reason for others. His rather quaint example involves the purchase of sweets:

That it may be to my advantage if I refrain from having sweets is a reason for accepting that I ought not to buy them. But that it is to my advantage that you refrain from buying sweets is not a reason for me or anyone else for accepting that you ought not to buy them (unless you ought to promote my interest).<sup>256</sup>

If judges could advance only prudential reasons for others to obey the law, then it follows that the parties may reject the law as the enforced imposition of another’s will. Prudential reasons thus undermine a central “function” of law,

250. Raz, *Hart*, *supra* note 109, at 130.

251. *Id.*

252. Joseph Raz, *Legal Principles and the Limits of Law*, YALE L.J. 823, 823-54 (1972).

253. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 154-55 (1979) [hereinafter RAZ, *AUTHORITY*]; Robert Brandom, *What Do Preferences Express?*, in *PRACTICAL RATIONALITY AND PREFERENCE* 11-12 (Christopher W Morris & Arthur Ripstein eds., 2007); Raz, *Hart*, *supra* note 109, at 130.

254. RAZ, *AUTHORITY*, *supra* note 253, at 154-55; Raz, *Hart*, *supra* note 109, at 130.

255. *See, e.g.*, CHRISTINE M KORSGAARD, *THE SOURCES OF NORMATIVITY* 8 (1996); Brandom, *supra* note 253, at 11-12.

256. Raz, *Hart*, *supra* note 109, at 130.

which is to provide compelling reasons for people to do what they judge is not in their interest.<sup>257</sup> If the judge is to provide some reason that can bind the parties, then (so it appears) what is required here is not only an impersonal reason for action that agent *A* could use to demand that agent *B* act,<sup>258</sup> but also one that is decisive.

The problem of prudential justification is raised in its most pointed form by the Critical Legal Studies movement.<sup>259</sup> Frederick Schauer neatly summarizes a powerful version of that position:

[T]he Critical Legal Studies perspective is usefully understood not as the often caricatured claim that “law is politics,” but rather as the broader but nevertheless more plausible claim that “law is almost everything.” . . . [From that perspective, judges] typically have goals—vocations, to put it more grandly—that are describable independently of legal norms, that are more salient for them than legal norms, and that are more important to them than the enforcement of legal norms.<sup>260</sup>

I have suggested that agents often have project-oriented goals or values, and that these can operate to tip reasons so that, where reasons are finely balanced, one or other justifications become decisive. The Critical Legal Studies point, as interpreted by Schauer, is that these goals are prudential ones, and so do not bind the parties.<sup>261</sup> Imposing such goals upon the parties, without providing an opportunity to shop around and without adhering to the duty of candor, would be arbitrary. Dworkin’s turn to decisive justification attempts to eliminate *these* types of goal, at least, from counting.<sup>262</sup>

Dworkin’s one-right-answer thesis, like Lucy’s high-stakes, high-standards claim, argued that litigants may properly demand impersonal, decisive, and so judge-independent reasons for decision in the context of legal adjudication.<sup>263</sup> In Lucy’s terms, the decision is sufficiently high-stakes that judicial justification must somehow live up to higher, decisive, standards than those applicable to the doctor, accountant, or zoo-keeper’s forms of liberal professional justification.<sup>264</sup> The central claim, characteristic of the decisive model of decisive justification, is that judges are not allowed the normative space afforded to other liberal

257. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 344 (1994) (“[T]he law’s direct function is to motivate those who fail to be sufficiently moved by sound moral considerations. . . . The law is . . . for those who deny their moral duties. It forces them to act as they should by threatening sanctions if they fail to do so.”).

258. Because agent *A* believes there is a reason, independent of *A* and *B*’s self interest, for agent *B* to act.

259. See, e.g., Frederick Schauer, *The Limited Domain of the Law*, VA. L. REV. 1909, 1925 (2004).

260. *Id.*

261. *Id.*

262. See generally Dworkin, *No Right Answer*, *supra* note 1

263. *Id.* at 2.

264. Lucy, *supra* note 19, at 245.

professionals. Accordingly, judges either cannot rely on perspectival or stylistic reasons, or they have to lie about their reasons when presiding over zero sum conflicts. Where there are losers, we might think, judges have to *look* mechanistic: that is what the judicial, adjudicatory form of justification seems to demand. They must become more mechanistic and authoritarian decision-makers than they were before they went to the bench. That simply is what it means to assume the role of the judge.

But is this so? Take an example pulled from a criminal law casebook.<sup>265</sup> In *People v. Rideout*,<sup>266</sup> the defendant, a drunk driver, stopped in the middle of the road, caused a car crash in which the eventual victim, Keiser, and the car-driver, Reichelt, initially exited their vehicle unharmed.<sup>267</sup> Keiser, worried that Reichelt's car now posed a traffic danger, re-entered the road to turn on the car's hazard lights.<sup>268</sup> A third driver, Welch, did not see the car or Keiser, and collided with both, killing Keiser.<sup>269</sup> The question presented to the court was whether Rideout caused Keiser's death.<sup>270</sup>

The court determined that three causation tests applied—the response/coincidence test; the apparent safety doctrine; and the voluntary human intervention doctrine.<sup>271</sup> The first would render Rideout criminally liable; the other two would identify Keiser's autonomous act of leaving a place of safety and reentering the roadway as a supervening cause, and so let Rideout off the hook.<sup>272</sup> The court acknowledges that under the response/coincidence test, in which the question is whether it is reasonably foreseeable that Keiser would seek to render the car safe for other traffic, Keiser's actions are foreseeable, as are Welch's, and so Rideout would be a proximate legal cause of Keiser's death.<sup>273</sup> However, the court prefers the other two doctrines. Here is what the court says:

Whether the intervening cause is responsive or coincidental in the case at bar is arguable at best. . . . In our view, Keiser's decision to reenter the roadway renders the foreseeability factor of little value to the analysis. Rather, that decision directly involves the two remaining factors identified by Dressler that are present here. Those two factors, we believe, compel the conclusion that the intervening cause of the second accident was also a superseding cause.<sup>274</sup>

The court's decision is hardly a compelling rejection of the state's argument.

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265. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (5th ed. 2006).

266. 727 N.W.2d 630 (Mich. App. 2006), *judgment rev'd in part* 728 N.W.2d 459 (Mich. 2007).

267. *Id.* at 632.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 634-35.

272. *Id.* at 635.

273. *Id.* at 634-35.

274. *Id.* at 635.

It acknowledges that the state's argument competes for selection along with the defendant's, even though the court attempts to minimize the force of that argument. But a fair reading of the causation tests and of the decision suggests that things are not so clear-cut as the court attempts to suggest. Indeed, the *Michigan Supreme Court reversed the Rideout decision on appeal*.<sup>275</sup> In *Rideout*, then, the court appears just to acquit the defendant, not based on some decisive reason, but on based upon an indecisive policy decision about where to cut chain of causation.<sup>276</sup>

Or consider *Morrison v. Thaelke*,<sup>277</sup> a case of first impression concerning formation of contract.<sup>278</sup> The problem addressed by the court in *Morrison* is that, under the general rules of contract formation, an offer may be revoked at any time before its acceptance is communicated to the offeror, but not after acceptance.<sup>279</sup> Communication may, however, be a temporally extended process, and where there is a lapse of time between the sending of a revocation and its receipt, the offeree may accept the offer. That is in fact what happened in *Morrison*.

*Morrison* mailed Thaelke an offer for the sale of property; Thaelke, on receipt of the offer, sent his acceptance of the contract back through the mail to Morrison.<sup>280</sup> After mailing the acceptance, but prior to Morrison's receipt thereof, Thaelke attempted to withdraw his acceptance of the offer.<sup>281</sup> The question is whether the acceptance had legal effect once it had been deposited in the post or only upon receipt.<sup>282</sup> The judge faced a clear conflict between two legally supported choices, neither of which was decisive.<sup>283</sup>

In *Morrison*, there were two conflicting rules, each of which provides persuasive legal authority for the alternative choices.<sup>284</sup> The "deposited acceptance" rule stipulates that depositing the letter in the post signifies acceptance; the "acceptance on receipt" rule conceives of the post as the agent of the sender, and delays acceptance until it is received by the offeror.<sup>285</sup> Whichever rule was selected would fill a gap in the revocation-of-contract doctrine.<sup>286</sup>

There was, however, no decisive legal answer.<sup>287</sup> The judge acknowledged

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275. *People v. Rideout* 728 N.W.2d 459 (Mich. 2007).

276. *Rideout*, 727 N.W.2d at 635.

277. *Morrison v. Thaelke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963).

278. *Id.* at 891.

279. *See, e.g.*, CAL. CIV. CODE § 1586 (West 2007) ("A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.").

280. *Morrison*, 155 So. 2d at 890.

281. *Id.*

282. *Id.* at 891.

283. *Id.* at 891, 905.

284. *See generally id.* (discussing the merits and supporting progeny of two conflicting rules: the rule that a contract is created when acceptance is received through the mail, and the rule that a contracts exists only when the offeree mails acceptance).

285. *Id.* at 891, 897-98.

286. *Id.* at 891-94.

287. *See generally id.* at 891-95 (explaining the valid reasons and support for the "acceptance

that he faced a case of first impression<sup>288</sup> and that other courts were split on the issue, as was the relevant academic literature.<sup>289</sup> Here, the jurisdiction had no authoritative reasons guiding the court, and there was no tie-breaking reason to settle which should win out.<sup>290</sup> Faced with such a gap, the judge provided somewhat fuzzy reasons for picking one option over the other. As the court put it:

[B]oth advocates and critics muster persuasive argument. As [an influential treatise] indicated, there must be a choice made, and such choice may, by the nature of things, seem unjust in some cases. Weighing the arguments with reference not to specific cases but toward a rule of general application and recognizing the general and traditional acceptance of the rule as well as the modern changes in effective long-distance communication, it would seem that the balance tips, whether heavily or near imperceptively, to continued adherence to the [deposited acceptance rule]. This rule, although not entirely compatible with ordered, consistent and sometime artificial principles of contract advanced by some theorists, is, in our view, in accord with the practical considerations and essential concepts of contract law.<sup>291</sup>

The *Morrison* decision is at best a tepid recognition of the demands<sup>292</sup> for decisive justification that legal authority raises.

### C. *Decisive Formalism and Indecisive Merits*

The law, because it presents high-stakes scenarios, may make lawyers, the parties, and the public especially willing to tolerate content-independent justifications that do not deal with merits of the legal problem.<sup>293</sup> Accordingly, a variety of burdens, presumptions or closure rules may operate to produce decisiveness where the underlying merits of the case do not.<sup>294</sup> In such cases, judges may be encouraged to swing from content-independent and formalistic decisiveness to the permissive merits and back again, as the process of justification permits.<sup>295</sup>

For example, the presumption of innocence operates in a criminal case, along with the burden of proof beyond a reasonable doubt, to set high evidentiary

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on receipt” and “deposited acceptance” rules).

288. *Id.* at 891.

289. *Id.* at 892.

290. *Id.* at 891-92.

291. *Id.* at 904.

292. Whether normative or merely psychological.

293. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 340 (1995).

294. *Id.*

295. *Id.*

standards that the state must meet if it is to convict an accused of a crime.<sup>296</sup> In another case taken from the criminal law casebook,<sup>297</sup> *State v. Rose*,<sup>298</sup> a driver non-negligently drove through an intersection, hitting and killing a pedestrian.<sup>299</sup> Rose continued over 600 feet before stopping, and then fled the scene.<sup>300</sup> The evidence was in equipoise: it was equally (or roughly equally) likely that the victim died on impact, as it was that he died some time after impact (as a result of being dragged down the street under the car's wheels).<sup>301</sup> If the former, the criminal act of killing occurred before Rose had formed any criminally culpable mental state, and so there was no concurrence of the elements of the crime of homicide.<sup>302</sup> If the latter, Rose would have had both the request mental state and have engaged in the requisite act at the time the victim died.<sup>303</sup>

In this case, though the reasons for conviction and acquittal were in equipoise, the court acquitted.<sup>304</sup> It did so because the standard of proof in criminal cases—the beyond-a-reasonable-doubt standard—operated to determine that roughly equal reasons were not enough for conviction.<sup>305</sup> Instead, some substantial certainty is required.<sup>306</sup> Here, a content-independent and formalist closure rule operated instead of the merits to determine what happened when the available options were in rational equipoise.

Perhaps the broadest default rule is one that states that “everything that is not clearly prohibited, is permitted.”<sup>307</sup> Such a rule, Michael Moore, suggests, is embodied in the “principle of legality backed by its substantive presumptions in favor of liberty and its procedural concern that a would-be criminal have the opportunity to know that the action he contemplates is prohibited.”<sup>308</sup>

For example, in the California criminal case, *Keeler v. Superior Court*,<sup>309</sup> an estranged husband killed his wife's unborn while assaulting her.<sup>310</sup> The court held that the defendant could not be convicted of homicide, because the unborn child did not fit the statutory definition of a human being, which was an attendant circumstance of the crime.<sup>311</sup> The principle of legality, so the court held, required

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296. *In re Winship*, 397 U.S. 358, 359-63 (1970).

297. DRESSLER, *supra* note 265.

298. 311 A.2d 281 (R.I. 1973).

299. *Id.* at 282-83.

300. *Id.*

301. *Id.* at 284-85.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. RAZ, ENGAGING REASON, *supra* note 9; see also Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2465 (1992).

308. *Id.*

309. 470 P.2d 617 (Cal. 1970).

310. *Id.* at 618.

311. *Id.* at 632-34.



it to eschew broadening the definition of human being, even though the substantive moral merits might demand it, because those reasons conflicted with reasons of fair notice, liberty rights, and the powers of courts to interpret criminal statutes under California law.<sup>312</sup>

The problem for the court where the available legal rules are indecisive is that no single right answer determines the outcome of the case.<sup>313</sup> Indecision presents a problem for a judge who would simply balance the rules or rely on some formalistic type of reasoning that “screens off” consideration of extra-legal reasons and instead requires the judge to rely upon the extant legal rules.<sup>314</sup>

Joseph Raz, for one, has endorsed these formalistic and content-independent reasons of legal doctrine as a means of settling otherwise indecisive cases.<sup>315</sup> The problem, he recognizes, is that by choosing which, among the indecisive reasons, will operate to explain and so justify action, courts act on their own rather than the parties’ reasons for action.<sup>316</sup> Raz thinks that formalism provides better grounds for decision, because it affords some institutional, shared, and predictable standard of decision, while arbitrary decisions risk being sufficiently random to undermine this feature of law.<sup>317</sup> Raz appears to believe that, in such circumstances, if the judge cannot be decisive, she might at least be orderly.<sup>318</sup> Rather than rely on the indecisive merits, Raz suggests, that judges ought to turn back to the law to seek some form of determinate outcome.<sup>319</sup> Doctrinal or formalist legal values, he believes, provide the only proper source of decisive reasons upon which to base institutional choice.

A slightly different option is to acknowledge that what Raz elsewhere calls “pragmatic conflict” in the law<sup>320</sup> which operates as a source of liberal legal adjudication. Whatever the larger consequences of pragmatic conflict in undermining the legal values of predictability and stability,<sup>321</sup> there is an

312. In *Keeler*, the substantive moral merits of the case conflicted with reasons of fair notice and the powers of courts (as opposed to legislatures) to interpret criminal statutes under California law. See generally *id.*, see also CAL. PENAL CODE §§ 4-6.

313. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 531 (1988).

314. See, e.g., *id.* at 510 (1988) (“Formalism is the way in which rules achieve their “ruleness” . . . by . . . screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”).

315. See RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* note 293, at 195.

316. See *id.* at 201.

317. See *id.* at 312 (discussing the conflict of choosing the “best” choice over one that adheres to precedent).

318. *Id.* at 313 (explaining the importance of adhering to a choice once it is made).

319. “Doctrinal reasons, reasons of system, local simplicity and local coherence, should always give way to moral considerations when they conflict with them. But [the doctrinal reasons] have a role to play when natural reason runs out.” *Id.* at 335. That role is to take the place of personal predilection and to provide an institutional reason for decision when both legal and moral reasons are incommensurable.

320. See *id.* at 201.

321. See *id.*

additional problem for justification that is relatively little noticed in discussions of adjudication. This is the problem of explaining or justifying permissibly indecisive decisions. While it is generally accepted that judges must decide cases, different legal systems, courts, and judges may adopt different standards of explanation. Although a detailed discussion of this phenomenon goes beyond the scope of my argument, it is worth at least indicating the importance of investigating this phenomenon contours that such an investigation might take.

#### *D. Institutional Structure and Judicial Reason-Giving*

It may be that where judges are normatively permitted to select among competing outcomes, they face a choice among styles of legal rationalization. Some may opt for a more dogmatic and doctrinal style at the expense of candor. Others may opt for a fuzzier style, one that expresses rational equipoise, but perhaps at the cost of clarity. Not only judges, but also whole courts may adopt different styles of justification. Some courts may encourage plural opinions, leaving themselves on later occasions (and the lawyers and the parties) to pick and choose among the competing justifications. Others may insist upon unified majority opinions, so that the reasons supporting the judgment are clearly expressed. Each style may render concurring and dissenting opinions more or less important.

There may be a host of other ways in which to structure the production of legal opinions and the ways in which the profession and the parties use them to deal with permissive justification in the face of rational indecision. And each institutional arrangement may have different costs and benefits for the status of adjudication as authoritarian and dogmatic or as a form of liberal professionalism. Most important of all, perhaps, is the ability of all the reasons, values, and perspectives that apply to a given legal problem to find their home in the law and their proper acknowledgment or weighting.

I have already suggested that, in the American context, an emphasis on principled decision-making has repeatedly led to demands that the standard for settling points of law is that of decisive justification.<sup>322</sup> From Herbert Wechsler to Ronald Dworkin, a repeated refrain has been that the resolution of legal arguments, not merely the outcome of legal cases, must turn on decisive justifications.<sup>323</sup>

At the opposite end of the scale, is what Oliver Wendell Holmes called the judge's "instinctive preferences and inarticulate convictions."<sup>324</sup> It appears, the outcome of the case is up to the judge: She can decide whichever way she wishes. Not only does reason fail to require a particular outcome, but the judge cannot choose between the options on the basis of reason at all. The available reasons are indecisive as to which to choose. All that is left is her rationally

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322. DUXBURY, *supra* note 57 (citing Fuller, *Reason*, *supra* note 42).

323. Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1298-99 (2008).

324. OLIVER WENDELL HOLMES, *THE COMMON LAW* 35-36 (2009).

arbitrary taste or inclination.<sup>325</sup>

Somewhere in-between, perhaps, is a recognition of various institutional substitutes for judicial ‘second opinions.’ One is the possibility of appeal, which is sometimes a matter of right, and sometimes so structured as to depend upon there being some significant issue in dispute.<sup>326</sup> In this way, two or three courts can have a look at the issue and determine the outcome.<sup>327</sup> A second is the practice of certain trial courts to deny a defendant’s motion for summary judgment where the issues are indecisive, and instead permit the case to go to trial, with the proviso that the court will reconsider the issues at a later point if the plaintiff fails to develop specific facts.<sup>328</sup> Motions to dismiss at the end of the moving party’s case based on insufficiency of the evidence may serve the same function.<sup>329</sup> All of these types of second opinion or reconsideration provide institutional opportunities for a second-opinion or second look, and may speak to equivocation about the underlying issues.

Standard descriptions of indecisive decision identify a familiar range of psychological sources for the resulting judicial choice. These include the “judicial hunch” (or what the judge had for breakfast) as well as political ideology, whether conscious or not.<sup>330</sup> Whatever the psychological basis for the resulting decision, having picked a particular option, the judge can only try to render her decision acceptable post hoc by operation of the “characteristic judicial virtues . . . impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle.”<sup>331</sup> None of these virtues are decisive; rather, they express the values of liberal legal adjudication.

If these are the only two options—decisive reasons or whimsy—then decisive reasons are necessary to avoid capricious decision-making. But the range of adjudicatory postures is not binary in this manner, and what is often called judicial will is not exhausted by judicial caprice. Choices may be supported by

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325. See SMART & WILLIAMS, *supra* note 82, at 100.

326. See, e.g., *Ross v. Moffit*, 417 U.S. 600, 610-14 (1974).

327. See *id.*

328. See FED. R. CIV. P. 56.

329. See FED. R. CIV. P. 12(b)(6).

330. See, e.g., JEROME FRANK ET AL., *LAW AND THE MODERN MIND* 108 (1930) (“The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it.”); Joseph Hutcheson, Jr., *Judgment Intuitive The Function of the Hunch in Judicial Decision*, 14 *CORNELL L. Q.* 274, 287 (1928) (“This hunch . . . takes the judge vigorously on to his decision; and yet, the cause decided, the way thither, which was for the blinding moment a blazing trail, becomes wholly lost to view.”); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 *A.B.A. J.* 357, 358-59 (1925) (illustrating how judges struggle to frame the issue that sits before them and therefore must they must ‘select the [framing] that seems to them to lead to a desirable result’).

331. See HART, *supra* note 127, at 205.

reasons, albeit indecisive ones. Where reasons are permissively justified, each reason fully justifies some option (in the sense of providing all the reason needed to render the option a rationally adequate candidate for choice), but no reason uniquely justifies the option. In that case, a choice of one among the options can be defended for reasons, rather than as no more than an instinctive preference or inarticulate conviction.

Necessity may, however, be only one available posture to judges who may also be able to promote plural outcomes, or default from the merits to formalism, or provide weak support for picking a particular outcome. And these diverse explanatory modes of judicial justification may in turn be related to the institutional structure of judicial decisions, in which multi-judge courts publish multiple, divided opinions authored by each judge on the court, “allowing the next generation to pick what they like”,<sup>332</sup> or single majority and dissenting opinions, requiring the court to speak with one voice. These are the problems of the conflict between permissive pluralism and dogmatic authority that are a perennial feature of liberal legal systems.

The claim that law as a liberal profession containing diverse judicial styles, though important, does not answer the impulse animating the demand for decisive justification in high-stakes circumstances (such as legal adjudication). In private life, it may be acceptable to just do what we like and rely upon our personal intuitions. In public life, and especially in the life of a public official, such reasons may be unacceptable if forced upon others.

The worry is, not that we lack reasons, but that we lack sufficiently neutral ones. Decisive justification is not the answer. It, like permissive justification, is powerless to address that worry. Decisive justification provides a reason that comprehensively defeats competing reasons. It does not provide a reason that is independent of the personal interests of the agent or decision-maker. The sorts of reason that may prove decisive may thus prove decisive *for me* even if not for you, or for others.

The problem of impersonal justification is certainly presented in starker terms by permissive justification than decisive justification. The eligibility model of practical conflict, in which undefeated reasons are sufficient to justify some action or outcome, invites the impersonal question when there is pressure to select one among the eligible options. However, while decisive justification may repress the problem of personal justification, it does not solve it, for the sorts of tipping reason prove decisive may indeed be personal ones.

Furthermore, the demand for impersonal justification itself invites a variety of different responses. Is the sort of reason we seek one that is universalizable across agents or circumstances, or one that, though not universalizable, is morally well grounded? In the legal context, we might demand that the agent’s reasons be institutional ones, not moral ones. In that case, agents cannot turn outside the law to find decisive justifications, but must make do with the law as they find it, gaps and all. All this is a matter of some controversy.

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332. WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 31 (2007) (quoting Lord Reid in ALAN PATERSON, *LAW LORDS* 185 (1982)).

The idea that universalization can quiet the worries associated with permissive justification is a strong theme in Sir Neil MacCormick's jurisprudence.<sup>333</sup> Universalization provides a distinctive form of rationalization adequate to the justificatory gap left by permissive justification. It does not require the judge to draw upon the reasons she already has, but instead allows the judge to put new reasons into currency, albeit reasons that apply to everyone, and are so neutral in that sense. Universalization respects the fact that the judge is leaving legal reasons for posterity, and so that she is choosing not only for herself, but for others as well.

What permissive justification *does* suggest is that, on occasion, reason is gappy, and that rational gaps need not indicate a rational failure. I have suggested that, in addition, we have a range of procedures to help us deal with those gaps, even if, on occasion, these procedures prove unsuccessful. Some of the procedures invite participation in, and so ownership of, the decision process. Others turn to tie-breaking rules to solve the need for some decisive reason. In any event, the presence of indecisive reasons does not indicate that the sort of permissive justification that goes along with them is somehow substandard, or does not live up to the demands of rational justification.

#### CONCLUSION

We began by examining the decisive justification as a means of explaining Dworkin's demand for bivalent justifications: justifications that not only provide a reason why the winner won, but also why the loser lost.<sup>334</sup> Dworkin's demand for decisive justification and one right answer<sup>335</sup> is important precisely because it brought to the forefront something lurking in discussions about the responsibility of judges: the idea that justification requires consoling the losers at each point in argument, whichever way it goes, so that the reason that is dispositive for one party must be dispositive for the other.<sup>335</sup>

While others in the legal profession may have the liberty to take different perspectives on the practice of law, judges engaged in the practice of adjudication are much more narrowly constrained. Dworkin has given names to such objections: the "one right answer" thesis<sup>336</sup> is a very definite way of formulating thought that judges are not like other professionals and, given their responsibility to winners and losers, must be categorically decisive with reasons independent of judicial temperament.

Permissive justification challenges the decisive justification. It suggests that there is room within the practice of law for different perspectives and styles, not only of lawyering, but of adjudication too. The extent to which concrete legal systems incorporate diverse perspectives and practices, may render some aspects of legal decision-making unpredictable on a day-to-day basis, nonetheless

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333. *See generally* NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1994).

334. *See supra* Part I.

335. Dworkin, *No Right Answer*, *supra* note 1, at 2.

336. *Id.*

creating opportunities for legal agents, including judges, to generate reasons as a feature of a capacious, liberal legal system.

What distinguishes judicial decision-making from its lay equivalents is that the judge is, in virtue of her role, peculiarly required to explain how her reasons for decision apply, not only to herself, but also to everyone else. The judge thus has a special duty to provide universal, if not unique, reasons for decision. This Article has all-too-briefly sketched one way in which universalization can make you honor my commitments. Universalization respects the fact that, in committing herself to a particular course of action, the judge is committing the rest of us to that project as well. In doing so, the judge claims, the rest of us cannot refuse to acknowledge her commitments as ones we too have reason to pursue, even if (aside from the judge's decision) we would have chosen to prioritize other eligible options.

# A VIEW FROM WITHIN THE FORTUNE 500: AN EMPIRICAL STUDY OF NEGATIVE VALUE CLASS ACTIONS AND DETERRENCE

LINDA SANDSTROM SIMARD\*

## INTRODUCTION

The American civil justice system relies heavily on private enforcement to deter and redress corporate wrongdoing. Theoretically, civil litigation deters wrongful conduct by threatening liability for harm caused by such conduct. Under this theory, the threat of liability increases the potential cost of the conduct and induces corporations to invest in precautions to avoid harm. When deterrence fails, the imposition of liability redresses the harm by compensating the victim. This private enforcement regulatory model collapses, however, when litigation is not economically viable. Specifically, when the cost of pursuing litigation exceeds the expected recovery, there is no incentive to file suit, leading to no threat of liability to deter wrongful conduct, and no compensation for victims. Thus, when a manufacturer sells a million gas grills by falsely advertising that they are “Made in U.S.A.” when in fact some of the parts are imported,<sup>1</sup> or when an insurance company wrongfully rounds premiums up to the nearest whole dollar on hundreds of thousands of policies,<sup>2</sup> or when a financial management company fraudulently induces stockholders to hold onto over-valued stock by misstating corporate earnings,<sup>3</sup> there is no incentive for an individual to file suit because the cost of litigation exceeds the expected recovery. While these injuries are admittedly quite small to each individual, turning a blind eye suggests to corporations that it is acceptable to engage in wrongful conduct that nickels and dimes the masses.

In 1966, the Civil Rules Advisory Committee amended the federal class action rule to address “the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”<sup>4</sup>

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1. Knight Kiplinger, *Class-Action Lawsuit or Shakedown?*, KIPLINGER’S PERSONAL FINANCE, Sept. 2012, at 15. Also available at: <http://www.kiplinger.com/article/business/T008-C013-S001-class-action-lawsuit-or-shakedown.html>, archived at <http://perma.cc/WJ4C-SMFV>.

2. *Allstate Ins. Co. v. Martinez*, No. 04-96-00597-CV, 1997 WL 269067 (Tex. Ct. App. 4th Dist. May 21, 1997); *Texas Farmers Ins. Co. v. Sendejo*, No. 04-96-00598-CV, 1997 WL 249447 (Tex. Ct. App. 4th Dist. May 14, 1997).

3. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 76 (2006).

4. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (discussing the policy underlying negative value class actions).

The modern rule paved the way for so-called negative value class actions.<sup>5</sup> By aggregating groups of small value claims together, the cost of litigation is shared by a class of similarly situated claimants, thus making litigation more feasible for claims that would otherwise never see the light of a courtroom.

Although the negative value class action arrived on the scene nearly half a century ago, questions about its social utility remain controversial to this day. John Frank, a member of the Civil Rules Advisory Committee that drafted the amended rule, framed the controversy aptly when he said:

For all our effort, we do not know whether this is a good or a bad thing. The great big question is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system.<sup>6</sup>

The answer to the so-called “great big question” depends on whether negative value class actions are an effective deterrent of wrongful conduct. If they are, the costs associated with litigating a few rare instances of undeterred harm are outweighed by the overwhelming benefits of deterrence. If they are not, the costs associated with litigating a large and recurring number of negative value class actions outweigh the small compensatory benefits conferred on individuals.

This Article offers the first comprehensive analysis of the deterrent effect of negative value class action litigation from the perspective of large, publicly traded companies. Part I discusses the theory of deterrence. Part II analyzes previous empirical studies of deterrence in a variety of legal and factual contexts. While these studies inform our understanding of the deterrence theory generally, they reach conflicting conclusions regarding the efficacy of litigation as a deterrent, and they leave a number of important questions unanswered. Part III then describes the study that is the subject of this Article. The study presents new evidence from corporate counsels of Fortune 500 companies regarding historical experience with negative value class action litigation.

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5. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 n.1 (5th Cir. 2004) (“A ‘negative value’ suit is one in which class members’ claims would be uneconomical to litigate individually”); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 904-06 (1987) (identifying three types of class actions: Type A class actions comprised of marketable claims; Type B class actions comprised of nonmarketable claims; and Type C class actions comprised of both marketable and nonmarketable claims). See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2044 (2010) (using the phrase “small stakes” class action to refer to a class action where the cost to litigate exceeds the expected recovery); Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 793 (2007) (noting that the phrases “small value” and “negative value” are interchangeable).

6. John P. Frank, Whither Rule 23: Memorandum to the Honorable Patrick E. Higginbotham (Apr. 28, 1995) (on file with the Advisory Committee); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 401 (2000) (Rand Institute for Civil Justice 2000).



## I. THE THEORY OF DETERRENCE

The deterrence theory relies on a simple but largely untested assumption that the threat of civil liability induces actors to avoid wrongful conduct by increasing the cost associated with that conduct.<sup>7</sup> This assumption flows from the following syllogism: (1) people are rational actors who choose their actions out of self-interest; (2) self-interest is economic and cost-benefit driven; and (3) the imposition of liability for harm caused by one's conduct motivates actors to avoid inefficient injuries.<sup>8</sup> Specifically, by threatening an actor with liability for harm caused by wrongful conduct, an actor has an incentive to invest in precautions up to the equilibrium point where an extra dollar of precaution equals the additional risk avoided.<sup>9</sup> The following formula represents the theoretical deterrent value derived from a threat of litigation:

$$EL * p + EC \geq I$$

EL represents the expected loss;<sup>10</sup>  $p$  represents the probability that the actor will be liable for the harm;<sup>11</sup> EC represents the expected cost of defending the action; and I represents the investment in precautions. The left side of the equation represents costs that may be avoided if harm is averted, and the right side of the equation represents an efficient investment in precautions to avoid the harm. The formula assumes that a rational actor will invest in precautions up to, but not beyond, the expected value derived from avoiding harm. Thus, from a purely economic perspective, the deterrent value derived from a threat of litigation should be less than or equal to the avoidable cost of litigation (i.e. the expected liability plus the cost of defending the suit).

7. Jonathan W. Cardi et al., *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567, 568 (2012) ("Much of the law and economics literature relies on this assumption as if it were analytic truth"). See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 68-69 (1970) (general deterrence is focused on individual choice and relies upon cost/benefit incentives to deter undesirable conduct).

8. Cardi et al., *supra* note 7, at 568.

9. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 843-44 (2002). For example, assume A and B are drivers. On average, A incurs \$200 in accident costs per year and B incurs \$25 in accident costs per year. Assume also that both A and B have the option of investing \$50 annually in brake maintenance to reduce future accident costs. A will invest in the precaution as long as the reduction in annual accident costs exceeds \$50. B will not invest in the precaution because the cost of the precaution is greater than his annual accident costs. Even if the investment in precaution would reduce his annual accident costs to zero, B would be investing \$25 more in precautions than he would reap in benefit. CALABRESI, *supra* note 7, at 73-77.

10. The expected loss is the product of the magnitude of expected harm multiplied by the probability of harm.

11. The probability that the defendant will be liable for the harm is distinguishable from the probability of harm itself. The probability of harm depends upon the likelihood that events will unfold in a certain way, whereas the probability of liability depends upon whether the plaintiff will satisfy the burden of proof on each of the elements of the claim.

In theory, class certification increases deterrence by sweeping a large group of claimants into a single action and increasing the threat of liability. The magnitude of the increase in deterrence depends on the likelihood that individual litigation will be filed if a class is not certified. For example, a victim of wrongful conduct will have an incentive to file an individual suit when the expected recovery exceeds the cost of the litigation. This type of claim, commonly referred to as a positive value claim, creates a threat of liability from individual litigation, which in turn induces an actor to invest in precautions. When there are many similar positive value claims, an actor will anticipate a threat of liability from a series of individual suits and invest in precautions up to the value of the aggregate expected loss.<sup>12</sup> Certification of a class of positive value claims enhances deterrence only to the extent that the class sweeps the entire group of similar claims into a single suit, including those claims that might not actually be filed as an individual suit.<sup>13</sup> Thus, positive value class actions enhance deterrence in an amount equal to the variation between the threat of loss from a class action and the threat of loss from a series of individual suits.<sup>14</sup>

Certification of a class of negative value claims presents a very different situation. A victim of wrongful conduct will have no economic incentive to file an individual suit when the expected recovery is dwarfed by the cost of pursuing the litigation. Thus, there is no threat of individual litigation and an actor has no economic incentive to invest in precautions. Certification of a class of negative value claims, however, enables litigation for the claims and creates a threat of liability that would not otherwise exist.

The following formula represents the deterrent value derived from a class action seeking damages:

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12. The aggregate expected loss depends in part upon the likelihood that individual suits will actually be filed. As the expected net benefit decreases toward zero, the likelihood that an individual suit will be filed also decreases.

13. Coffee, *supra* note 5, at 904 (Type-A class actions, or positive value class actions, are comprised of individual claims that independently marketable in the absence of class certification). Positive value class actions tend to be disfavored by courts because class action treatment is considered unnecessary when individual suits are feasible. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748-49 (5th Cir. 1996). Restrictions on positive value class actions have encouraged the use of non-class aggregation techniques that involve the use of pre-trial multi-district consolidation, unified judicial management, and collective settlement agreements. *See* Troy A. McKenzie, *Toward A Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 962 (2012). A number of scholars have raised warning flags about the growing use of non-class aggregation because the lack of class certification requirements that protect individual claimants allows for the over empowerment of lawyers. *Id.* at 962-63; *see also* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U.L. REV. 1273, 1274-76 (2012).

14. The magnitude of this delta depends upon a variety of factors including the likelihood that individual suits will be filed, the likelihood of success by plaintiffs in the individual suits, the likelihood that a class will be certified, and the likelihood of success by the class.

$$EL_{CA} * p_{CA} + EC_{CA} \geq I_{CA}$$

$EL_{CA}$  represents the expected aggregate loss to the class;  $p_{CA}$  represents the probability that the actor will be liable for the harm caused to the class;  $EC_{CA}$  represents the expected cost of defending against the class action; and  $I_{CA}$  represents the investment in precautions to avoid harm to the class.

While these formulas are useful in conceptualizing deterrence, they camouflage several potential limitations of deterrence theory. First, the formulas assume an actor has access to perfect information. In fact, however, estimating the relevant variables, at the relevant time, may be very difficult.<sup>15</sup> Second, the formulas assume that the underlying harm may be remediated by a change in conduct motivated by cost incentives. Some harm, however, may be undeterred by cost incentives.<sup>16</sup> Finally, the formulas assume that an actor faces a choice between an act and the accident's costs. Yet, when an actor invests in insurance to protect against the risk of accident costs, the insurer pools together a variety of risks and spreads the loss among them. Grouping risks together potentially dilutes the incentive to avoid harm because a specific act no longer bears its own costs.<sup>17</sup>

A simple accident example illustrates these limitations. Assume a driver is approaching a yellow light. If the driver knows that running through the light will increase accident costs by \$100<sup>18</sup> while stopping at the light will have no impact on accident costs, one would assume that the driver will be more likely to stop at the light than run through it.<sup>19</sup> Yet, at the time that the decision whether to run through the light is made, it is very unlikely that the driver will be able to make an accurate and timely estimate of the costs and benefits of his conduct.<sup>20</sup> Moreover, if the driver is daydreaming as he approaches the yellow light, he will not have conscious control over his conduct and the incentives will fail to deter the harm. If the driver has purchased accident insurance and agreed to pay an annual premium in exchange for protection from lump sum accident costs, he is less likely to change his behavior as he approaches the yellow light than if he

15. Rosenberg, *supra* note 9, at 838 n.19 (the expected value of a claim depends upon a number of factors, including litigation costs and risks, the types and difficulty of proof, the complexity of factual, legal, and related public policy questions, and the novelty of the issues involved); CALABRESI, *supra* note 7, at 103 (noting that individuals are unlikely to be able to estimate accurately the risk before an accident occurs); *see also* Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1394-97 (2000) (noting that courts have trouble estimating the size of a class and the expected recovery even after the underlying events have unfolded).

16. CALABRESI, *supra* note 7, at 109-11 (general deterrence is not effective in stopping people from absentmindedly taking their eyes off the road).

17. *Id.* at 103-04.

18. The increase in accident costs is calculated by multiplying the increased probability of harm by the magnitude of the harm.

19. The decision would also have to take into account the expected benefit from running the light, if any.

20. CALABRESI, *supra* note 7, at 103-04.

does not have insurance because the connection between his conduct at the time of the accident and the resulting accident cost is diluted by the insurance company's ability to spread the loss among a pool of risks.<sup>21</sup> Although deterrence theory suggests that the driver should stop at the yellow light to avoid the increase in accident costs, the theory fails to account for the real life variables that may cause the driver to run the light.

To analyze how actual decision-making varies from rational forecasts, the next section discusses a series of empirical studies that test the deterrence assumption in a variety of procedural and substantive contexts.

## II. RECENT STUDIES ON DETERRENCE THEORY

Studies seeking to test the efficacy of the deterrence theory have reached mixed conclusions.<sup>22</sup> While some studies have found a link between cost internalization and deterrence,<sup>23</sup> no study to date has been able to substantiate the

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21. *Id.* at 104. Even if the driver knows that his rates are likely to increase if he causes an accident, the monetary value of the premium increase is not equal to the monetary value associated with the lump sum accident cost that he would incur if he did not have insurance. *Id.*

22. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000) ("The use of rational choice theory enabled the law-and-economics movement, in its early days, to achieve significant advances in understanding the interaction between legal rules and society. But now that the movement has reached intellectual maturity, the rationality assumption severely limits its continued scholarly development. There is simply too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory."); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 379 (1994) (comparing the "strong" form of the deterrence argument—which assumes that tort law does in fact deter as thoroughly as economic models suggest—and a more "moderate" form of the argument—which assumes that tort law provides some amount of deterrence, but considerably less than the economists tend to predict. Author concludes that the strong form of the deterrence argument is unsound); Tom R. Tyler & John M. Darley, *Building A Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 713 (2000) ("Although research supports the basic premise of the deterrence model, it also suggests that estimates of the likelihood of being caught and punished have, at best, a minor influence on people's law-related behavior. Some studies suggest that such estimates do not independently influence behavior when the influence of other factors is considered. Other studies find an independent influence, but it is typically small in magnitude.").

23. MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS 133 (1990) (workers' compensation systems result in a decrease in worker fatalities); FRANK A. SLOAN ET AL., DRINKERS, DRIVERS AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY (2000) (liability on alcohol servers reduces fatalities from alcohol related motor vehicle accidents).

assumption that the imposition of damages serves as a comprehensive deterrent.<sup>24</sup> Indeed, one study found no clear link between the threat of punitive damages and deterrence,<sup>25</sup> another study found only “thin” evidence of a correlation between liability for medical malpractice and a reduction in negligence rates,<sup>26</sup> and several studies have reached mixed results on the deterrent effects of tort reform.<sup>27</sup>

Two recent studies illustrate the inconsistency of the evidence on deterrence theory. In a study published in 2012, Professors Cardi, Penfield and Yoon surveyed over 700 first-year law students and presented them with a series of vignettes involving conduct that might result in liability.<sup>28</sup> The students were given a prompt regarding the applicable law and asked to rate the likelihood that they would engage in the conduct.<sup>29</sup> The prompts described the consequences of the conduct under the applicable law in one of four ways: (1) no liability; (2) criminal liability;<sup>30</sup> (3) tort liability; or (4) no mention of applicable law at all.<sup>31</sup> Interestingly, the results of the study indicated that “the threat of tort liability had little to no deterrent effect” on the likelihood that participants would engage in

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24. Cardi et al., *supra* note 7, at 571 (“Some scholars have found limited evidence that tort acts as a weak deterrent with respect to certain behaviors. Still others have found no evidence of deterrence or even, in a few cases, a negative association—that certain tort rules are associated with an increase in related injuries.”).

25. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 296-98 (1998).

26. Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1598 (2002).

27. See Paul H. Rubin & Joanna M. Shephard, *Tort Reform and Accidental Deaths*, 50 J. L. & ECON. 221 (2007) (finding non-economic damage caps, a higher evidence standard for punitive damages, product liability reform and prejudgment interest reform are associated with fewer motor vehicle accidental deaths but reforms to the collateral source rule are associated with increased motor vehicle accidental deaths). See generally Joanna Shephard, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905 (2008) (finding tort reforms in medical malpractice area correlate with an increase in deaths).

28. Cardi et al., *supra* note 7, at 599-603, Appendix (the vignettes included: (1) throwing a metal Frisbee with thinner than average edges in a public park; (2) allowing someone to ride your wave-runner without a life jacket; (3) using a cell phone while driving; (4) an off-duty EMT driving by an injured motorcyclist; (5) bumping a parked car to get out of a parking space; (6) a train conductor on a runaway train deciding whether to switch the track which will result in killing one person or doing nothing which will result in killing several people; (7) throwing a metal boomerang with thinner than average edges in a public park; (8) operating heavy machinery while medicated; (9) providing a recommendation for a former employee who often showed up late for work).

29. *Id.*

30. *Id.* at 580 (although the use of the word “criminal” in this situation may not be technically accurate, the authors sought to capture the moral dimension that society associates with criminal versus civil responsibility).

31. *Id.* (providing no legal regime was intended to measure whether people consciously consider the possibility of legal sanctions when acting in a way that creates risk).

the specified conduct.<sup>32</sup> Surprisingly, the study participants were just as likely to take risks when they were told that they might be subject to tort liability as when they were told that they would be subject to no liability.<sup>33</sup>

There are several possible explanations of the study's results. Study participants may have underestimated the risk of incurring tort sanctions, either as a result of cognitive bias or because of a perception that only a small percentage of tortious injuries result in the filing of a civil action.<sup>34</sup> Moreover, to the extent that legal liability is imposed for breaches of social norms and shared community values, it is possible that tort sanctions had little effect on the willingness to engage in risky conduct because the study participants were already inclined to abide by existing social standards of conduct.<sup>35</sup> Finally, participants may have assumed that insurance would cover the liability, thus reducing the deterrent effect of the threat of liability.<sup>36</sup>

In light of these results, it is surprising that another recent study concluded that a threat of damages promotes socially desirable behavior, particularly when damages relate to a class of victims or exceed actual harm.<sup>37</sup> In this study, Professors Eisenberg and Engel tested the deterrent value of damages in three situations: (1) damages to an individual litigant; (2) damages to a class of litigants; and (3) damages beyond actual harm to victims, such as through a

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32. *Id.* at 588 (the threat of criminal liability, on the other hand, correlated with deterrence).

33. *Id.* at 591-92 (The authors note that "[t]his finding is counterintuitive. It contradicts not only the study's hypothesis, but also decades-old contrary assumptions of judges, policy-makers, and academics. Moreover, the finding even belies self-reports of the study's participants. [Participating students] reported (after having participated in the study) that they had expected to be proven less likely to engage in risky behavior in the face of potential tort liability than in its absence. The study's results . . . reveal this intuition to be inaccurate.").

34. *Id.* at 593-94 (citing Ruth Rutenberg et al., *The Taxpayers' Burden from Product-Related Harm*, 21 KAN. J.L. & PUB. POL'Y 121, 125 (2011) (estimating that an annual average of over 131,000,000 product related injuries results in only 24,000 to 29,000 product liability suits filed)); see also Joyce Ehrlinger & David Dunning, *How Chronic Self-Views Influence (and Potentially Mislead) Estimates of Performance*, 84 J. PERSONALITY & SOC. PSYCH. 5, 5-7 (2003) (people tend to overestimate their own abilities and to underestimate their chances of becoming injured or of injuring others); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 705-06 (1999) (describing a cognitive bias that suggests people are more likely to see an event as foreseeable if they recall similar events having occurred in the past); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 KAN. L. REV. 115, 121 (1993) (a deterrent effect is achieved when certainty of punishment reaches a sufficient level).

35. Cardi et al., *supra* note 7, at 594.

36. *Id.* (to the extent that at least some of the vignettes involved conduct that is not likely to be the subject of liability insurance (i.e., throwing a Frisbee) it is unlikely that this particular explanation is relevant to the conclusions of the study).

37. Theodore Eisenberg & Christoph Engel, *Assuring Civil Damages Adequately Deter: A Public Good Experiment*, 11 J. EMPIRICAL LEGAL STUD. 301 (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2424083](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424083).

punitive damages regime.<sup>38</sup> The study employed a public good experiment design<sup>39</sup> to determine if the risk of liability in any of the three scenarios would cause participants to maintain a stable rate of cooperation toward a public good over time.<sup>40</sup>

The results of the experiment support the conclusion that cooperation toward a public good project shows more improvement when an actor is threatened with aggregate damages for the total harm caused to a group than when an actor is only threatened with damages for harm caused to an individual.<sup>41</sup> The baseline of the experiment supported the expected conclusion that cooperation toward a common goal deteriorates when there is no opportunity to seek damages for injurious

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38. *Id.* at 303.

39. *Id.* at 305 (A public good experiment provides participants with an endowment from which each participant may choose to make a contribution to the public good. The group obtains a maximum benefit if all participants contribute 100% of their endowment to the public good but each individual obtains the most individual benefit by not contributing at all.)

40. The experiment lasted thirty periods and the researchers divided each period into two stages. *Id.* at 308. In the first stage, each individual had to decide how much of their endowment, to contribute to a public good project and how much to keep. *Id.* The study determined each participant's income by subtracting the participant's contribution from the original endowment and adding a percentage of the total contributions made by all participants. *Id.* Participants were informed about the other participants' contributions after individual contributions were complete. *Id.* The following formula was used to determine each participant's income:

$$\text{Income} = \text{endowment} - \text{individual contribution} + 40\% (\text{total contributions})$$

If all participants contributed all of their endowment, total social welfare would be maximized and each participant's income would be equal ( $20 - 20 + 40\%$  of total contributions). *Id.* If one participant contributed zero, however, and the remaining participants contributed all of their endowments, the participant who contributed nothing would freeload off the benefits conferred by the public good without paying for it ( $20 - 0 + 40\%$  of the total contributions), whereas the participants who contributed would earn less ( $20 - 20 + 40\%$  of the total contributions). *Id.*

In the second stage, the researchers randomly chose one participant as the "active participant." *Id.* at 309. The active participant took currency from other participants based on how much each of the other participants invested in the public good project in the first stage. *Id.* The amount of currency that the active participant could take from other participants sought to replicate damages in three scenarios: actual harm to an individual plaintiff, actual harm to a class of plaintiffs, and damages exceeding actual harm (i.e., punitive damages). *Id.* The first scenario sought to replicate traditional bipolar litigation by allowing the active player to impose damages for harm caused to the active player. The study measured this harm by the "difference between what the active player received and what she would have received in the period if the punished players had contributed as much to the project as the active player did." *Id.* The second scenario sought to replicate class action litigation by allowing the active player to impose damages for the total harm the punished player caused to the group. *Id.* at 310. The third scenario allowed the active player to impose damages up to the punished player's income in the period, regardless of the actual harm caused to the active player or the group. *Id.* at 312.

41. *Id.*

conduct.<sup>42</sup> A decline in cooperation persisted in the model that allowed a participant to seek damages for his own injury, but the decline was less severe than when no damages were available at all.<sup>43</sup> When a participant was able to seek aggregate damages for harm caused to an entire group, cooperation remained virtually stable at a higher level than both of the other two models (the baseline and individual compensatory models), at least by the later periods of the experiment.<sup>44</sup> The final treatment allowed the imposition of damages that exceeded the overall harm caused to the entire group, thus resembling a punitive damages regime. Unlike all of the earlier treatments, this scenario resulted in increased cooperation over time.<sup>45</sup> Overall, the authors found evidence suggesting:

a damages rule analogous to [traditional bilateral litigation] is sufficient to deter serious deterioration in cooperation over time. . . . A damages rule more closely tied to . . . damages in class action litigation, prevented the pattern of deteriorating cooperation over time. A more Draconian rule of damages, linked to income without requiring harm, promoted increased cooperation over time but at the cost of allowing socially unjust damages.<sup>46</sup>

Although the researchers comprehensively planned and meticulously executed both of these recent studies, they reached conflicting conclusions that suggest further research is necessary. By analyzing what the evidence in these studies shows, and fails to show, these studies point the way for further study.

Both of the recent studies analyze reported behavior, rather than actual behavior.<sup>47</sup> The studies seek to predict how actors will respond to a threat of

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42. *Id.* at 315.

43. *Id.* at 319 (“Overall the compensatory treatment somewhat improves the public good compared to the baseline but the effect is not strong enough to avoid the common deterioration in cooperation over time.”).

44. *Id.* at 320 (“The increased damages available in the class action treatment stem the classic . . . trend of deteriorating cooperation over time. Holding the low-contributors liable for a greater share of the harm they impose leads to improved behavior from the perspective of social welfare.”). The class action treatment found a strong association between prior period punishment and contribution levels: “In the last ten periods, contributions increased by an average of 2.7 ECUs when the participant had been required to pay damages in the prior period . . . and decreased by an average of 0.9 ECUs when the participant did not pay damages [in the prior period].” *Id.* at 322. This finding suggests that participants learned from prior experience and were willing to adjust their behavior in light of previous liability.

45. *Id.* at 323, 327-29 (The punitive treatment raised concerns about the possibility of antisocial punishment imposed by the active player. When one removes the concern regarding antisocial punishment, the results of the punitive treatment show non-deterioration in cooperation over time but no clear increase in cooperation over time.)

46. *Id.* at 335.

47. Cardi et al., *supra* note 7, at 596 (recognizing that reliance on reported behavior rather than actual behavior is a weakness of the study because survey participants may over-report



liability based upon hypothetical factual scenarios. The nature of a hypothetical scenario raises the possibility that participants may incorrectly report how they would actually behave under similar circumstances. Indeed, by focusing the participants' attention on isolated, hypothetical situations, the reported behavior is based upon a more simplified decision making process than actual behavior.<sup>48</sup> Since it is impossible to measure how reported behavior varies from actual behavior, further research should focus on collecting data based on historical behavior.

The recent studies also provide vastly different opportunities for participants to learn from previous experience. The first study examines a single period experiment and finds little or no deterrent effect from the threat of damages. By limiting the experiment to a single period, however, the study fails to consider an actor's behavioral revisions in light of previous experience. The second study, on the other hand, provides participants an opportunity to revise their behavior in thirty immediate periods of repeated play. Notably, levels of cooperation were quite different after ten periods, twenty periods and thirty periods of play. This suggests that behavior evolved over time as experience was reinforced. While each of these studies presents very different opportunities to learn from experience, it is unclear how closely these hypothetical scenarios resemble actual decision-making. Data based upon actual experience would close the gap.

Both studies simplify the problem of informational deficiencies. In order to predict a threat of liability, a corporation must estimate and then aggregate liability on individual claims.<sup>49</sup> These estimates are subject to variability.<sup>50</sup> Indeed, potential liability tends to change throughout the lifecycle of a lawsuit. For example, the expected loss from litigation at any particular point in time increases or decreases depending upon how a court rules on pivotal motions, such as a motion to dismiss for failure to state claim, class certification, admissibility

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behaviors they deem to be socially acceptable and under-report those deemed to be unacceptable.”).

48. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) (“To deal with limited memories we make lists. To deal with limited brain power and time we use mental shortcuts and rules of thumb. But even with these remedies, and in some cases because of these remedies, human behavior differs in systematic ways from that predicted by the standard economic model of unbounded rationality.”). *Id.*

49. George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. 1989, 1994 (2002) (“All of the plausible means for determining overall liability require first an approximation and then a summation of liability on individual claims. No mass tort case seems to come with a figure for total liability attached.”).

50. For example, estimates are subject to variability depending upon risk preferences. Studies involving cognitive psychology have shown that individuals tend to be risk averse with respect to moderate to high probability gains (plaintiffs with strong cases), but risk seeking with respect to moderate to high probability losses (defendants with weak cases). On the other hand, studies also show that individuals generally tend to be risk seeking as to low probability gains (plaintiffs with weak cases) and risk averse as to low probability losses (defendants with strong cases). Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 657-58 (2011).

of expert testimony, or summary judgment.<sup>51</sup> Reported behavior based upon hypothetical scenarios fails to account for these challenges.

Finally, both studies measure individual behavior rather than institutional behavior. To the extent that decision-making processes are different for individuals and corporations,<sup>52</sup> data based upon individual behavior may not accurately predict institutional behavior.

The next section describes a new study designed to advance our understanding of deterrence and negative value class actions by focusing on historical experience with negative value class action litigation from the perspective of corporate decision makers.

### III. DETERRENCE: A VIEW FROM WITHIN THE FORTUNE 500

#### A. Study Goals

The study sought to refine our understanding of the relationship between negative value class action litigation and the prevention of harm. A comprehensive Questionnaire was sent to general counsel at each of the corporations on the 2011 Fortune 500 list.<sup>53</sup> Unlike previous studies that relied upon randomly chosen study participants to report how they would respond to hypothetical situations, this study collected information from those individuals most likely to possess institutional knowledge regarding negative value class action litigation.<sup>54</sup> In this sense, the study fills an important gap left open by previous studies.<sup>55</sup>

The efficacy of deterrence theory depends upon the likelihood that an actor will predict a risk of future liability at a time when the actor may take precautions to avoid the liability. As illustrated by the deterrence formula, a number of variables affect the decision to invest in precautions to avoid future harm.<sup>56</sup> Indeed, accurately predicting the variables that inform the left side of the equation—the avoidable cost of litigation—depends upon predicting the

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51. *Id.* at 649.

52. Cardi et al., *supra* note 7, at 597 (“Prior research has hinted that the threat of tort sanctions might have a greater deterrent effect on firms.”).

53. Questionnaire, *infra* App. A.

54. The survey was sent to general counsels on the assumption that they are most likely to possess institutional knowledge of how the companies have responded to the threat of class action litigation. To the extent that this assumption was inaccurate, the survey recipients were requested to forward the survey to a person who possessed such knowledge.

55. For example, in the previous studies based upon hypothetical scenarios, it was impossible to determine how informational deficiencies, risk preferences and cognitive limitations might change the reported behavior of participants. By relying upon actual historical experience, decision makers have incorporated any relevant practical limitations and made the best decision possible in light of these challenges.

56. See *supra* notes 10-11 and accompanying text for a discussion of the deterrence formula:  $EL * p + EC \geq I$ .

likelihood and magnitude of harm that may result from particular conduct (EL), as well as the legal implications that flow from the harm (*p*).

Several decades ago, Professor Francis McGovern popularized the concept of maturity in relation to class action litigation.<sup>57</sup> He suggested that litigation is mature when “little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.”<sup>58</sup> Prior to maturity, litigators continue to collect evidence, resolve legal issues, and develop trial strategies. In light of the fact that deterrence depends heavily upon the ability to anticipate future liability, this study seeks to better understand the relationship between litigation maturity and deterrence.<sup>59</sup>

Intuitively, one would presume that prior litigation provides a valuable source of information from which a corporation may predict future liability. For example, a corporation that has been held liable for harm resulting from particular conduct in the past will possess information regarding the factual and legal assertions that formed the basis for liability in the previous litigation, and this information will inform a prediction about the risk of future liability for similar conduct. Indeed, once a corporation is held liable for particular conduct, one would expect the corporation to take affirmative action to avoid litigation regarding the same or similar conduct in the future.

Even when a corporation has not been a party to previous litigation, the imposition of liability against others can form the basis for predicting future liability. For example, a corporation that is aware of previous litigation against a competitor will be equipped to anticipate a risk of future liability for similar conduct. Indeed, if a corporation possesses information about the factual and legal assertions that formed the basis for the imposition of liability against a competitor, one would expect the corporation to attempt to avoid litigation for the same or similar conduct in the future.

When there is no track record from previous litigation, predicting future liability is much more difficult. One would expect that cases involving novel legal theories and/or unproven factual scenarios are hard to predict because there is little or no information to put a corporation on notice of the factual and legal assertions that may form the basis for liability.

The study presented in this Article tests these assumptions. The Questionnaire includes three basic parts: a statement of the study goal,<sup>60</sup> a

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57. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. REV. 659, 659 (1989) (describing mature mass torts as those involving “full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs’ contentions”).

58. *Id.*

59. *Id.*

60. The survey states that the “goal of the study is to refine our understanding of the relationship between small-stakes class action litigation and the prevention of injury.” *See* Questionnaire, *infra* App. A, at 1. The Questionnaire refers to “small-stakes” class actions instead of “negative value” class actions. It should be noted that the phrases are synonymous.

definition section,<sup>61</sup> and thirty-two questions. These questions seek to collect evidence to prove (or disprove) the following three hypotheses:

1. A risk of future liability is easier to anticipate when there is a well-developed record of the factual and legal issues from previous litigation than when there is no track record from previous litigation.
2. Corporations who have been held liable for particular conduct will successfully change their conduct to avoid future litigation regarding similar conduct.
3. Corporations who are informed about lawsuits filed against their competitors and who rely upon this information in making their own business decisions will successfully change their conduct to avoid subsequent similar litigation.

### *B. Reducing Survey Error*

The structure of the study reduces the potential for survey error. Survey error may arise from a variety of sources, including coverage error, sampling error, measurement error, and nonresponse error. Coverage error occurs when the list from which a researcher draws a sample fails to include all elements of a population, thus skewing the survey by failing to give all elements of the population a chance at participation.<sup>62</sup> To reduce coverage error, the Questionnaire was sent to every company on the 2011 Fortune 500 list, giving every member of the list an equal chance to participate. The list of Fortune 500 companies was obtained from public records. Company websites provided the

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61. To ensure that all respondents share similar understanding of the terminology, the Questionnaire included the following definitions:

‘**Small-Stakes Class Actions**’ join together claims that cannot be economically litigated on an individual basis because each claim for relief is insufficient to cover the costs of litigation. Individual claims may seek damages ranging from a few pennies to several thousand dollars. Once joined together into a class, these claims become viable because the cost of litigation is spread among a large group of class members.” See Questionnaire, *infra* App. A, at 1.

‘**First Generation Small-Stakes Class Actions**’ are small-stakes class actions that involve novel legal theories and/or unproven factual scenarios.” *Id.* [hereinafter First Generation Action].

‘**Second Generation Small-Stakes Class Actions**’ are small-stakes class actions that involve legal theories and factual scenarios that have been previously argued in other cases but have not been definitively resolved. Thus while the case theories are not novel, ambiguity exists regarding the interpretation of important legal questions and/or the existence of evidentiary support for factual allegations.” *Id.* [hereinafter Second Generation Action].

‘**Third Generation Small-Stakes Class Actions**’ are small-stakes class actions that involve legal theories and factual scenarios that have been the subject of earlier class actions and enjoy fairly well developed legal and factual support from previous litigation. While some level of ambiguity persists, third generation class actions enjoy the most robust information from which to predict the likely outcome of a suit.” *Id.* [hereinafter Third Generation Action].

62. DON A. DILLMAN ET AL., INTERNET, MAIL, AND MIXED-MODE SURVEYS: THE TAILORED DESIGN METHOD 17, 43 (3d ed. 2009).

identification of corporate counsels, and respondents were contacted via multiple means (i.e. multiple mailings and personal telephone calls). Finally, surveys returned to sender as undeliverable were checked, corrected and re-mailed with correct addresses. The overall risk of coverage error, therefore, is quite small.

Although the Questionnaire was sent to the entire population of Fortune 500 companies, not every recipient of the survey responded. The study relies upon the sample of responses received to generalize results of the Questionnaire to the entire survey population. Sampling error arises whenever data are collected from a subset of the relevant population and are used to estimate the distribution of characteristics of the entire population.<sup>63</sup> While it is impossible to remove this potential for error without surveying every member of a population, it is possible to estimate sampling error with considerable precision.<sup>64</sup> Thus, when estimating the characteristics of the population from the random sample of survey responses, sample results are accompanied by a 95% confidence interval which suggests that 95 out of 100 times a random sample is drawn from the population, the estimate from that sample will be within a specific range of the sample results. For example, if the results of a sample show that 20% of the respondents answered a particular question in the affirmative, a 95% confidence interval of +/- 5% would mean that 95 out of 100 times a random sample is drawn from the same population, 15-25% of the respondents will answer the same question in the affirmative.<sup>65</sup>

Measurement error results from ambiguous questions that create imprecise responses.<sup>66</sup> To reduce the risk of measurement error, the Questionnaire includes a variety of question and response formats. A number of questions employ a polar-point-labeled scale response system with verbally and numerically labeled end points and numerically labeled mid points, equally spaced along a horizontal continuum (the numerical scale ranges from 1-10). This question type provides an easy method for respondents to conceptualize relative preferences.<sup>67</sup> Other questions provide a full set of verbal category labels, equally spaced in a vertical list. This type of response system offers more control over how researchers interpret each response.<sup>68</sup> Some questions ask for a yes or no response. To the extent that any questions resulted in ambiguous responses, the question was omitted them from the study conclusions.

Nonresponse error occurs when those “who do not respond are different from those who do respond in a way that is important to the study.”<sup>69</sup> Since the goal

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63. *Id.* (“Sampling error is the result of collecting data from only a subset, rather than all, of the members of the sampling frame.”).

64. *Id.*

65. *Id.* at 56-57.

66. *Id.* at 18.

67. *Id.* at 143 (discussing how some surveyors prefer this response system over a full set of verbal category labels because they believe that a numeric range provides an easier method for respondents to conceptualize relative preferences).

68. *Id.*

69. *Id.* at 17.

of the study is to analyze how corporations respond to the threat of negative value class action litigation, it is imperative that those who respond to the survey share a similar vulnerability to this type of litigation as those who do not respond.<sup>70</sup> In other words, the sample must represent both the characteristics shared by the population and the diversity of characteristics that differentiate the members of the population in relation to the subject of the study. Although the population consists of a diverse group of companies operating in a wide variety of industries, every member of the population is subject to state and federal securities regulation as a publicly traded company. As such, every member of the population shares a similar vulnerability to securities class action litigation. Given that securities litigation is by far the single most common type of class action, this similarity among the population significantly reduces the risk of nonresponse error.<sup>71</sup> Indeed, to the extent that securities class actions often

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70. This does not mean that data can only be collected from respondents who have been named as defendants in such suits. Indeed, a lack of experience as a litigant may prove that a respondent is particularly well versed at recognizing the threat of litigation and averting the harm. Such a respondent would provide highly relevant information for this study.

71. The Administrative Office of the U.S. Courts reports that as of 2004, 47% of class actions pending in federal court involved securities regulation. See John C. Coffee, Jr., *Private Securities Litigation Reform Act: Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1539-40 (2006) (demonstrating that securities class actions are “the 800-pound gorilla that dominates and overshadows other forms of class actions”). The following table shows class actions pending in federal courts as of September 30, 2002, 2003, and 2004:

<b>Type of Case</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>
Contract	282	290	289
Real Property	33	38	34
Tort Actions	529	604	600
Antitrust	249	231	202
Employment Rights	164	159	173
Other Civil Rights	298	274	266
Prisons, Prisoners	66	64	82
RICO	53	76	46
ERISA	134	183	216
Other Labor Suits	180	204	262
Securities/Commodities/Exchange	2325	2339	2480
Others	522	515	529
Total	4835	4977	5179
Securities Class Actions as a Percentage of Total	47.5%	47%	47.9%

See Admin. Office of the U.S. Courts, *Table X4: U.S. District Courts—Class Action Civil Cases Pending, by Nature of Suit and District, as of September 30, 2002*, 2002 ANNUAL REPORT [hereinafter *Table X4*, 2002 ANNUAL REPORT], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2002/appendices/x04sep02.pdf>, archived at <http://perma.cc/E5YA->

involve negative value claims, exposure to this type of litigation is directly relevant to the subject of the study. In addition to potential securities class actions, members of the population share vulnerability to employment related class actions, including civil rights, ERISA, and other labor suits.<sup>72</sup> Of course, vulnerability to class action litigation is not completely uniform across the population because industry specific class action suits are not equally prevalent for all members of the population. For example, companies in the retail industry are vulnerable to consumer class actions that companies in the oil pipeline industry likely are not. Overall, the similarity of exposure to securities and employment related class action litigation tends to reduce the risk of non-response error, while the relatively small risk of industry specific class action litigation minimally increases the risk of non-response error.

A number of techniques were used to motivate survey recipients to respond to the questionnaire. Each mailing included a personally addressed cover letter that described the significance of the study,<sup>73</sup> a copy of the questionnaire, a biography of the author and a self-addressed return envelope. Approximately eight weeks after the first mailing, a follow-up letter was sent to all companies from whom a response had not been received (either a completed survey or correspondence indicating a lack of interest) along with another copy of the questionnaire.<sup>74</sup> Approximately one to two weeks following the second mailing, a personal phone call was made to every recipient from whom a response had not yet been received. As a result, responses were received from forty-nine respondents who participate in thirty-one different industries.<sup>75</sup> Overall,

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YJZS; Admin. Office of the U.S. Courts, *Table X4: U.S. District Courts—Class Action Civil Cases Pending, by Nature of Suit and District, as of September 30, 2003*, 2003 ANNUAL REPORT, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2003/appendices/x4.pdf>, archived at <http://perma.cc/VB5T-9D9X>; Admin. Office of the U.S. Courts, *Table X4: U.S. District Courts—Class Action Civil Cases Pending, by Nature of Suit and District, as of September 30, 2004*, 2004 ANNUAL REPORT, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/x4.pdf>, archived at <http://perma.cc/W6DA-6L8W>. Since 2004, the Administrative Office of the U.S. Courts discontinued reporting this information.

72. See *Table X4*, 2002 ANNUAL REPORT, *supra* note 71 for the frequency of each of these categories.

73. Cover Letter, *infra* App. B. The cover letter ensured complete confidentiality, offered to share the results of the study with all survey participants and provided a telephone number and email address for correspondence with the author of the study.

74. Follow-up Letter, *infra* App. C.

75. Responses were received from companies in the following industries: metals; education; communication equipment; medical products; pharmaceuticals; construction and farm machines; insurance: life and health; insurance property and casualty; engineering and construction; health care: medical facilities; information technology services; motor vehicle and parts; telecommunications; food: consumer products; food: wholesale; general merchandise; specialty retailer; industrial machinery; utility: gas and electric; chemicals; pipelines; electronic equipment; aerospace and defense; automotive retailing services; mining, crude oil products; financial data services; computer services; scientific, photographic and control equipment; entertainment;

respondents represent a diverse group of publicly traded companies that share a vulnerability to class action litigation involving state or federal securities claims, civil rights claims, ERISA claims, and other labor related claims. Notwithstanding these efforts, some survey error likely remains. Although corporate counsel from each company had an equal opportunity to participate in the study, the sensitive nature of the subject matter likely discouraged many from participating. While the data provide adequate coverage of the population to draw conclusions within a 95% confidence interval for most questions, a higher participation rate would have allowed narrower confidence intervals.

Additionally, those who responded to the survey may have more experience with class action litigation and/or have a stronger opinion regarding the subject of the study than recipients who chose not to participate.<sup>76</sup> Indeed, a small number of survey recipients communicated a hesitation to participate in the study precisely because they had little or no experience with class action litigation and therefore thought they had nothing of value to add.<sup>77</sup> Finally, respondents have an incentive to downplay the validity of this costly regulatory device. While it is impossible to ignore this reality, the evidence does not indicate that the results are skewed to any significant degree by bias. The respondents do not have similar experience with negative value class action litigation. Thirteen respondents from thirteen different industries responded that they have never been named as a defendant in a negative value class action, suggesting that these respondents are less negatively disposed to the device than a respondent who has been dogged by such actions. Indeed, even among respondents who have been named as defendants in such litigation, most indicated such actions happened infrequently. Additionally, one would expect bias to result in uniform responses. However, the responses in this study are spread out, often covering the entire spectrum from “very low” to “very high.”

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commercial bank; internet services; and retailing. The following industries had multiple respondents: communication equipment (two respondents); construction and farm machines (two respondents); insurance: life and health (three respondents); motor vehicles and parts (two respondents); food: consumer products (three respondents); general merchandise (two respondents); specialty retailer (two respondents); utility: gas and electric (four respondents); chemicals (two respondents); electronic equipment (three respondents); aerospace and defense (two respondents); automotive retailing services (three respondents).

76. Of the forty-nine survey responses, thirteen respondents have never been named as a defendant in a negative value class action.

77. When these thoughts were communicated, the author explained that the depth and breadth of exposure to class action litigation (or lack thereof) is, in and of itself, meaningful evidence that is relevant to the study. Notwithstanding, it is likely that some recipients of the Questionnaire chose not to respond for this reason.



### C. Survey Results

#### Hypothesis 1:

*A Risk of Future Liability Is Easier to Anticipate When There Is a Well-developed Record of the Factual and Legal Issues from Previous Litigation Than When There Is No Track Record from Previous Litigation*

In order to estimate future liability, an actor must be able to: (1) anticipate the legal and factual claims that may form the basis for liability in the future; (2) estimate a plaintiff's likelihood of success on the merits; and (3) estimate the magnitude of the potential liability. An error in any of these estimates will result in under or over deterrence. The following questions seek to gauge respondents' ability to anticipate the variables that inform deterrence at each stage of litigation maturity.

*With regard to the occasions when your company has been named as a defendant in a **First Generation Small-Stakes Class Action**, please rate your ability to anticipate the legal and factual claims at the time of the event or business decision that later became the subject of the class action suit. (emphasis in original).<sup>78</sup>*

The response to this question suggests that most respondents have a very hard time anticipating the legal and factual claims that form the basis for First Generation Small-Stakes Class Actions. Indeed, only 10% of respondents rated their ability to anticipate these actions as high, 15% rated their ability to anticipate these actions as moderate, and a full 75% rated their ability to anticipate these actions as low.<sup>79</sup>

In light of this data is not surprising that respondents also have difficulty anticipating a plaintiff's likelihood of success in First Generation Small-Stakes

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78. The response scale ranges from "1 = We generally have not anticipated the legal and/or factual claims of First Generation Small-Stakes Class Actions" to "10 = We generally have anticipated the legal and factual claims of First Generation Small-Stakes Class Actions." See Questionnaire, *infra* App. A, at question 15.

79. Throughout this Article, a rating between 7-10 is referred to as "high," a rating between 4-6 is referred to as "moderate" and a rating between 1-3 is referred to as "low." Among the twenty respondents to this question, two rated their ability to anticipate these actions between 7-10; three rated their ability to anticipate these actions between 4-6 (all three rated their ability at 4); and fifteen rated their ability to anticipate these actions between 1-3. A 95% confidence interval is +/- 13%. Respondents who rated their ability to anticipate actions as high, identify with the following industries: electronic equipment; and utility: gas and electric.

Respondents who rated their ability to anticipate actions as moderate, identify with the following industries: construction and farm machines; insurance: life and health; and commercial bank. Respondents who rated their ability to anticipate actions as low, identify with the following industries: construction and farm machines; insurance: life and health; insurance: property and casualty; engineering and construction; health care: medical facilities; food: consumer products; general merchandise; specialty retailer; utility: gas and electric; automotive retailing services; food: wholesale; computer services; and entertainment.

Class Actions. The following question asks:

*With regard to the occasions when your company has been named as a defendant in a **First Generation Small-Stakes Class Action**, please rate your ability to estimate the plaintiffs' likelihood of success on the merits at the time of the event or business decision that later became the subject of the suit. (emphasis in original).<sup>80</sup>*

In response to this question, 20% of respondents rated their ability to estimate plaintiff's likelihood of success as high; 25% rated their ability as moderate; and 55% rated their ability as low.<sup>81</sup> Similarly, respondents had trouble estimating the magnitude of potential liability of First Generation Actions:

*With regard to the occasions when your company has been named as a defendant in a **First Generation Small-Stakes Class Action**, please rate your ability to estimate the magnitude of the potential liability at the time of the event or business decision that later became the subject of the suit. (emphasis in original).<sup>82</sup>*

The response to this question suggests that many respondents are unable to accurately estimate the magnitude of the potential liability, with 20% rating their ability to estimate the magnitude of potential liability as high, 20% rating their ability as moderate, and a full 60% rating their ability as low.<sup>83</sup>

The data suggest that a large margin of error exists for each of the relevant variables that inform the deterrence formula for First Generation Actions. While it is difficult to determine from this data if the margin of error on each variable is likely to give rise to under-deterrence or over-deterrence, a reasonably drawn conclusion from cost incentives suggests that respondents are more likely to under-estimate future liability than to over-estimate it.

While it is not surprising that many corporations have a hard time anticipating First Generation Actions, these actions pave the way for the development of mature litigation. The next series of questions focuses on Second Generation actions:

*With regard to the occasions when your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, please rate your ability to anticipate the legal and factual claims at the time of*

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80. The response scale ranges from "1 = We have not been able to accurately estimate the plaintiffs' likelihood of success in First Generation Small-Stakes Class Actions" to "10 = We have been able to accurately estimate the plaintiffs' likelihood of success in First Generation Small-Stakes Class Actions." See Questionnaire, *infra* App. A, at question 16.

81. A 95% confidence interval is +/- 13%.

82. The response scale ranges from "1 = We have not been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision" to "10 = We have been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision." See Questionnaire, *infra* App. A, at question 17.

83. A 95% confidence interval is +/- 13%.

*the event or business decision that later became the subject of the suit. (emphasis in original).*<sup>84</sup>

Not surprisingly, the response to this question suggests that respondents are better able to anticipate Second Generation Actions than First Generation Actions. Respondents are almost equally likely to rate their ability as high, moderate, or low, with 31% of respondents rating their ability to anticipate such claims as high, 34.5% rating their ability as moderate, and 34.5% rating their ability as low.<sup>85</sup> While it is not surprising that respondents are more prepared to anticipate a Second Generation Action than a First Generation Action, two-thirds of respondents rated their ability to anticipate such claims as moderate or low, suggesting that optimal deterrence is unlikely to be achieved in many Second Generation Actions. A related question asks:

*With regard to the occasions when your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, please rate your ability to estimate the plaintiffs' likelihood of success at the time of the underlying event or decision that later became the subject of the suit. (emphasis in original)*<sup>86</sup>

Similar to earlier questions, the response to this question suggests that respondents are better able to estimate the plaintiffs' likelihood of success in Second Generation Actions than they are in First Generation Actions, with 34.5%

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84. Responses are on a scale from "1 = We generally have not anticipated the legal and/or factual claims of Second Generation Small-Stakes Class Actions" to "10 = We generally have anticipated the legal and factual claims of Second Generation Small-Stakes Class Actions." See Questionnaire of Second Generation Small-Stakes Class Actions; see also Questionnaire, *infra* App. A, at question 21.

85. Among the 29 respondents to this question, nine rated their ability to anticipate such suits between 7-10; ten rated their ability between 4-6 and ten rated their ability between 1-3. A 95% confidence interval is +/- 10.5%. Respondents who rated their ability to anticipate actions as high, participate in the following industries: construction and farm machines; telecommunications; general merchandise; specialty retailer; utility: gas and electric; chemicals; electronic equipment; aerospace and defense; and commercial bank. Respondents who rated their ability to anticipate these claims as moderate, participate in the following industries: construction and farm machines; insurance: life and health; insurance: property and casualty; general merchandise; chemicals; electronic equipment; automotive retailing services; computer services; and entertainment. Respondents who rate their ability to anticipate these claims as low participate in the following industries: metals; insurance: life and health; motor vehicles and parts; specialty retailer; utility: gas and electric; automotive retailing services; food wholesale; scientific photographic and control equipment.

86. The response scale ranges from "1 = We have not been able to accurately estimate the plaintiffs' likelihood of success in Second Generation Small-Stakes Class Actions" to "10 = We have been able to accurately estimate the plaintiffs' likelihood of success in Second Generation Small-Stakes Class Actions." A 95% confidence interval is +/- 10.5%. See Questionnaire, *infra* App. A, at question 22.

of respondents rating their ability to estimate the plaintiff's likelihood of success as high, 44.8% rating their ability as moderate, and 20.7% rating their ability as low. While these results demonstrate an improvement over First Generation Actions, there is still considerable inability to predict future liability.

With regard to estimating the magnitude of the potential liability, the following question asks:

*With regard to the occasions when your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, please rate your ability to estimate the magnitude of the potential liability to the class at the time of the underlying event or decision that later became the subject of the suit. (emphasis in original).<sup>87</sup>*

In response to this question, 41.4% of respondents rated their ability to estimate the magnitude of the potential liability as high, while 24.1% rated their ability as moderate and 34.5% rated their ability as low.

Respondents rated their ability to anticipate the risk of legally cognizable harm much higher when litigation was fully mature, as supported by the responses to the following question:

*With regard to the occasions when your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, please rate your ability to anticipate the legal and factual claims at the time of the underlying event or decision that later became the subject of the suit. (emphasis in original).<sup>88</sup>*

The response to this question shows an overwhelming improvement in the ability to anticipate the legal and factual claims asserted. A full 75% of respondents rated their ability to anticipate Third Generation Actions as high, with only 12.5% rating their ability as moderate, and 12.5% rating their ability as low.<sup>89</sup> This is nearly the mirror image of respondents' ability to anticipate First Generation Actions where 10% rated their ability as high, 15% rated their ability as moderate, and a full 75% rated their ability as low.

The following related question resulted in similar responses:

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87. The response scale ranges from "1 = We have not been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision" to "10 = We have been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision." A 95% confidence interval is +/- 10.5%. See Questionnaire, *infra* App. A, at question 23.

88. The response scale is based upon "1 = We generally have not anticipated the legal and/or factual claims of Third Generation Small-Stakes Class Actions" to "10 = We generally have anticipated the legal and factual claims of Third Generation Small-Stakes Class Actions." See Questionnaire, *infra* App. A, at question 27.

89. Of the twenty-four respondents to this question, eighteen rated their ability to anticipate these claims between 7-10. Three rate their ability between 4-6, and three rated their ability between 1-3. A 95% confidence interval is +/- 12%.

*With regard to the occasions when your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, please rate your ability to estimate the plaintiffs' likelihood of success at the time of the underlying event or decision that later became the subject of the suit. (emphasis in original)<sup>90</sup>*

Of the 24 responses, 75% rate their ability to estimate plaintiffs' likelihood of success as high, while 12.5% rate their ability as moderate and 12.5% rate their ability as low.<sup>91</sup>

Finally:

*With regard to the occasions when your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, please rate your ability to estimate the magnitude of the potential liability at the time of the underlying event or decision that later became the subject of the suit. (emphasis in original)<sup>92</sup>*

In response, 75% of respondents rated their ability to estimate magnitude of the loss as high, while 12.5% rated their ability as moderate, and 12.5% rated their ability as low.<sup>93</sup>

The data support the first hypothesis that it is easier to anticipate a risk of future liability when there is a well-developed record of the factual and legal issues from previous litigation than when there is no record. Even when litigation is mature, however, the variables that induce a corporation to engage in anticipatory compliance are based upon estimates that are subject to variability. In fact, 87.5% of respondents rated their ability to anticipate even Third Generation Actions as a 9 or lower, suggesting that most respondents perceive some room for error in their estimates. Thus, while the deterrence formula helps to conceptualize the notion of anticipatory compliance, it is unlikely that most litigation induces the precise calculation of deterrence predicted by the formula.<sup>94</sup> However, this does not necessarily mean that deterrence is ineffective because a generalized perception of a risk of liability may be sufficient to induce a change in conduct. Consequently, deterrence may be more accurately assessed by how effectively an actor avoids future litigation, which is a question addressed by the second hypothesis.

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90. The response scale ranges from "1 = We have not been able to accurately estimate the plaintiffs' likelihood of success in Third Generation Small-Stakes Class Actions" to "10 = We have been able to accurately estimate the plaintiffs' likelihood of success in Third Generation Small-Stakes Class Actions." Questionnaire, *infra* App. A, at question 28.

91. A 95% confidence interval is +/- 12%.

92. The response scale ranges from "1 = We have not been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision" to "10 = We have been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision." Questionnaire, *infra* App. A, at question 29.

93. A 95% confidence interval is +/- 12%.

94. See *supra* notes 10-11 and accompanying text.

Hypothesis #2:

*Corporations who have been held liable for particular conduct will successfully change their conduct to avoid future litigation regarding similar conduct.*

Deterrence theory suggests that if a company is sued in a First or Second Generation Action, the company will change its conduct to avoid being sued in a later generation of the same, or a similar, dispute. The following questions test this premise:

*When your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, approximately how often has the company been named as a defendant in the earlier generation of a similar dispute? (emphasis in original).<sup>95</sup>*

Somewhat surprisingly, 51.7% of respondents report that they have been named in an earlier generation of a similar dispute, while 48.3% of respondents report that they have never been named in an earlier generation of a similar dispute.<sup>96</sup> The responses to the following question are even more telling:

*When your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, approximately how often has the company been named as a defendant in an earlier generation of a similar dispute? (emphasis in original).<sup>97</sup>*

In response, 84% of respondents reported having been named in an earlier generation of a similar dispute and only 16% reported never being named in an earlier generation of a similar dispute.<sup>98</sup> The data contradict deterrence theory. Well over three quarters of the respondents were unsuccessful in avoiding subsequent litigation, even after being named in an earlier generation of a similar dispute.

Several possible explanations exist. It is possible that respondents were unable to change their behavior to avoid the subsequent suit either because both suits derived from the same behavior or because the time frame between the suits was short. If this is the case, respondents may be unable to respond to the information learned in the earlier generation suit in time to avoid subsequent

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95. Possible responses included: (a.) Never; (b.) Infrequently (between 1-3 times); (c.) Somewhat often (four or more times). See Questionnaire, *infra* App. A, at question 20.

96. Based upon twenty-nine responses to this question, fourteen respondents answered “never”, twelve respondents answered “infrequently (between 1-3 times)” and three respondents answered “somewhat often (four or more times).” A 95% confidence interval is +/- 16.5%.

97. Responses include: (a.) Never; (b.) Infrequently (between 1 - 3 times); (c.) Relatively often (more than 4 times). See Questionnaire, *infra* App. A, at question 26.

98. Based upon 25 responses to this question, seventeen respondents have been named in an earlier generation of a similar dispute infrequently (1-3 times) and four have been named in an earlier generation of a similar dispute relatively often (more than 4 times). Only four respondents have never been named in an earlier generation of a similar dispute. A 95% confidence interval is +/- 18%.

litigation. Even when the time between multiple suits is relatively long, it is possible that large companies lack the flexibility and nimbleness to assimilate information, make policy changes, or adapt to new procedures in time to avoid follow-on litigation. Finally, it is possible that corporations are in fact changing their behavior to avoid future litigation but suits are being filed against them anyway. While a change in conduct to avert harm should result in protection from litigation exposure, defendants must bear the cost of defense even if the allegations of liability are not sustainable, thereby creating settlement value in filing frivolous suits.<sup>99</sup>

The data fail to confirm the second hypothesis.

#### Hypothesis #3

*Corporations who are informed about lawsuits filed against their competitors and who rely upon this information in making their own business decisions will successfully change their conduct to avoid subsequent similar litigation.*

The following questions focus on whether litigation against a competitor induces an actor who has not yet been the target of enforcement to change its conduct to avoid future liability:

*Please rate your company's awareness of class actions against your competitors (these are class actions in which you are NOT named as a defendant).<sup>100</sup>*

The response to this question indicates that respondents believe they are fairly well informed about class actions within their industry. Specifically, 46.9% of respondents rate their awareness of class actions against competitors as high, 32.7% rate their awareness as moderate, and 20.4% rate their awareness of class actions against competitors as low.<sup>101</sup> From an industry perspective, the companies who rate their awareness as high hail from nineteen industries,<sup>102</sup> the companies who rate their awareness as moderate hail from fifteen industries,<sup>103</sup>

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99. Some of the multi-generational litigation involving repeat defendants may involve situations where the cost of prevention is greater than the avoidable cost of litigation. In this scenario, companies will rationally choose not to invest in precautions, knowing that they will have to shoulder the burden of litigation if harm materializes.

100. The response scale ranges from "1 = Almost No Awareness" to "10 = Very Aware." See Questionnaire, *infra* App. A, at question 2.

101. Based upon forty-nine responses, twenty-three respondents rate their awareness between 7-10; eleven respondents rate their awareness between 4-6; and ten respondents rate their awareness between 1-3. A 95% confidence interval is +/-8%.

102. The respondents who report the highest awareness of class action litigation against their competitors represent the following industries: education; pharmaceuticals; construction and farm machines; insurance: life and health; insurance: property and casualty; information technology services; telecommunications; food: consumer products; general merchandise; specialty retailer; utility: gas and electric; electronic equipment; automotive retailing and service; food: wholesale; mining, crude oil products; scientific, photographic and control equipment; entertainment; commercial bank; and internet services.

103. The respondents who report moderate awareness of class action litigation against their

and the companies who rate their awareness as low hail from nine industries.<sup>104</sup> Interestingly, respondents within a single industry do not necessarily report the same level of awareness. For example, among the four respondents representing the industry “Utility: Gas and Electric,” two reported their awareness as high (7 and 9) and two reported their awareness as low (2 and 3). Similarly, among the three respondents representing the industry “Food: Consumer Products,” one respondent reported awareness as high (7), one respondent reported awareness as moderate (6) and one respondent reported awareness as low (3). Overall, the data suggest that participants in the same industry do not necessarily undertake the same effort to become aware of class action litigation against their competitors.<sup>105</sup>

The Questionnaire also asks:

*Please rate the quality of information (level of detail, reliability, accuracy, etc.) that your company learns about the legal theories and factual assertions in class actions against your competitors.*<sup>106</sup>

The response to this question suggests that many respondents believe the quality of information they possess about class actions against their competitors is relatively strong. Indeed, 44.7% of respondents rate the quality of information they possess as high, 46.8% rate the quality of information as moderate, and only 8.5% rate the quality of information as low.<sup>107</sup> From an industry perspective, the respondents who rate the quality of information they possess as high hail from eighteen industries,<sup>108</sup> respondents who rate the quality of information they

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competitors represent the following industries: communication equipment; medical products; construction and farm machines; insurance: life and health; engineering and construction; health care: medical facilities; motor vehicle and parts; food: consumer products; chemicals; pipelines; electronic equipment; aerospace and defense; automotive retailing services; financial data services; and computer services.

104. The respondents who report the lowest awareness of class action litigation against their competitors represent the following industries: metals; communication equipment; food: consumer products; industrial machinery; utility: gas and electric; chemicals; electronic equipment; aerospace and defense; and automotive retailing services.

105. Of the twelve industries represented by more than one respondent, eight industries have respondents who rate their awareness in a different category (high, moderate, or low) than another respondent from the same industry. These eight industries are: construction and farm machines; communication equipment; food: consumer products; utility: gas and electric; chemicals; electronic equipment; automotive retailing and service; and insurance: life and health.

106. The response scale ranges from “1 = The quality of information is very poor” to “10 = The quality of information is excellent.” See Questionnaire, *infra* App. A, at question 4.

107. Based upon forty-seven responses, twenty-one respondents rate the quality of information they possess between 7-10; twenty-two respondents rate the quality of information they possess between 4-6; and four respondents rate the quality of information they possess between 1-3. A 95% confidence interval is +/- 8%.

108. The respondents who report the highest quality of information regarding class action litigation against their competitors represent the following industries: insurance: property and casualty; education; pharmaceuticals; construction and farm machines; insurance: life and health;



possess as moderate hail from seventeen industries,<sup>109</sup> and respondents who rate the quality of information they possess as low hail from three industries.<sup>110</sup> Again, respondents from the same industry do not necessarily rate the quality of information they possess similarly. For example, respondents representing “Utility: Gas and Electric” rate the quality of information they possess about class actions against their competitors from the very low to the very high (four respondents rated: 1, 3, 5, 9).<sup>111</sup>

Of course, a company that possesses high quality information about class actions against its competitors will not be deterred from wrongful conduct unless it considers this information in making its own business decisions. Thus, the following question asks:

*Please rate the **relevance** of the information you acquire about class actions against your competitors to your company’s business decisions. (emphasis in original)<sup>112</sup>*

Here, 41.7% of respondents report that information about class actions against competitors is highly relevant to their own business decisions, 25% report that such information is moderately relevant to their own business decisions, and 33.3% report that such information is not very relevant to their own business decisions.<sup>113</sup> Those who report that the information is highly relevant to their

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information technology services; food: consumer products; computer services; entertainment; general merchandise; specialty retailer; utility: gas and electric; pipelines; electronic equipment; food: wholesale; mining, crude oil products; commercial bank; and internet services and retailing.

109. The respondents who report moderate quality of information regarding class action litigation against their competitors represent the following industries: metals; communication equipment; medical products; construction and farm machines; insurance: life and health; engineering and construction; health care: medical facilities; motor vehicles and parts; telecommunications; food: consumer products; utility: gas and electric; chemicals; electronic equipment; aerospace and defense; automotive retailing and service; financial data services; and scientific, photographic and control equipment.

110. The respondents who report the lowest quality of information regarding class action litigation against their competitors represent the following industries: motor vehicles and parts; utility: gas and electric; and aerospace and defense.

111. Of the twelve industries that are represented by more than one respondent, five industries include at least one respondent that rates the quality of information they possess in a different category than another respondent in that same industry. These five industries are: construction and farm equipment; food: consumer products; utility: gas and electric; electronic equipment; and insurance: life and health.

112. The response scale ranges from “1 = Not relevant” to “10 = Highly relevant.” See Questionnaire, *infra* App. A, at question 5.

113. Based upon forty-eight responses, twenty respondents rate the relevance of such information between 7-10; twelve respondents rate the relevance of such information between 4-6; and sixteen respondents rate the relevance of such information between 1-3. A 95% confidence interval is +/- 8%.

own business decisions hail from sixteen industries,<sup>114</sup> those who report that the information is moderately relevant hail from nine industries,<sup>115</sup> and those who report that the information is of low relevance hail from thirteen industries.<sup>116</sup> Moreover, respondents within a single industry report varying degrees of reliance upon class action information against their competitors in making their own business decisions.<sup>117</sup>

Not surprisingly, there is a relationship between the quality of information possessed and respondents' willingness to rely on that information. Specifically, respondents who have high quality information overwhelmingly report that the information is highly relevant to their own business decisions.<sup>118</sup> Overall, sixteen respondents reportedly possess high quality information concerning class actions against their competitors that is also highly relevant to their own decision making, and thirty-three respondents reportedly possess low or moderate quality information that is not highly relevant to their own business decisions. If deterrence theory holds water, the sixteen respondents who rely upon high quality information about class actions against their competitors in making their own business decisions should be named in fewer suits than the thirty-three respondents who have lower quality information and/or find the information less relevant to business decisions. [For ease of discussion, the sixteen respondents

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114. The respondents who report that information about class actions against competitors is highly relevant to their own business decisions represent the following industries: education; pharmaceuticals; insurance: life and health; information technology services; motor vehicles and parts; food: consumer products; general merchandise; specialty retailer; utility: gas and electric; chemicals; pipelines; electronic equipment; food: wholesale; computer services; entertainment; and internet services and retailing.

115. The respondents who report that information about class actions against competitors is moderately relevant to their own business decisions represent the following industries: construction and farm machines; insurance: life and health; insurance: property and casualty; health care: medical facilities; food: consumer products; electronic equipment; automotive retailing services; mining, crude oil products; and scientific, photographic and control equipment.

116. The respondents who report that information about class actions against competitors are of low relevance to their own business decisions represent the following industries: metals; communication equipment; medical products; engineering and construction; motor vehicles and parts; telecommunications; utility: gas and electric; chemicals; electronic equipment; aerospace and defense; automotive retailing and service; financial data services; and commercial banks.

117. Of the twelve industries with multiple respondents, six industries have at least one respondent who rates the relevance of information about class actions against competitors in a different category than another respondent from the same industry. These industries are: food: consumer products; utility: gas and electric; chemicals; electronic equipment; automotive retailing and service; and insurance: life and health.

118. Specifically, of the twenty-one respondents who report possessing high quality information about class action litigation involving competitors, sixteen of them report that such information is highly relevant to their own business decisions, four report that such information is moderately relevant to their own business decisions and only one reports that such information is of low relevance.

will hereinafter be referred to as “The Best Practices Group” and the thirty-three respondents will hereinafter be referred to as “The Common Practices Group”]. The following questions probe this hypothesis.

*To your knowledge, has your company ever been named as a defendant in a **First Generation Small-Stakes Class Action**? (emphasis in original).<sup>119</sup>*

The responses to this question indicate that 35.4% of all respondents have been named as defendants in a First Generation Action, while 64.6% have not been named in such suits.<sup>120</sup> Among The Best Practices Group, 37.5% have been named as defendants in a First Generation Action, and 62.5% have not been named in such an action.<sup>121</sup> Among The Common Practices Group, 34.4% have been named in a First Generation Action, and 65.6% have not been named in such an action.<sup>122</sup> Overall, respondents from fourteen industries were named as defendants in First Generation Actions, with eight industries represented by respondents in The Best Practices Group<sup>123</sup> and ten industries represented by respondents in The Common Practices Group.<sup>124</sup>

The data suggest that The Best Practices Group of respondents have no advantage in avoiding First Generation Actions, with 62.5% of the Best Practice Group and 65.6% of the Common Practices Group reporting that they have never been named as a defendant in a First Generation Action.<sup>125</sup> This is not surprising

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119. Questionnaire, *infra* App. A, at question 13.

120. The question called for a “Yes” or “No” response. Based upon forty-eight responses, seventeen respondents report that they have been sued in a First Generation Action. A 95% confidence interval is +/- 13.5%. Questionnaire, *infra* App. A, at question 13.

121. Because the number of respondents who meet defining characteristics of The Best Practices Group is only sixteen, a 95% confidence interval is +/- 24%. Further study is necessary to narrow the confidence intervals.

122. Because the number of respondents who meet defining characteristics of The Common Practices Group is thirty-three, a 95% confidence interval is +/- 16.5%. Further study is necessary to narrow the confidence intervals.

123. In The Best Practices Group, respondents from the following industries report having been named in a First Generation action: insurance: life and health; food: consumer products; general merchandise; utility: gas and electric; electronic equipment; food: wholesale; computer services; and entertainment.

124. In The Common Practices Group, respondents from the following industries report having been named in a First Generation action: communication equipment; construction and farm equipment; insurance: life and health; insurance: property and casualty; health care: medical facilities; food: consumer products; utility: gas and electric; electronic equipment; automotive retailing and service; and commercial bank.

125. The Questionnaire also asks:

How frequently does your company tend to be named as a defendant in **First Generation Small-Stakes Class Actions**? (emphasis in original).

Three verbal category responses were: “infrequently (approximately 3 or fewer cases in any 5 year period of time)”; “A moderate number of times (approximately 4-10 cases in any 5 year period of

when one considers that First Generation Actions involve novel assertions that have not been aired in previous litigation. While The Best Practices Group does a better job than The Common Practices Group learning about previous class actions against their competitors and using that information in making business decisions, this effort is not likely to help anticipate the novel theories that are the subject of First Generation Actions. One would expect Second Generation Actions to present a different picture:

*To your knowledge, has your company ever been named as a defendant in a **Second Generation Small-Stakes Class Action**? (emphasis in original).*

The response to this question indicates that 58.3% of all respondents have been named in a Second Generation Action.<sup>126</sup> Among The Best Practices Group of respondents, 56.3% have been sued in a Second Generation Action and 43.8% have not been named in a Second Generation Action.<sup>127</sup> Among The Common Practices Group of respondents, 59.4% have been sued in a Second Generation Action and 40.6% have not been named in such an action.<sup>128</sup>

The data raise several interesting points worth noting. The overall percentage of respondents named in Second Generation Actions is higher than the overall number of respondents named in First Generation Actions (58.3% compared to 35.4%). This makes sense when we consider that Second Generation Actions benefit from the novel claims that are tested in First Generation Actions. Once a novel claim has been litigated in a First Generation Action, the theory can be copied and litigated repeatedly in Second Generation suits. Thus, the fact that more respondents report being sued in a Second Generation Action is expected.

A slightly larger percentage of The Best Practices Group (43.8%) has never been named in a Second Generation Action than The Common Practices Group (40.6%). This is precisely the opposite of First Generation Actions, where a

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time”); “Frequently (more than 10 cases in any 5 year period of time).” Questionnaire, *infra* App. A, at question 14. The data show that among the Best Practices Group, five respondents (62.5%) answered that they were named as a defendant in a First Generation Action “infrequently”, two respondents (25%) answered that they were named as a defendant in a First Generation Action a “moderate number of times” and one respondent (12.5%) answered that it was named as a defendant in a First Generation Action “frequently.” In the Common Practices Group, eleven respondents (78.6%) answered that they were named as a defendant in a First Generation Action “infrequently,” two respondents (14.3%) answered that they were named as a defendant in a First Generation Action a “moderate number of times” and one respondent (7.1%) answered that it was named as a defendant in a First Generation Action “frequently.” Unfortunately, because the number of respondents that have been named in First Generation Actions is so small no statistically significant comparison of frequency can be drawn.

126. Specifically, twenty-eight respondents report being sued in a Second Generation Action and twenty respondents report never being sued in a Second Generation Action. A 95% confidence interval is +/- 13.5%. Questionnaire, *infra* App. A, at question 18.

127. A 95% confidence interval is +/- 24%.

128. A 95% confidence interval is +/- 16.5%.

slightly smaller percentage of The Best Practices Group (62.5%) has never been named as a defendant in a First Generation Action than The Common Practices Group (65.6%). One possible explanation for this reversal is that deterrence is working more effectively in The Best Practices Group than it is in The Common Practices Group. To the extent that The Best Practices Group is collecting and relying upon high quality information about class action litigation against their competitors, and The Common Practices Group is not, we would expect The Best Practices Group to reduce its likelihood of being sued in a Second Generation Action as compared to The Common Practices Group. The data suggest, however, that the effect of collecting and relying upon high quality information about class actions against competitors is quite modest.<sup>129</sup> Indeed, when one considers the range of responses within a 95% confidence interval, there is no statistically significant difference between the two groups.<sup>130</sup>

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129. The Questionnaire also asks:

How frequently does your company tend to be named as a defendant in **Second Generation Small-Stakes Class Actions?** (emphasis in original).

Three verbal category responses were: “infrequently (approximately 3 or fewer cases in any 5 year period of time)”; “A moderate number of times (approximately 4-10 cases in any 5 year period of time)”; “Frequently (more than 10 cases in any 5 year period of time)”. Questionnaire, *infra* App. A, at question 19. The data show that among the Best Practices Group, six respondents (66.7%) answered that they were named as a defendant in a Second Generation Action “infrequently”, three respondents (33.3%) answered that they were named as a defendant in a Second Generation Action a “moderate number of times” and zero answered that they were named as a defendant in a Second Generation Action “frequently.” In the Common Practices Group, fifteen respondents (68.2%) answered that they were named as a defendant in a Second Generation Action “infrequently”, five respondents (22.7%) answered that they were named as a defendant in a Second Generation Action a “moderate number of times” and two respondents (9.1%) answered that they were named as a defendant in a Second Generation Action “frequently.” Unfortunately, because the number of respondents that have been named in Second Generation Actions is so small (particularly the Best Practices Group with only nine respondents) no statistically significant comparison of frequency can be drawn.

130. It is possible that the respondents in The Best Practices Group would have been sued more than the respondents in The Common Practices Group but for the efforts taken to reduce their exposure to such suits. Since The Best Practices Group was approximately 3% more likely to be sued in a First Generation Action than The Common Practices Group, we might assume that The Best Practices Group of respondents hail from industries that shoulder greater exposure to class action litigation than The Common Practices Group of respondents. Using this as a baseline, we might assume that The Best Practices Group should be approximately 3% more likely to be sued in a Second Generation Action than The Common Practices Group. Thus, if 40.6% of respondents from The Common Practices Group have never been sued in a Second Generation Action, we might predict that only 37.6% of The Best Practices Group would never have been sued in a Second Generation Action but for the efforts taken to reduce exposure. Under these assumptions, the efforts taken by The Best Practices Group resulted in an approximately 6% reduction in exposure from the baseline prediction. When considered in light of the range of responses within a 95% confidence interval, however, this difference is statistically insignificant.

When we focus on Third Generation Actions the data shift in a surprising manner:

*To your knowledge, has your company ever been named as a defendant in a **Third Generation Small-Stakes Class Action**? (emphasis in original).*

The response to this question indicates that 48.9% of all respondents have been named as a defendant in a Third Generation Action and 51.1% have not been named in such an action.<sup>131</sup> If we isolate The Best Practices Group, 53.3% have been named as a defendant in a Third Generation Action, and 46.7% have never been named in such an action.<sup>132</sup> Among The Common Practices Group, 46.9% have been named in a Third Generation action, and 53.1% have never been named in such an action.<sup>133</sup>

The data suggest that the overall percentage of respondents named in Third Generation Actions is lower than the overall percentage of respondents named in Second Generation Actions (48.9% compared to 58.3%). This is not surprising when we consider that Third Generation Actions benefit from the legal and factual issues that have been resolved in Second Generation suits. At this stage of maturity, the outcome of litigation is more predictable and weak claims are not likely to be filed. Indeed, for precisely this reason we would expect that companies who collect and rely upon high quality information regarding class action litigation against their competitors will avoid being sued in Third Generation Actions more successfully than the Common Practices Group. Yet, the data fail to support this notion. Indeed, the data indicate that 46.7% of the respondents in The Best Practices Group have never been sued in a Third Generation Action, while a significantly larger percentage (53.1%) of respondents in the Common Practices Group have never been sued in a Third Generation Action.<sup>134</sup> When one considers the range of possible responses within a 95%

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131. Among the forty-five responses to the question, twenty-three have been named in a Third Generation Action and twenty-two have not been named in such an action. A 95% confidence interval is +/- 14%. Questionnaire, *infra* App. A, at question 24.

132. Among the sixteen respondents in The Best Practices Group, nine have been sued in a Third Generation Action and seven have not been named in such an action. A 95% confidence interval is +/- 24%.

133. Among the thirty-three respondents in The Common Practices Group, thirty-two responded to this question. Fifteen respondents report that they have been sued in a Third Generation Action, and seventeen respondents report that they have not been sued in a Third Generation Action. A 95% confidence interval is 16.5%.

134. The Questionnaire also asks:

How frequently does your company tend to be named as a defendant in **Third Generation Small-Stakes Class Actions**? (emphasis in original)

Three verbal category responses were: infrequently (approximately 3 or fewer cases in any 5 year period of time); A moderate number of times (approximately 4-10 cases in any 5 year period of time); Frequently (more than 10 cases in any 5 year period of time). Questionnaire, *infra* App. A, at question 25.

confidence interval, it is impossible to make any statistically significant distinctions between The Best Practices Group and The Common Practices Group. The data fails to confirm the hypothesis that Corporations who are informed about lawsuits filed against their competitors and who rely upon this information in making their own business decisions successfully avoid subsequent similar litigation.

Overall, the data collected in this study supports the notion that a relationship exists between litigation maturity and deterrence. Corporations report that it is easier to anticipate a risk of future liability when there is a well-developed record of the factual and legal issues from previous litigation than when there is no track record from previous litigation. In light of this finding, however, it is somewhat surprising that over three-quarters of the respondents have been sued in multiple generations of the same or a similar suit. Equally surprising is the finding that corporations armed with high quality information about previous litigation against their competitors are virtually no more successful in avoiding subsequent litigation than corporations who lack this information.

#### CONCLUSION

This Article offers new evidence to answer the primary question that has swirled around negative value class actions for decades: does the social utility derived from these actions outweigh “the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court.”<sup>135</sup> The answer to this question hinges on deterrence.

The data presented in this Article suggest that negative value class actions may not be as effective at deterring wrongful conduct as we expect them to be. This study tested three inter-related hypotheses: (1) future liability is easier to anticipate when there is a well-developed record of the factual and legal issues from previous litigation than when there is no track record from previous litigation; (2) corporations who have been held liable for particular conduct will successfully change their conduct to avoid litigation regarding similar conduct in

---

The data show that among the Best Practices Group, six respondents (66.7%) answered that they were named as a defendant in a Third Generation Action “infrequently”, two respondents (22.2%) answered that they were named as a defendant in a Third Generation Action a “moderate number of times” and one respondent (11.1%) answered that it was named as a defendant in a Third Generation Action “frequently.” In the Common Practices Group, ten respondents (58.8%) answered that they were named as a defendant in a Third Generation Action “infrequently”, six respondents (35.3%) answered that they were named as a defendant in a Third Generation Action a “moderate number of times” and one respondent (5.9%) answered that it was named as a defendant in a Third Generation Action “frequently.” Unfortunately, because the number of respondents that have been named in Third Generation Actions is so small (particularly the Best Practices Group with only nine respondents) no statistically significant comparison of frequency can be drawn.

135. John P. Frank, Whither Rule 23: Memorandum to the Honorable Patrick E. Higginbotham (Apr. 28, 1995) (unpublished memorandum on file with the Advisory Committee).

the future; (3) corporations who are informed about lawsuits filed against their competitors, and who rely upon this information in making their own business decisions, will successfully change their conduct to avoid subsequent similar litigation. The new data suggests that although there is a relationship between litigation maturity and deterrence, corporations are not successfully avoiding future litigation by relying upon information learned from earlier suits.

Before we conclude that small-stakes class actions are ineffective deterrents, however, we must consider whether corporations are partly to blame for the disappointing deterrence statistics. Indeed, with 84% of respondents reporting that they have been named as a defendant in multiple generations of the same (or a similar) dispute and a majority of respondents reporting that they do not collect high quality information about class actions against their competitors and/or consider such information when making their own business decisions, it is impossible to conclude that these corporations are investing their best efforts to avoid liability. To the extent that the data presented in this study brings attention to areas of weakness and highlights action that may be taken to address these weaknesses, everyone wins. Corporations do not want to be sued in negative value class actions any more than society wants to bear the expense associated with them. If this study motivates corporations to take efforts to improve deterrence, the study will have accomplished a great deal.



## APPENDIX A Small-Stakes Class Action Survey

### I. Introduction

The goal of this study is to refine our understanding of the relationship between small-stakes class action litigation and the prevention of injury.

### II. Definitions

For purposes of this survey, please apply the following definitions in answering the questions:

**“Small-Stakes Class Actions”** join together claims that cannot be economically litigated on an individual basis because each claim for relief is insufficient to cover the costs of litigation. Individual claims may seek damages ranging from a few pennies to several thousand dollars. Once joined together into a class, these claims become viable because the cost of litigation is spread among a large group of class members.

**“First Generation Small-Stakes Class Actions”** are small-stakes class actions that involve novel legal theories and/or unproven factual scenarios.

**“Second Generation Small-Stakes Class Actions”** are small-stakes class actions that involve legal theories and factual scenarios that have been previously argued in other cases but have not been definitively resolved. Thus while the case theories are not novel, ambiguity exists regarding the interpretation of important legal questions and/or the existence of evidentiary support for factual allegations.

**“Third Generation Small-Stakes Class Actions”** are small-stakes class actions that involve legal theories and factual scenarios that have been the subject of earlier class actions and enjoy fairly well developed legal and factual support from previous litigation. While some level of ambiguity persists, third generation class actions enjoy the most robust information from which to predict the likely outcome of a suit.

**\*\*Please note:** The following questions do not ask you to categorize specific class actions into one of these categories. Rather, the questions seek general impressions regarding your experience with class actions at various stages of maturity. The questions ask you to gauge the maturity of class actions in which you have been involved according to **your own knowledge and impressions**. It is NOT necessary to conduct research to supplement your knowledge of earlier generations of class actions to respond to these questions.

**“You”** refers to the entity or corporation on whose behalf you are responding.

### III. Completed Surveys

Please return all survey responses to:

Professor Linda Simard  
Suffolk University Law School  
120 Tremont St.  
Boston, MA 02108-4977

### IV. Questions

1. Please state your company's industry:

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2. Please rate your company's awareness of class actions against your competitors (these are class actions in which you are NOT named as a defendant):

---

1      2      3      4      5      6      7      8      9      10

1= Almost No Awareness (We generally don't learn about class actions against our competitors)

10 = Very Aware (We learn about all class actions against our competitors very soon after they are filed)

Comment: \_\_\_\_\_

---



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3. Does your company have a system in place to learn about class actions against your competitors? (i.e. a formal or informal network of general counsels, a trade organization, etc.)

- a. No
- b. Yes

Comment (please describe the system):

---



---



---

4. Please rate the quality of information (level of detail, reliability, accuracy, etc.) that your company learns about the legal theories and factual assertions in class actions against your competitors:

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1 = The quality of information is very poor.

10 = The quality of information is excellent.

Comment: \_\_\_\_\_

\_\_\_\_\_

5. Please rate the **relevance** of the information you acquire about class actions against your competitors **to your company's business decisions**:

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1 = Not relevant

10 = Highly relevant

Comment: \_\_\_\_\_

\_\_\_\_\_

6. Please rate the effectiveness of small-stakes class actions in regulating your competitors' conduct (for example, do small-stakes class actions deter your competitors from breaking legal rules to gain a competitive advantage?):

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1 = Small-stakes class actions have not been effective in regulating our competitors' conduct.

10 = Small-stakes class actions have been very effective in regulating our competitors' conduct.

Comment: \_\_\_\_\_

\_\_\_\_\_

7. To your knowledge, has your company ever been named as a defendant in a small-stakes class action filed in a state or federal court in the United States that **includes foreign citizens (non U.S. citizens) as class members**?

a. No (please go on to question 9)

b. Yes

8. How frequently does your company tend to be named as a defendant in small-stakes class actions filed in state or federal court in the United States that **include foreign citizens as class members**?

- a. Almost never (approximately 0- 1 case in any 5 year period of time)
- b. Infrequently (approximately 2-3 cases in any 5 year period of time)
- c. A moderate number of times (approximately 4-10 cases in any 5 year period of time)
- d. Frequently (more than 10 cases in any 5 year period of time)

9. To your knowledge, has your company ever been named as a defendant in a small-stakes judicial action filed in a court outside of the United States (i.e. an action involving a large number of people alleging small-stakes injuries)?

- a. No
- b. Yes

If yes, please rate your impressions of the process offered in these forums (efficiency, opportunity to present your case, outcome, availability of appellate review, etc.)

---

1      2      3      4      5      6      7      8      9      10

1 = Quality of the process was poor

10 = Quality of the process was excellent

Comments (please identify the countries where the proceedings occurred):

---



---



---

10. To your knowledge, has your company ever been the subject of a **non-judicial** legal proceeding outside of the United States to redress a large scale, small-stakes dispute (i.e. an administrative or regulatory proceeding)?

- a. No
- b. Yes

If yes, please rate your impressions of the process offered in these forums (efficiency, opportunity to present your case, outcome, availability of review or reconsideration, etc.)

---

1      2      3      4      5      6      7      8      9      10

1 = Quality of the process was poor

10 = Quality of the process was excellent

Comments (please identify the countries where the proceedings occurred):

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11. To your knowledge, has your company ever been the subject of a legal proceeding outside of the United States (judicial or non-judicial) **regarding a dispute that had previously been the subject of a class action suit in the United States?**

- a. No
- b. Yes

If yes, did the foreign forum recognize the US class action judgment and accord it preclusive effect?

- a. No
- b. Yes

12. Do you believe that your foreign competitors have a competitive advantage over your company because they are less likely to be named as defendants in small-stakes class actions filed in state or federal courts in the United States?

- a. No
- b. Yes

13. To your knowledge, has your company ever been named as a defendant in a **First Generation Small-Stakes Class Action?**

- a. No (please go on to question 18)
- b. Yes

14. How frequently does your company tend to be named as a defendant in **First Generation Small-Stakes Class Actions?**

- a. Infrequently (approximately 3 or fewer cases in any 5 year period of time)
- b. A moderate number of times (approximately 4-10 cases in any 5 year period of time)
- c. Frequently (more than 10 cases in any 5 year period of time)

15. With regard to the occasions when your company has been named as a defendant in a **First Generation Small-Stakes Class Action**, please rate your ability to anticipate the legal and factual claims at the time of the event or business decision that later became the subject of the class action suit:

---

1      2      3      4      5      6      7      8      9      10

1= We generally have not anticipated the legal and/or factual claims of First Generation Small-Stakes Class Actions.

10 = We generally have anticipated the legal and factual claims of First Generation Small-Stakes Class Actions.

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

16. With regard to the occasions when your company has been named as a defendant in a **First Generation Small-Stakes Class Action**, please rate your ability to estimate the plaintiffs' likelihood of success on the merits at the time of the event or business decision that later became the subject of the suit:

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1 = We have not been able to accurately estimate the plaintiffs' likelihood of success in First Generation Small-Stakes Class Actions.

10 = We have been able to accurately estimate the plaintiffs' likelihood of success in First Generation Small-Stakes Class Actions.

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

17. With regard to the occasions when your company has been named as a defendant in a **First Generation Small-Stakes Class Action**, please rate your ability to estimate the magnitude of the potential liability at the time of the event or business decision that later became the subject of the suit:

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1= We have not been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision.

10 = We have been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision.

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

18. To your knowledge, has your company ever been named as a defendant in a **Second Generation Small-Stakes Class Action**?

- a. No (please go on to question 24)
- b. Yes

19. How frequently does your company tend to be named as a defendant in **Second Generation Small-Stakes Class Actions**?

- a. Infrequently (approximately 3 or fewer cases in any 5 year period of time)
- b. A moderate number of times (approximately 4-10 cases in any 5 year period of time)
- c. Frequently (more than 10 cases in any 5 year period of time)

20. When your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, approximately how often has the company been named as a defendant in the earlier generation of a similar dispute?

- a. Never
- b. Infrequently (between 1-3 times)
- c. Somewhat often (four or more times)

21. With regard to the occasions when your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, please rate your ability to anticipate the legal and factual claims at the time of the event or business decision that later became the subject of the suit:

---

1      2      3      4      5      6      7      8      9      10

1 = We generally have not anticipated the legal and/or factual claims of Second Generation Small-Stakes Class Actions.

10 = We generally have anticipated the legal and factual claims of Second Generation Small-Stakes Class Actions.

22. With regard to the occasions when your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, please rate your ability to estimate the plaintiffs' likelihood of success at the time of the underlying event or decision that later became the subject of the suit:

---

1      2      3      4      5      6      7      8      9      10

1 = We have not been able to accurately estimate the plaintiffs' likelihood of success in Second Generation Small-Stakes Class Actions.

10 = We have been able to accurately estimate the plaintiffs' likelihood of success in Second Generation Small-Stakes Class Actions.

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

23. With regard to the occasions when your company has been named as a defendant in a **Second Generation Small-Stakes Class Action**, please rate your ability to estimate the magnitude of the potential liability to the class at the time of the underlying event or decision that later became the subject of the suit:

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1 = We have not been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision.

10 = We have been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision.

Comment: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

24. To your knowledge, has your company ever been named as a defendant in a **Third Generation Small-Stakes Class Action**?

- a. No (Please go on to question 30.)  
 b. Yes

25. How frequently does your company tend to be named as a defendant in **Third Generation Small-Stakes Class Actions**?

- a. Infrequently (approximately three or fewer cases in any five year period of time)  
 b. A moderate number of times (approximately four to ten cases in any five year period of time)  
 c. Frequently (more than ten cases in any five year period of time)

26. When your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, approximately how often has the company been named as a defendant in an earlier generation of a similar dispute?

- a. Never  
 a. Infrequently (between one and three times)  
 b. Relatively often (more than four times)



27. With regard to the occasions when your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, please rate your ability to anticipate the legal and factual claims at the time of the underlying event or decision that later became the subject of the suit:

---

1      2      3      4      5      6      7      8      9      10

1 = We generally have not anticipated the legal and/or factual claims of Third Generation Small-Stakes Class Actions.

10 = We generally have anticipated the legal and factual claims of Third Generation Small-Stakes Class Actions.

Comment: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

28. With regard to the occasions when your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, please rate your ability to estimate the plaintiffs' likelihood of success at the time of the underlying event or decision that later became the subject of the suit:

---

1      2      3      4      5      6      7      8      9      10

1 = We have not been able to accurately estimate the plaintiffs' likelihood of success in Third Generation Small-Stakes Class Action.

10 = We have been able to accurately estimate the plaintiffs' likelihood of success in Third Generation Small-Stakes Class Action.

Comment: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

29. With regard to the occasions when your company has been named as a defendant in a **Third Generation Small-Stakes Class Action**, please rate your ability to estimate the magnitude of the potential liability at the time of the underlying event or decision that later became the subject of the suit:

---

1      2      3      4      5      6      7      8      9      10

1 = We have not been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision.

10 = We have been able to accurately estimate the magnitude of the potential liability at the time of the underlying event or decision.

Comment: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

30. Please identify the factors that your company uses to determine whether to invest in precautions that may reduce the likelihood of a class action suit:

(Circle all that apply.)

- a.
- a. Cost benefit analysis (invest in precautions when the cost of precaution is less than the expected loss from a class action lawsuit)
- b. Customer relations (invest in precautions to maintain good customer relations, even when the cost of the precaution exceeds the expected loss from a class action lawsuit)
- c. Publicity (invest in precautions to avoid bad publicity, even when the cost of the precaution exceeds the expected loss from a class action lawsuit)
- d. Other (Please describe below.)

Comment: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

31. Based upon your experience, please rate the quality of the procedures applied in small-stakes class action litigation in the United States (i.e. efficiency, opportunity to present your case, outcome, availability of review or reconsideration, etc.):

\_\_\_\_\_

1      2      3      4      5      6      7      8      9      10

1 = Quality of the process is poor.

10 = Quality of the process is excellent.

32. Please indicate if someone from your company would be willing to participate in a follow up interview via telephone.

- a. No
- b. Yes (Please provide the name and contact information below.)

\_\_\_\_\_  
 \_\_\_\_\_

Please feel free to include any additional comments (in the space below, on the back of this page, or on a separate sheet):

Thank you for your time in responding to these questions.

Please return all completed surveys to:

Professor Linda Simard  
Suffolk University Law School  
120 Tremont St.  
Boston, MA 02108-4977

**APPENDIX B**  
October 24, 2011

Dear (name):

I am writing to solicit ten to fifteen minutes of your time for a research project concerning so-called “small-stakes class actions.” The phrase “small-stakes class action” refers to a class action that joins together claims that cannot be economically litigated on an individual basis because each claim for relief is insufficient to cover the costs of litigation. When joined together into a class, these claims become viable because the cost of litigation is spread among a large group of class members. Notwithstanding the name “small-stakes class action,” these suits are anything but “small-stakes” to the defendants who are threatened with massive liability.

Academic theory suggests that small-stakes class actions serve important societal goals.<sup>136</sup> Yet, very little empirical evidence exists to support or refute the academic theory. This study provides you with an opportunity to provide valuable empirical evidence regarding the role small-stakes class actions play in corporate decision-making. The goal of this study is to refine our understanding of the relationship between small-stakes class actions and the prevention of injury.

In exchange for your participation in the study, you will be provided with the survey results and study conclusions. The survey is being sent to all Fortune 500 companies, and a high response rate will offer significant insights and valuable information regarding small-stakes class action litigation from the defense perspective. In an effort to reduce the perceived risk associated with participation in the study, all information collected from the study will maintain the anonymity of the participants in the study. Specifically, all survey responses will be kept strictly confidential; results, calculations, and conclusions will be communicated without attribution to any participant in the study (including information released to study participants), and no individual company or counsel will be identified as a participant in the study. Survey responses will be used to develop one or more scholarly papers discussing the results of the study.

I have enclosed a brief personal biography to provide you with information regarding my scholarly background. Please do not hesitate to contact me with any questions or comments.

Thank you for your contribution to the success of this study.

Sincerely,

Linda Sandstrom Simard

---

136. Specifically, small-stakes class actions are intended to: (1) minimize injury costs through prevention (deterrence) and (2) compensate for injuries that are not prevented. Most class members receive relatively small compensation from small-stakes class actions, making the deterrence function the primary rationale for these suits. See Brian Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2067-68 (2010).

**APPENDIX C**  
February 16, 2012

Dear (name):

Several months ago, I requested your participation in an empirical study on class action litigation. Specifically, the study focuses on “negative value” or “small-stakes” class actions involving class members who allege very small losses. These class actions involve individual claims that are too small to justify an individual lawsuit because the cost of litigation exceeds the potential recovery for any individual class member. Thus, class certification under these circumstances allows litigation that otherwise would not be viable. This study seeks to determine when, if ever, these class actions make sense. The study promises to make a significant contribution to the ongoing debate by collecting empirical, anonymous, evidence from corporate decision makers who will provide a perspective that has been noticeably absent from academic literature on the subject.

To date, a number of your colleagues at other Fortune 500 companies have participated in the study. In order to generate credible results, however, I need your participation. I assure you that all information collected from the study will maintain the anonymity of the participants in the study. All survey responses will be kept strictly confidential; results, calculations and conclusions will be communicated without attribution to any participant in the study, and no individual company or counsel will be identified as a participant in the study. In exchange for your participation, I will provide you with access to the study results and conclusions, without attribution or identification of participants. Survey responses will be used to develop one or more scholarly papers for publication.

Thank you for your contribution to the success of this study. Please do not hesitate to contact me with any questions or comments.

Sincerely,

Linda Sandstrom Simard

# Indiana Law Review

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## SPEECH

### ADDRESS TO THE SEVENTH CIRCUIT BAR ASSOCIATION AND THE SEVENTH CIRCUIT JUDICIAL CONFERENCE ANNUAL JOINT MEETING MAY 6, 2013\*

SENATOR RICHARD G. LUGAR\*\*

I thank the Seventh Circuit Bar Association and the Seventh Circuit Judicial Conference for this opportunity to address your annual joint meeting. It is a great pleasure to be with so many friends who have served our country and our state. As a Hoosier, I have always been proud of the Seventh Circuit's contributions to American jurisprudence and to the well being of Indiana.

Since leaving office, I have been fortunate to become affiliated with several universities and organizations that give me a chance to continue my public service in a more scholarly and analytical format. Among these are the University of Indianapolis, Indiana University, Georgetown University, the German Marshall Fund, and the Center for Strategic and International Studies. Additionally, three weeks ago we announced the formation of The Lugar Center in Washington, D.C. This is a new non-profit organization through which I hope to continue my work in several specific policy areas, especially containing the spread of weapons of mass destruction, advancing global food security, and achieving more effective foreign assistance practices. The Center also will be dedicated to promoting a more bipartisan process within our government.

It is this element that I wish to address today, especially in relation to the construction of our court system and the confirmation of Federal judges by the Senate.

During my 36 years in the Senate, I witnessed a great number of changes in our government, but few were as profound as the change in attitudes toward the process of confirming Federal judges.

For most of our nation's history, judicial confirmations in the Senate rarely resulted in even a dozen negative votes against a nominee. Prior to 1955, Supreme Court nominees almost never testified before the Senate as part of their

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\* The text of Senator Richard G. Lugar's May 6, 2013, speech to the Seventh Circuit Bar Association and the Seventh Circuit Judicial Conference Annual Joint Meeting was originally published in THE CIRCUIT RIDER, No. 15, Nov. 2013, at 8-10, available at [http://c.y.mcdn.com/sites/www.7thcircuitbar.org/resource/resmgr/circuit\\_rider/The\\_Circuit\\_Rider\\_Vol\\_15.pdf](http://c.y.mcdn.com/sites/www.7thcircuitbar.org/resource/resmgr/circuit_rider/The_Circuit_Rider_Vol_15.pdf). Reprinted with permission from the Seventh Circuit Bar Association and *The Circuit Rider*.

\*\* United States Senator from Indiana serving between the years of 1977 and 2013.

confirmations. This was true of Indiana's own Sherman Minton, who was confirmed without controversy despite declining to appear before the Judiciary Committee following his nomination by President Truman.

When I began my Senate service in 1977, judicial confirmation hearings had become standard practice, but the vast majority of them were not the tense affairs we witness today. I recall that one of the Federal judges that I championed in the 1980s was asked just two questions at his Judiciary Committee hearing, the second of which was: "Dick Lugar said you will be a good judge—are you going to be a good judge?" The nominee quickly answered yes and the hearing was gavelled to a close.

Expectations changed significantly as a result of the battle over the Supreme Court nomination of Robert Bork. The unprecedented involvement of outside interest groups in the nomination process and the degree to which opponents attempted to portray the nominee's judicial opinions as character flaws signaled a new era in judicial confirmations. After the failure of the Bork nomination, Presidents were on notice that a no-holds-barred fight against any judicial nominee was a possibility. The Bork experience also guaranteed that all subsequent Supreme Court nominations would feature adversarial questioning during confirmation hearings.

But although the Bork nomination clearly was a watershed event, the norms against overt politicization of judicial nominations remained powerful. Few Senators sought to derail Federal judicial appointments without an extraordinary reason, and most Senators still began the confirmation process with the presumption that they would support a nominee unless information arose to convince them otherwise.

Over the last quarter century, however, this norm gradually has degenerated. I attribute this primarily to the ability of outside political forces on both sides to monetize partisanship through the use of cable news, the internet, and social media. Information technology has enabled many more commentators to successfully market at very low cost a strident viewpoint to vast numbers of adherents. Such operations find judicial nominations to be especially useful targets, because it is easier to personalize attacks against human beings than abstract policies. In addition, judicial nominees who already have served on the bench usually have records rich in controversial detail that can be manipulated or exploited.

For prospective Federal judges, this evolution to a highly partisan norm has meant far more contentious confirmations, longer waiting periods between their nomination and confirmation, and much closer Senate confirmation votes than in the past.

The new norms against politicizing judicial nominations can be observed in the Senate votes on the four most recent Supreme Court Justices to be confirmed. Chief Justice Roberts received 22 negative votes in the Senate; Justice Alito received 42, Justice Sotomayor received 31, and Justice Kagan 37.

All four of these Supreme Court Justices possessed strong qualifications and high moral character. Each of them demonstrated skill and a judicial temperament in their confirmation hearings. My own sense is that had they been nominated in the atmosphere of the 1990s, the negative votes against these

Justices would have been in the single digits. Had they been nominated in the pre-Bork era, their confirmations would have been unanimous or close to it. Yet between 2005 and 2010, roughly one half to four-fifths of the opposing party in the Senate voted against the nominations of all four justices.

What these numbers tell us is that most Senators no longer apply a non-political standard to their vote on nominees to the Supreme Court. The straightforward reason for this is that it is no longer good politics to do so. If you polled Senators today, you would find agreement that casting a vote for a Supreme Court Justice nominated by a President of the opposing party carries extreme political risks and almost no political benefits.

During my 2012 primary campaign, we operated a vigorous phone bank through which volunteers made well over a million calls to Hoosier Republican households. These volunteers were able to engage roughly a quarter million Hoosiers in conversation on the election and the issues of the day. As we tallied issues raised in these conversations, it was clear that among the votes that I cast, none were more controversial than my votes to confirm Justices Sotomayor and Kagan. Some Republican primary voters had been convinced that these Justices were unqualified or ethically unfit to sit on the bench. Many others opposed them on philosophical grounds or simply because they had been nominated by President Obama.

I made the case during the campaign that Republican-appointed judges would not likely receive a fair hearing in the future if nominees of Democratic presidents were routinely blocked in the present. I also argued that opposing well-qualified judicial nominees rarely resulted in a more moderate candidate being named, because the tendency during and after such an episode is for the President to dig in his heels. I encountered a good number of voters who agreed with these points in principle. But many of them perceived such enormous risk from President Obama's judicial appointees that any concern for the future treatment of Republican-appointed judges was trumped by their desire to oppose the President.

It is no mystery that in politics, short-term thinking predominates. It may also be that for some, preventing a judge with whom they disagree from taking the bench is more important than securing the appointment of a judge they like, though it was rarely expressed to me in that way.

My concern is that one party or the other will succumb to a fit of partisan passion and decide to filibuster a qualified Supreme Court nominee. We are very close to this. Periodically, the thought is raised that filibustering a prospective justice would not be such a bad thing. This usually happens in the early stages of vetting a nominee as the opposing forces are coming to grips with their options.

In 1968, the Senate held an unsuccessful cloture vote on the Supreme Court nomination of Abe Fortas, but there is disagreement as to whether this constituted a full-fledged filibuster. In any case, the Fortas nomination has never been much of a precedent because of its many peculiarities, including ethical problems that emerged late in the confirmation process and the fact that those voting against cloture were almost evenly split between Democrats and Republicans. Thus, this failed nomination was not the result of one party using a filibuster strategy to kill a nominee of the opposite party for partisan reasons.



If we cross this partisan barrier in a way that establishes a precedent, the last vestiges of fair and open-minded treatment of judicial nominees could disintegrate. Filibusters of judges could become common, with the votes of only a handful of centrists in either party coming into play.

In such a universe, the problems that have encumbered the Federal Judiciary, including lengthy judicial vacancies and heavy caseloads, would multiply. But the consequences could be much further reaching for our system of government.

Crossing over the line could change the character of American democracy. The Founders emphasized the difference between the “political branches”—the Executive and the Legislature—and the Judiciary. Their concern about the potential dangers of passionate, interest-driven political divisions, which Madison famously called the “mischiefs of faction,” influenced their design of our entire governmental structure. But they were especially concerned that such mischiefs not permeate those who would sit on the bench.

If nominating and confirming judges becomes a purely partisan affair, it will be far more likely that judges subjected to such proceedings will feel less inclined to uphold strict norms of impartiality and non-partisanship. Moreover, how the Senate treats judges is a leading indicator of the direction of our political culture and our expectations for our government. The judiciary was conceived as the element of our government that would be the least subject to partisanship. If the Senate routinely treats judicial nominees as objects to be exploited for political advantage, hopes for bipartisan unity and productivity throughout our democracy would be much dimmer.

I believe that despite recent trends, a foundation still exists on which to rebuild the vital concept of non-partisan confirmation of judges. Even if most Senators are resigned to what they see as a personal political necessity to vote against a Supreme Court nominee of the opposite party, few relish the process. Perhaps more importantly, although Supreme Court nominations produce political combat with few limitations, opposition to lower court nominees is more selective and more often takes the form of delay than outright opposition.

In 2005, I had the opportunity to introduce Chief Justice John Roberts at his Judiciary Committee confirmation hearing. This was one of the most memorable and proud occasions of my Senate tenure. On that day I told the Judiciary Committee that, “the timeless lesson that transcends any particular case and whatever controversy may swirl about it is how our courts resolve disputes, from the momentous to the mundane, in administering a fair, impartial system of justice that must stand outside the political passions and pressures of the day, and whose judges must put aside whatever personal views they may have on the issues presented.”

Through all of the deeply divisive issues and political combat that permeate our democracy in the present age, we must defend this principle. I hope that each of you will use the occasion of this Conference to rededicate yourself to fulfilling the trust that our Founders placed in our courts and the judicial branch. I thank each of you for your hard work, study, and expertise that daily benefits our country and our legal system.

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## NOTES

### COMMUNITY-BASED TAX CREDITS: TAX CREDITS THAT REDUCE CONSUMER-DRIVEN POLLUTION BY ENCOURAGING COLLECTIVE ACTION

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#### INTRODUCTION

Kellen Bolden dreamed of being a millionaire.<sup>1</sup> Then, at the age of ten, his dreams were destroyed.<sup>2</sup> Kellen boarded his school bus after a day at Pointe South Elementary School, located in a community twenty miles south of Atlanta.<sup>3</sup> Suddenly, without any warning, he collapsed onto the ground, gasping for breath.<sup>4</sup> Despite urgent attempts to save his life, he passed away less than an hour later.<sup>5</sup> The cause of death: asthma.<sup>6</sup> The likely trigger: diesel exhaust from the school buses.<sup>7</sup>

Unfortunately, the loss of Kellen Bolden is not an isolated incident; Brennan Passons,<sup>8</sup> Jovante Woods,<sup>9</sup> and countless others, young and old, have lost their lives to asthma.<sup>10</sup> In 2009, approximately one in ten children in the United States

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1. Lynne Peeples, *Air Pollution, Asthma Burden Unevenly Shared Among U.S. Children*, HUFFINGTON POST (May 7, 2012, 7:55 PM), [http://www.huffingtonpost.com/2012/05/07/air-pollution-asthma-children-\\_n\\_1497818.html](http://www.huffingtonpost.com/2012/05/07/air-pollution-asthma-children-_n_1497818.html), archived at <http://perma.cc/F9KE-PTUQ>.

2. *Id.*

3. Valerie Gregg, *Sprawl*, MOMENTUM (Fall 2001), available at [http://whsc.emory.edu/\\_pubs/momentum/2001fall/sprawl.html](http://whsc.emory.edu/_pubs/momentum/2001fall/sprawl.html), archived at <http://perma.cc/T5TX-VWPH>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Peeples, *supra* note 1.

9. Chandra Baldwin-Woods, *Chandra's Story: Losing a Son to Asthma*, MOMS CLEAN AIR FORCE (Mar. 27, 2012), <http://www.momscleanairforce.org/2012/03/27/chandras-story-losing-a-son-to-asthma/>.

10. In 1997, 3447 Americans died from asthma attacks. CENTER FOR DISEASE CONTROL, CDC VITAL SIGNS: ASTHMA IN THE US 2 (2011) [hereinafter CDC VITAL SIGNS], available at <http://www.cdc.gov/VitalSigns/pdf/2011-05-vitalsigns.pdf>, archived at <http://perma.cc/T5TX-VWPH>.

had asthma,<sup>11</sup> making it the most common chronic illness among children.<sup>12</sup> In 2007 alone, 3447 American adults and children died from asthma attacks.<sup>13</sup> One of the major triggers of asthma is air pollution.<sup>14</sup> In fact, air pollution claims the lives of an estimated 70,000 people in the United States each year.<sup>15</sup>

Yet, the tragic deaths of children like Kellen, Brennan, and Jovante do not capture the nation's attention like other recent tragic events, such as Hurricane Katrina, the Aurora Colorado massacre, Superstorm Sandy, and the Newtown Connecticut tragedy. With each of these, the loss of life was swift and enormous.<sup>16</sup> But every day, innocent people—fathers and sons, mothers and daughters, the old and the young—are taken from us by a slow, silent killer. What is worse—we know the culprit. We know how to slow it down. We have simply failed to act.

This country has taken strides towards reducing air pollution and protecting the health of many of its citizens.<sup>17</sup> But, it has not gone far enough. We need new ideas and solutions—solutions that hold all polluters accountable, address the inequities and disparities of air pollution, and incentivize and mobilize communities to act collectively to reduce air pollution.

This Note proposes a solution to help reduce air pollution in the United States. This solution comes in the form of a new tax credit, hereinafter referred to as the Community Clean Air Tax Credit (CCAT Credit). This tax credit would be available to individuals living in communities or neighborhoods that have taken steps to reduce air pollution. To be eligible to receive the CCAT Credit, the community or neighborhood as a whole must meet state-mandated pollution reduction goals. However, even if the community reaches the state-mandated goals, only the residents or households that individually meet the state goal would earn the CCAT Credit. The value of this tax credit would depend on the number

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11. *Id.*

12. CENTER FOR DISEASE CONTROL, ASTHMA MORTALITY AND HOSPITALIZATION AMONG CHILDREN AND YOUNG ADULTS—UNITED STATES, 1980-1993 (1996), *available at* <http://wonder.cdc.gov/wonder/prevguid/m0041248/m0041248.asp>, *archived at* <http://perma.cc/4FAV-VDVU>.

13. CDC VITAL SIGNS, *supra* note 10, at 2.

14. U.S. ENVTL. PROT. AGENCY, SMOG—WHO DOES IT HURT? WHAT YOU NEED TO KNOW ABOUT OZONE AND YOUR HEALTH 2 (1999), *available at* <http://www.epa.gov/airnow/health/smog.pdf>, *archived at* <http://perma.cc/5FPK-8YDP>.

15. BERNIE FISCHLOWITZ-ROBERTS, EARTH POLICY INSTITUTE, AIR POLLUTION FATALITIES NOW EXCEED TRAFFIC DEATHS BY 3 TO 1 (Sep. 17, 2002), [http://www.earth-policy.org/plan\\_b\\_updates/2002/update17](http://www.earth-policy.org/plan_b_updates/2002/update17), *archived at* <http://perma.cc/9RGY-Q38E>.

16. For example, within minutes, twelve people were killed in the movie theatre mass shooting in Aurora, Colorado. Twenty-six individuals, not including the gunman, were killed in the school shooting in Newtown, Connecticut. George Zornick, *Sixteen US Mass Shootings Happened in 2012, Leaving at Least 88 Dead*, NATION (Dec. 14, 2012, 4:18 PM), <http://www.thenation.com/blog/171774/fifteen-us-mass-shootings-happened-2012-84-dead#> *archived at* <http://perma.cc/3DSV-BRB3>.

17. These strides are largely the result of the Clean Air Act. *See* 42 U.S.C. §§ 7401-7671q (2006).

of goals met by each community, and on the number of goals each household individually satisfied. The goals, mandated by the state, could include reduction in average household electricity consumption, reduction in average per capita trash production, and increased residential recycling participation, just to name a few. Each goal has one common denominator—they would directly or indirectly result in a reduction in air pollution.

The idea behind this tax credit is simple. Air pollution cannot be significantly reduced by individuals and advocacy groups alone. It requires collective action. Thus, earning the tax credit requires not only individual action, but also the collective action of entire communities. Currently, this country's regulatory framework for reducing air pollution targets the emitters of pollution—power plants, businesses, and factories. Yet the consumers, the purchasers of the emitter's products, are the true source of pollution in this country. The purpose of the CCAT Credit is threefold. First, it is meant to shift the focus of air pollution reduction efforts away from the emitters, where it is currently focused, and onto the consumer. Second, it is meant to modify individual consumer behavior in a way that improves the environment. And third, it is meant to create a financial incentive to collectively act within one's community to reduce pollution.

This Note analyzes the potential benefits of implementing this proposed solution and examine why it is necessary. Part I provides a brief introduction to the current regulatory mechanism used to control and reduce pollution—the Clean Air Act. Part II examines why the current model is not working and identifies the ultimate source of pollution in this country—consumers. Part III examines the challenges in solving this problem and presents a new solution in the form of a community-based tax credit, which will alter consumer behavior while encouraging people to collectively act to reduce air pollution. Part IV addresses several issues that this tax credit is likely to raise, such as how it will be funded and ways to increase its effectiveness. This Note does not lay out the specific blueprint of this proposed CCAT credit. Rather, it explains how a commonly-used incentive (the tax credit) may be used to promote environmentally-positive behaviors at both an individual and community level. Individual action alone will not clean our polluted air, but community action might be able to finally turn the tides.

## I. THE CLEAN AIR ACT

The primary regulatory mechanism used to control and reduce pollution is the Clean Air Act.<sup>18</sup> Its purpose is “to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.”<sup>19</sup> The Act grants power to the Environmental Protection Agency (EPA) to establish national ambient air quality standards

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18. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006).

19. 42 U.S.C. § 7401(b)(1) (2006).

(NAAQS),<sup>20</sup> which limit the maximum concentration of specific pollutants in the air.<sup>21</sup> The federal government and the states share the responsibility of attaining these goals through cooperative federalism.<sup>22</sup> The federal government sets the air quality standards, and the states prepare state implementation plans (SIPs) to meet these standards.<sup>23</sup> Once the EPA determines that a satisfactory SIP is in place, both the EPA and the state are tasked with enforcing the SIP against violators.<sup>24</sup>

#### A. *Some Successes of the Clean Air Act*

In some respects, the Clean Air Act has had great success. It has resulted in a significant reduction of several pollutants that pose serious risks to human health, including carbon monoxide emissions,<sup>25</sup> lead emissions from gasoline,<sup>26</sup> sulfur dioxide emissions,<sup>27</sup> and hazardous air pollutant emissions.<sup>28</sup>

This has resulted in positive health and economic impacts. Between 1970 and 1990, the implementation of the Act is estimated to have prevented 205,000 premature deaths, along with hundreds of thousands of cardiovascular and respiratory diseases.<sup>29</sup> In that same time period, the reduction in air pollution saved an estimated \$22 trillion in health care expenses and lost productivity at a cost of \$523 billion.<sup>30</sup> As of 2010, the EPA estimates that the annual economic benefit of air quality improvements associated with the Act is nearly \$2 trillion.<sup>31</sup> The EPA publishes these statistics, along with several others, as indicative of its nationwide success in reducing air pollution.<sup>32</sup> Unfortunately, these positive

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20. *Id.* § 7409(a)(1)(A).

21. 40 C.F.R. §§ 50.1-50.17 (2006).

22. 42 U.S.C. § 7410(a)(1) (2006); *see also* Robert Fischman, *Cooperative Federalism and Natural Resource Law*, 14 N.Y.U. ENVTL. L.J. 179, 180 (2005) (describing cooperative federalism as “an arrangement under which a national government induces coordination from subordinate jurisdictions”).

23. *Id.* at § 7410(a)(1).

24. *Id.* at § 7413(a)(1)-(3) (2012).

25. Annual carbon monoxide emissions were reduced by 62% between 1970 and 2008. Craig N. Oren, *Is the Clean Air Act at a Crossroads?*, 40 ENVTL. L. 1231, 1235 (2010).

26. Between 1970 and 2005, lead emissions dropped by 99%. *Id.* at 1235-36.

27. Sulfur dioxide emissions fell by 66% between 1970 and 2008. *Id.* at 1236.

28. Hazardous air pollutant emissions fell by 40% between 1990 and 2005. U.S. ENVTL. PROT. AGENCY, OUR NATION’S AIR 1-2 (2010) [hereinafter OUR NATION’S AIR], *available at* <http://www.epa.gov/airtrends/2010/report/fullreport.pdf>, *archived at* <http://perma.cc/34JX-CZXB>.

29. NATIONAL WILDLIFE FEDERATION, THE CLEAN AIR ACT—HIGHLIGHTS OF THE FIRST 50 YEARS 1 (2010), *available at* <https://www.nwf.org/pdf/Policy-Solutions/CleanAirActFactSheet.pdf>.

30. NAT’L ASS’N OF CLEAN AIR AGENCIES, DON’T TAKE AWAY A STATE’S RIGHT TO PROTECT ITS CITIZENS FROM DIRTY AIR 4 (2005), *available at* <http://www.4cleanair.org/FinalBrochure-April05.pdf>, *archived at* <http://perma.cc/G625-E2R9>.

31. U.S. ENVTL. PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1990 TO 2020 7-3 (2010), *available at* <http://www.epa.gov/oar/sect812/aug10/fullreport.pdf>.

32. OUR NATION’S AIR, *supra* note 28.

results are not felt by everyone, and the Act still has not achieved what its creators promised—“that all Americans in all parts of the country shall have clean air to breathe, air that will have no adverse effects on their health.”<sup>33</sup>

### *B. Failures of the Clean Air Act*

Many reports lead the public to believe that our federal, state, and local governments are successfully tackling the pollution problem in the United States.<sup>34</sup> But for thousands of people in this country, this is simply not true.<sup>35</sup> By painting the success of the Clean Air Act in broad strokes, the EPA neglects the persistent and devastating instances of failure. In 2011, the EPA knew of more than 1600 persistent violators of the Clean Air Act—sites the EPA believed required immediate attention.<sup>36</sup> Of these, 383 were placed on an EPA internal watch list for being serious and chronic polluters, but none have faced formal enforcement action for at least nine months.<sup>37</sup> For individuals living in the same communities as these chronic polluters, the EPA’s previously mentioned “successes” mean little to nothing.

And while air pollution affects individuals of all races and socioeconomic classes, recent studies show a possible link between low socioeconomic status and greater harm from air pollution.<sup>38</sup> These individuals may face greater exposure to pollution because of factors such as housing market dynamics and land costs, which results in pollution sources being located near disadvantaged communities.<sup>39</sup> The lack of access to health care, poorer job opportunities, dirtier workplaces, and higher traffic also make these groups of individuals more susceptible to health threats caused by air pollution.<sup>40</sup> Additionally, existing health conditions may predispose certain disadvantaged groups to greater risks of the adverse effects of air pollution.<sup>41</sup> So, while the Clean Air Act can be praised for what it has accomplished so far, it must not be forgotten that parts of this country, especially the most vulnerable, are still paying a heavy toll.

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33. Senator Edmund Muskie, Remarks at Congressional Conference, 116 CONG. REC. 32901 (Sep. 21, 1970).

34. OUR NATION’S AIR, *supra* notes 28.

35. AMERICAN LUNG ASSOCIATION, STATE OF THE AIR 2012 8 (2012), available at <http://www.stateoftheair.org/2012/assets/state-of-the-air2012.pdf>, archived at <http://perma.cc/7KZL-FNJA> (“Over 127.2 million Americans live in the 235 counties where they are exposed to unhealthful levels of air pollution in the form of either ozone or short-term or year-round levels of particles.”).

36. Jim Morris, *Many Americans Left Behind in the Quest for Cleaner Air*, THE CENTER FOR PUBLIC INTEGRITY (Nov. 7, 2011, 5:00 AM), <http://www.publicintegrity.org/2011/11/07/7267/many-americans-left-behind-quest-cleaner-air>, archived at <http://perma.cc/CWY6-5BVK>.

37. *Id.*

38. AMERICAN LUNG ASSOCIATION, *supra* note 35, at 35.

39. *Id.*

40. *Id.*

41. *Id.*

A recent study estimates that the damage<sup>42</sup> caused by the emissions of six major pollutants<sup>43</sup> in 2002 was \$184 billion across all market sectors of the economy.<sup>44</sup> The most damage was caused by agriculture and forestry (\$32 billion), utilities (\$62.6 billion), transportation (\$23.2 billion), and manufacturing (\$26.4 billion).<sup>45</sup> Pollution from households, including homes and cars, is not even included in this \$184 billion.<sup>46</sup> For example, the use of light duty cars and trucks caused an additional \$37 billion in air pollution damage.<sup>47</sup>

But for as hard as it is to put a dollar figure on these adverse effects of air pollution, the loss of a human life cannot be measured in this way. The value of the lives of Kellen Bolden, Brennan Passons, Jovante Woods, and the many others that lost their lives to air pollution cannot be calculated by some mathematical formula. This is the true cost of society's failures, and until this country stops the loss of innocent life, the Clean Air Act can never be deemed a true success.

### C. Limitations of the Act

The Clean Air Act has not yet achieved its primary goal of one hundred percent attainment of NAAQS.<sup>48</sup> At least part of the reason for its limited success, and the need for new ideas and solutions, is the Act's own limitations, including limitations in the design, implementation, enforcement of the Act, and its susceptibility to political control.

The Clean Air Act can be characterized as a command-and-control statute.<sup>49</sup> Command-and-control regulation is a system in which the federal government prescribes how much an individual pollution source is allowed to emit and the types of control equipment that must be used to meet this emission requirement.<sup>50</sup>

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42. Damages include adverse consequences for human health, decreased timber and agricultural yields, reduced visibility, accelerated depreciation of materials, and reductions in recreation services. Nicholas Z. Muller et al., *Environmental Accounting for Pollution in the United States Economy*, 101 THE AMERICAN ECONOMIC REVIEW 1649, 1659 (2011), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.101.5.1649>, archived at <http://perma.cc/4P3U-B6XE>.

43. The six major pollutants are sulfur dioxide, nitrogen oxides, volatile organic compounds, ammonia, fine particulate matter, and coarse particulate matter. *Id.*

44. *Id.* at 1672.

45. *Id.* at 1664.

46. *Id.* at 1673.

47. *Id.*

48. See Daniel H. Cole & Peter Z. Grossman, *When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 910 (arguing that command-and-control environmental regulations, such as the Clean Air Act, can be efficient and produce social benefits in excess of their costs).

49. *Id.*

50. U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSIS 4-3

When it enacted the Clean Air Act, Congress prescribed the following: the establishment of NAAQS by the EPA;<sup>51</sup> the creation of technology-based emissions standards without regard to the costs of compliance across industries;<sup>52</sup> and the imposition of New Source Performance Standards (NSPSs),<sup>53</sup> which placed the most stringent emission-reduction standards on new sources as opposed to older factories and plants.<sup>54</sup> There is little doubt that these direct regulations improved the quality of the air in the United States, but economists and policy analysts argue that these regulations have imposed great costs on society<sup>55</sup> and have still failed to meet NAAQSs for many parts of the country.<sup>56</sup> Additionally, all businesses in a particular industry are required to achieve the same pollution-control goal, costing some businesses much more money than others.<sup>57</sup> In order to address some of the problems with this command-and-control method, Congress began considering new solutions to reduce air pollution.<sup>58</sup>

In the early 1990s, Congress amended the Clean Air Act by incorporating market-based incentives for pollution reduction.<sup>59</sup> Market-based approaches “create incentives for the private sector to incorporate pollution abatement into production or consumption decisions and to innovate in such a way as to continually search for the least costly method of abatement.”<sup>60</sup> Market-based reforms provide a more flexible approach than command-and-control regulations.<sup>61</sup> One of the most prevalent market-based incentives is the cap-and-trade system.<sup>62</sup> In this approach, a government body sets a nation-wide cap on the

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(2010) [hereinafter GUIDELINES FOR PREPARING ECONOMIC ANALYSIS], *available at* [http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0568-50.pdf/\\$file/EE-0568-50.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf), *archived at* <http://perma.cc/3SL4-RMRA>.

51. 42 U.S.C. §§ 7408, 7409 (2006).

52. *Id.* at § 7411.

53. *Id.* at § 7411(f).

54. Cole & Grossman, *supra* note 48, at 910.

55. See Robert W. Hahn, *The Politics and Religion of Clean Air*, REG., Winter 1990, at 21, *available at* <http://www.cato.org/doc-download/sites/cato.org/files/serials/files/regulation/1990/1/v13n1-3.pdf> (estimating that the total cost of air pollution protection is \$30 billion per year, which represents a form of invisible tax on users of commodities that are produced by industry).

56. AMERICAN LUNG ASSOCIATION, *supra* note 35, at 8 (“Over 127.2 million Americans live in the 235 counties where they are exposed to unhealthful levels of air pollution in the form of either ozone or short-term or year-round levels of particles.”).

57. See Cole & Grossman, *supra* note 48, at 910 (“All firms within a given regulated industry or category of industries had to achieve the same pollution-control goal, no matter that it cost one firm \$ 100 million to do so but another only \$ 10 million.”).

58. *Id.* at 931-32.

59. *Id.*

60. GUIDELINES FOR PREPARING ECONOMIC ANALYSIS, *supra* note 50, at 4-5.

61. *Id.*

62. *Id.*



amount of a pollutant that can be emitted.<sup>63</sup> This cap is then allocated to emitters in the form of emission permits, which represent the right to discharge a specific volume of a specific pollutant.<sup>64</sup> Each emitter must hold a number of permits equivalent to their emissions.<sup>65</sup> If an emitter needs to increase their volume of emissions, it can purchase permits from entities that do not require all of their permits.<sup>66</sup>

One example of a successful cap-and-trade program is the sulfur dioxide trading program,<sup>67</sup> which was implemented in the 1990 Clean Air Act Amendments.<sup>68</sup> The annual health benefits derived from the Sulfur dioxide cap-and-trade program were estimated to be more than \$50 million per year in 2010, and the overall annual cost savings are estimated to be \$150 million.<sup>69</sup>

However, in some cases, trading programs have increased emissions where the emissions permits sold were not being fully utilized by the owner.<sup>70</sup> This can occur where older, heavily polluting industries find it cheaper to purchase emissions permits rather than reduce their emissions—thereby creating “toxic hot spots.”<sup>71</sup> Pollution trading in Los Angeles, for example, has led to concentrated toxic hot-spots in low-income and minority communities.<sup>72</sup> This reinforces the fact that, while air quality has improved significantly since the passage of the Clean Air Act, not everyone is reaping the benefits.

In addition to these design challenges, the Clean Air Act faces other limitations in its implementation. First, its enforcement power is susceptible to shifting political ideologies of the Executive Branch.<sup>73</sup> Congress delegated the enforcement power of the Clean Air Act to the EPA,<sup>74</sup> which is a federal agency under the control of the executive branch.<sup>75</sup> For example, some believe that the

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63. *Id.* at 4-7.

64. *Id.*

65. *Id.*

66. *Id.*

67. 42 U.S.C. § 7651b (2006).

68. Clean Air Act Amendments of 1990, Pub. L. No. 101-549.

69. Michael Faure, *Effectiveness of Environmental Law: What Does the Evidence Tell Us?*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 293, 316 (2012).

70. *Id.*

71. Stephen M. Johnson, *Economics v. Equity: Do Market-based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH & LEE L. REV. 111, 129 (1999).

72. Richard T. Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, DUKE ENVIRON. LAW AND POL. FORUM 231, 235 (1999) available at <http://scholarship.law.duke.edu/delpf/vol9/iss2/5>, archived at <http://perma.cc/YG89-EFN3>.

73. See generally Lisa Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (discussing the positive and negative effects of presidential control of federal agencies).

74. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

75. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), reprinted in 84 Stat. 2086 (1970).

EPA was weakened during George W. Bush's presidency, and that his administration exercised strong central control over the EPA and other regulatory agencies.<sup>76</sup>

In addition to this, recent litigation over new EPA rules has also hindered advancements in pollution reduction.<sup>77</sup> In *EME Homer City Generation, L.P. v. EPA*, the D.C. Circuit Court of Appeals recently struck down the EPA's new Cross-State Air Pollution Rule,<sup>78</sup> concluding that the "EPA ha[d] transgressed statutory boundaries."<sup>79</sup> This rule was designed to reduce sulfur dioxide emissions by 73% and nitrogen oxide by 54% at coal-fired power plants from 2005 levels.<sup>80</sup> These reductions would have significantly improved the lives of millions of Americans at a cost of \$800 million per year to the industry.<sup>81</sup>

These limitations of the Clean Air Act illustrate the need for new solutions. While the Act continues to improve the quality of air in the United States, and *could* one day live up to its promise, the question is—how many people will suffer the devastating consequences of air pollution before that promise is fulfilled?

## II. THE SOURCE OF THE PROBLEM—THE CONSUMER

The current mechanism for regulating air pollution is almost entirely focused on the emitter, even though the consumer is becoming increasingly responsible for the pollution in this country:

There is general agreement that we are nearing the end of achieving major gains in pollution abatement from traditional sources, that a significant portion of the remaining environmental problems facing this country is caused by individual behavior, and that efforts to control that

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76. See Cheryl Hogue, *Bush's Legacy At EPA*, CHEMICAL & ENGINEERING NEWS (Dec. 22, 2008), [http://pubs.acs.org/cen/email/html/cen\\_86\\_i51\\_8651gov1.html](http://pubs.acs.org/cen/email/html/cen_86_i51_8651gov1.html), archived at <http://perma.cc/5HSJ-PVCZ> ("Under President George W. Bush, the [EPA] softened regulations that were hindering industry, issued regulations that were deemed industry-friendly, shuttered the agency's technical and scientific libraries, and reduced the information companies must submit on their release of toxic substances.").

77. See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 12 (D.D.C. 2012).

78. The Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), was promulgated by the EPA in order to effectuate section 110(a)(2)(D)(i)(I) of the Clean Air Act, 42 U.S.C. 7410(a)(2)(D)(i)(I), which requires "upwind" states to prohibit emissions that contribute significantly to the pollution of "downwind" states.

79. *EME Homer City Generation, L.P.*, 696 F.3d at 12.

80. Valerie Volcovici, *Court Strikes Down EPA Rule on Coal Pollution*, REUTERS (Aug. 21, 2012 4:54 PM), <http://www.reuters.com/article/2012/08/21/us-usa-epa-ruling-idUSBRE87K0NQ20120821>, archived at <http://perma.cc/R6P8-AQZV>.

81. U.S. ENVTL. PROT. AGENCY, CROSS-STATE AIR POLLUTION RULE (CSAPR), <http://www.epa.gov/airtransport/CSAPR/index.html>, archived at <http://perma.cc/982-MTYU> (last updated June 26, 2014).

behavior have either failed or not even been made.<sup>82</sup>

The emissions produced as a result of consumer demand, as well as consumer behavior, are imposed on all of society.<sup>83</sup> This is a negative externality—a social cost which is neither incurred by the producer or the individual who consumes the product, but rather society as a whole.<sup>84</sup> To counteract the social costs of externalities, mechanisms such as regulation, liability, taxation, and subsidies are employed to force the parties responsible for producing these costs to internalize them.<sup>85</sup> However, most of the currently-used mechanisms target the producer of the pollution, not the consumer.<sup>86</sup> For example, the command-and-control regulations<sup>87</sup> force *producers* to lower emissions by implementing production constraints.<sup>88</sup> Market-based approaches,<sup>89</sup> such as cap-and-trade programs, seek to achieve the same result through a more flexible and efficient manner.<sup>90</sup> But both target the *producers*.<sup>91</sup> While these approaches have resulted in reduced pollution, further reductions require increased focus on deterring environmentally-destructive individual *consumer* behaviors.<sup>92</sup>

While opinion polls show that people generally rate protecting the environment as among their highest priorities, many individuals continue to behave in environmentally-destructive ways.<sup>93</sup> A former EPA Administrator once

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82. Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward A New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 117 (2009).

83. See F. ANDERSON ET AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 4 (1978) (examining the economic, legal, engineering, and political aspects of an environmental control strategy that promotes money “charges” on environmentally harmful conduct).

84. *Id.*

85. See Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1655 (2011) (discussing the costs of strategic spillovers—where parties generate externalities purposely—and potential solutions for eliminating this behavior).

86. James P. Kimmel, Jr., *Disclosing the Environmental Impact of Human Activities: How a Federal Pollution Control Program Based on Individual Decision Making and Consumer Demand Might Accomplish the Environmental Goals of the 1970s in the 1990s*, 138 U. PA. L. REV. 505, 526 (1989).

87. Command-and-control regulations “prescribe how much pollution an individual source or plant is allowed to emit and/or what types of control equipment it must use to meet such requirements.” GUIDELINES FOR PREPARING ECONOMIC ANALYSIS, *supra* note 50, at 4-3.

88. Kimmel, *supra* note 86, at 526.

89. See *supra* text accompanying notes 59-66.

90. Kimmel, *supra* note 86, at 526.

91. *Id.*

92. Babcock, *supra* note 82, at 117.

93. See Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1118-19 n.72 (2005) (citing RILEY E. DUNLAP ET AL., HEALTH OF THE PLANET 83 tbl.15 (1993) (results of a 1992 international opinion survey of citizens in twenty-four nations)).

remarked, “we like to drive big power cars, use a lot of electricity, generate a lot of waste, enjoy cheap food, live in grassy suburbs, and collectively send pollution in massive amounts to often distant waterways and airsheds.”<sup>94</sup> The majority of the population behaves in such ways—by driving cars, fertilizing and mowing yards, pouring household chemicals on the ground and down the drain. Each behavior might only contribute minute amounts of pollutants, but in the aggregate across millions of individuals, it results in a stunning amount of pollution.<sup>95</sup>

For example, individuals discharge fifty times more benzene<sup>96</sup> than all large industrial facilities combined.<sup>97</sup> Ninety-five percent of urban carbon monoxide emissions come from tailpipes and minor source emissions.<sup>98</sup> Motor vehicles, consumer products, and other small, non-industrial sources now contribute 76% of all air toxins.<sup>99</sup>

In order to continue reducing air pollution, this country must address these individual behaviors. The Clean Air Act will continue to be used to reduce air pollution produced by the emitters, but consumers must be held accountable for their environmentally-destructive decisions.

### III. OVERCOMING BARRIERS TO CONSUMER CHANGE AND COLLECTIVE INACTION WITH THE USE OF A NEW TAX CREDIT

Numerous barriers stand in the way of transforming the average American consumer into one that both accepts responsibility for their pollution contributions and then behaves in a way to reduce it. But, changing the behaviors of a few individuals is not enough. Pollution is a nation-wide problem that requires a nation-wide solution. Therefore, another barrier to improving the quality of the air is the difficulty of mobilizing a large group of individuals to act collectively to reduce pollution.<sup>100</sup> Modifying individual consumer behaviors and inducing collective action are both necessary in order to solve the pollution

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94. Babcock, *supra* note 82, at 120 (citing WILLIAM D. RUCKELSHAUS, STOPPING THE PENDULUM, ENVTL. F. 26-27 (1995)).

95. Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 518 (2004).

96. Benzene is an air emission produced by burning coal and oil and motor vehicle exhaust. U.S. ENVTL. PROT. AGENCY, BENZENE, <http://www.epa.gov/ttnatw01/hlthef/benzene.html> archived at <http://perma.cc/D54C-W63H> (last updated Feb. 3, 2012). Acute exposure can cause drowsiness, dizziness, headaches, respiratory tract irritation, and unconsciousness. *Id.* Chronic exposure has caused various blood diseases, reproductive problems in females, increased incidence of leukemia. *Id.*

97. Vandenbergh, *supra* note 95, at 571.

98. *Id.* at 542 n.95.

99. For this and numerous other statistics, see Babcock, *supra* note 82, at 120-23.

100. See Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RESOURCES J. 195, 199-204 (2007) (discussing the failures of modern climate regimes using Mancur Olson’s classical theory of collective action).

problem in the United States.<sup>101</sup>

A tax credit, such as the one proposed in this Note, is capable of modifying both individual and group behaviors. The idea of this tax credit stemmed largely from ideas promoted by two prominent scholars: John Dernbach and Mancur Olson. Dernbach has focused on barriers preventing individual behavior changes and has proposed legislative solutions to overcome them.<sup>102</sup> Mancur Olson, on the other hand, focused much of his work on the barriers preventing collective action and ways to encourage action from a large group.<sup>103</sup> This Note takes an idea shared by both Dernbach and Olson—namely the idea of using positive inducements<sup>104</sup>—and shows how it can be used in the form of a tax credit to overcome individual and group behavior barriers.

#### *A. Barriers to Changing Individual Consumer Behaviors*

Changing individual consumer behavior is a challenging task with many obstacles.<sup>105</sup> Some of these obstacles are overcoming deeply-engrained habits, conforming environmental views with consumer preference, encouraging individuals to use self-restraint, and changing personal behavior that is deeply grounded in self-interest.<sup>106</sup> Any solution to the problem of consumer-driven pollution must address some or all of these obstacles.<sup>107</sup>

One of the most challenging obstacles to overcome is breaking deeply engrained habits.<sup>108</sup> Habits control individuals' behaviors, even if they are expensive to maintain.<sup>109</sup> Driving alone instead of carpooling or wasting electricity by leaving lights on are examples of these increasingly costly behaviors, yet people continue to engage in these habits.<sup>110</sup> These habits become even more difficult to break if the sought-after behavior is inconvenient, costly, or requires significant effort,<sup>111</sup> such as transporting recyclable products to a

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101. See Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors That Harm the Environment*, 61 DUKE L.J. 1111, 1114-15 (2012) ("Individual behaviors and lifestyles lie at the core of both the climate-change problem and its potential solutions."); see also Harris, *supra* note 100, at 195-96.

102. John C. Dernbach, *Harnessing Individual Behavior to Address Climate Change: Options for Congress*, 26 VA. ENVTL. L.J. 107 (2008). Dernbach is a Distinguished Professor of Law at Widener Law School.

103. Olson was a distinguished economist and social scientist whose work primarily focused on the theory of collective action, much of which is contained in his seminal work, *The Logic of Collective Action*. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 51 (1965).

104. See Dernbach, *supra* note 102, at 152-53; see also OLSON, *supra* note 103, at 51.

105. See Babcock, *supra* note 82, at 125.

106. *Id.*

107. *Id.* at 174-75.

108. *Id.* at 130.

109. *Id.*

110. *Id.*

111. *Id.*

recycling bin if no recycling pickup is available.

Individuals also have difficulty conforming their consumer preference to their support for environmental laws.<sup>112</sup> This “may help explain the disconnect between citizen support for environmental laws and consumer behavior that often does not reflect a concern for the environment.”<sup>113</sup> One example is the placement of a “Save the Whales” sticker on the window of an SUV, a vehicle that uses excessive amounts of fuel, the production of which consequently threatens the continued existence of the whale.<sup>114</sup>

Individuals also struggle with self-restraint.<sup>115</sup> People can exercise self-restraint on small matters like giving up something for Lent,<sup>116</sup> but reaching zero discharge of pollution would require a “political community sufficiently motivated to overcome the barriers to self-restraint.”<sup>117</sup> Individual behavior is also driven by wants, needs, and lifestyle decisions.<sup>118</sup> One example is an individual’s choice to drive solo to work rather than carpooling because that individual prefers privacy and solitude.<sup>119</sup>

These are just a few of the many barriers that stand in the way of changing individual consumer-driven behaviors.<sup>120</sup> But, these challenges are multiplied when efforts are made to modify the behaviors of a collective group. Both must be addressed, and can possibly be addressed by this Note’s proposed tax credit, in order to significantly reduce air pollution in the United States.

### *B. Barriers Preventing Large-Scale Collective Action*

Society wants clean air but there is seldom a common interest in paying for it.<sup>121</sup> This is because “any single person’s efforts will inevitably produce small

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112. Michael P. Vandenberg, *The Social Meaning of Environmental Command and Control*, 20 VA. ENVTL. L.J. 191, 212 n.111 (2001).

113. *Id.*

114. Babcock, *supra* note 82, at 132.

115. Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 351 (2002).

116. Lent, in the Christian church, is a forty-day fast in preparation for Easter. Nancy Haught, *Season of Lent’s as much about adding as abstaining*, OREGONIAN (Feb. 24, 2013, 5:04 PM), [http://www.oregonlive.com/living/index.ssf/2013/02/season\\_of\\_lents\\_as\\_much\\_about.html](http://www.oregonlive.com/living/index.ssf/2013/02/season_of_lents_as_much_about.html), archived at <http://perma.cc/M8MJ-DUSS>. In the modern era, Christians often commit to breaking a bad habit or giving up certain foods, such as chocolate, desserts, or alcohol, for the 40-day period of Lent. *Id.*

117. Doremus, *supra* note 115, at 351.

118. Babcock, *supra* note 82, at 133.

119. *Id.*

120. *Id.* at 125.

121. Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461, 1474 (1996) (“Americans are not eager to sacrifice to protect the environment. They want both a clean, safe environment and the freedom to behave in a manner that makes protecting such an environment very difficult.”).

effects.”<sup>122</sup> Consequently, a “self-interested and rational person in a democracy will choose to do nothing and instead take a ‘free ride’ on the efforts of others.”<sup>123</sup> For this reason, Mancur Olson asserted that organizing large groups of individuals seeking a public good such as clean air would be extremely difficult.<sup>124</sup>

The theory is, as Olson points out in *The Logic of Collective Action*,<sup>125</sup> assuming that individuals in a group are rational, self-interested actors, everyone in that group with a common interest will act collectively to achieve that common interest.<sup>126</sup> But, empirical evidence does not support this theory.<sup>127</sup> Olson argues, “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.”<sup>128</sup>

According to Olson,

in order for the individuals in a large group to undertake the costs of collective action, there must be some sort of sanction or incentive distinct from the good being sought: “Only a separate and selective incentive will stimulate a rational individual in a latent group to act in a group-oriented way.”<sup>129</sup>

The incentive must work selectively on individuals in the group, not on the group as a whole.<sup>130</sup> One of the “most common categor[ies] of incentives would be one that brings economic benefit—or difficulty—to the recipient.”<sup>131</sup> An obvious candidate for such an incentive is a tax credit.

### *C. Tax Credits as a Means of Changing Behaviors*

A shared tenet of both Dernbach’s and Olson’s approach to changing individual and group behaviors is the use of incentives targeted at individuals.<sup>132</sup> Dernbach proposes the use of individual tax incentives, including credits and

122. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 418 (1994).

123. *Id.*

124. OLSON, *supra* note 103, at 126-29.

125. *Id.* at 1.

126. Harris, *supra* note 100, at 200 (citing OLSON, *supra* note 103, at 1).

127. OLSON, *supra* note 103, at 2.

128. *Id.*

129. Harris, *supra* note 100, at 203 (quoting OLSON, *supra* note 103, at 51).

130. *Id.* (citing ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 77 (1984)).

131. *Id.*

132. See Dernbach, *supra* note 102, at 152-53 (arguing that Congress should enact legislation that incentivizes individuals, as opposed to emitting entities such as factories, to reduce their greenhouse gas emissions); see also OLSON, *supra* note 103, at 51.

deductions, to induce individuals to act in environmentally-friendly ways.<sup>133</sup>

Similarly, one of Olson's approaches to collective action solutions was the use of a selective incentive separate from the public good being sought.<sup>134</sup> For example, if the public good being sought is clean air, promoting the benefits of clean air is not compelling enough to induce collective action. There must be another separate incentive.<sup>135</sup> The incentive must also be selective, meaning that only those individuals who act for the public good are rewarded with the incentive.<sup>136</sup>

A tax credit could serve as this separate, selective incentive. First, it is separate from the public good being sought—clean air. Second, it can be awarded selectively to individuals who worked towards achieving the group goal. To further strengthen the effectiveness of the incentive towards maximizing collective action, the tax credit would only become available if a certain percentage of the community (or neighborhood) participated in reaching the group goal. For example, if reduced electricity consumption is the group goal, a tax credit would be available for the individuals that reduce their electricity consumption below a certain level *only if the community or neighborhood as a whole* reduces its electricity consumption to a mandated level.

There is little doubt that a tax incentive provides an incentive for socially-desirable behaviors on both an individual and group level. But, in order to be effective, it needs to provide a strong enough incentive to overcome the immense barriers that impede individual and group behavior changes.

*1. The Use of Tax Credits to Induce and Reinforce Behaviors.*—The tax system has long been used to not only raise revenue, but also to encourage and advance socially-favored behaviors and economic goals by providing tax incentives.<sup>137</sup> As early as 1791, an excise tax was placed on alcohol to help curb consumption.<sup>138</sup> Today, a common tax method for influencing behaviors comes in the form of tax incentives.<sup>139</sup> These tax incentives are used to influence several types of socially-desirable behaviors such as research and development activities, the purchase of energy-efficient technology, and the pursuit of higher education.<sup>140</sup>

A tax credit is a dollar-for-dollar reduction in an individual's total tax

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133. Dernbach, *supra* note 102, at 152.

134. OLSON, *supra* note 103, at 51.

135. *Id.*

136. *Id.*

137. Daniel S. Goldberg, *Tax Subsidies: One-time vs. Periodic: An Economic Analysis of the Tax Policy Alternatives*, 49 TAX L. REV. 305, 305 (1994).

138. Alex Altman, *A Brief History Of: Sin Taxes*, TIME MAG. (Apr. 2, 2009), available at <http://www.time.com/time/magazine/article/0,9171,1889187,00.html>, archived at <http://perma.cc/ZRU5-YGTY>.

139. Shane Stinson et al., *Energy-efficient Tax Credits: Experimental Evidence on the Relative Power of Tax Incentives 1* (2012) (unpublished manuscript), available at <http://buchheit.ba.ttu.edu/Energy%20efficient%20tax%20incentives.pdf>, archived at <http://perma.cc/DAD-5ZBG>.

140. *Id.* at 1 n.1.



liability.<sup>141</sup> The government uses them to incentivize behaviors, such as making an investment in energy-efficient home appliances, by offsetting some of the cost of that behavior.<sup>142</sup> For example, if a high-efficiency washing machine costs \$1500 (compared to \$1000 for a standard washing machine), then offering a tax credit for \$500 would encourage the purchase of the high-efficiency appliance because the cost is comparable and it offers long-term energy savings. Residential energy-efficiency tax credits<sup>143</sup> were first introduced in the 1970s as a way to increase energy conservation and efficiency.<sup>144</sup> They benefit the consumer by reducing utility bills, but also support environmental objectives by reducing the demand for electricity generated by using fossil fuels.<sup>145</sup> In 2010, the residential sector consumed 23% of the total energy in the United States.<sup>146</sup> Thus, reducing residential demand can have a significant impact on the burning of fossil-fuels and the generation of air pollution.<sup>147</sup>

Currently, the federal government offers two tax credits related to residential energy-efficiency and renewable-energy generation technologies.<sup>148</sup> The first credit (IRC § 25C) allows taxpayers to claim a credit for energy-efficiency improvements made to their primary residence.<sup>149</sup> The second credit (IRC § 25D) allows taxpayers to claim a credit for properties that generate renewable energy (e.g. solar panels, geothermal heat pumps, small wind energy, fuel cells) that they install on their residence.<sup>150</sup> The purpose of the credits is to reduce the cost of investing in energy-efficient technology because consumers ironically forgo making these investments even though the long term reduced utility bill outweighs the initial investment cost.<sup>151</sup>

These tax incentives can be quite powerful influencers.<sup>152</sup> For example, the

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141. BLACK'S LAW DICTIONARY 695 (2d ed. 2001).

142. MARGOT L. CRANDILL-HOLICK & MOLLY F. SHERLOCK, CONG. RESEARCH SERV. R42089, RESIDENTIAL ENERGY TAX CREDITS: OVERVIEW AND ANALYSIS 6 (2012).

143. This Note's proposed CCAT Credit is not limited to energy-efficiency behaviors. It simply compares the CCAT Credit to federal energy-efficiency tax credits because they both focus on reduced energy consumption and, consequently, air pollution.

144. CRANDILL-HOLICK & SHERLOCK, *supra* note 142, at 1.

145. *Id.*

146. *Id.*

147. See Hannah C. Granade et al., *Unlocking Energy Efficiency in the U.S. Economy*, MCKINSEY & CO., at iii (2009), <http://pacenow.org/wp-content/uploads/2012/07/McKinsey-Study-on-Energy-Efficiency-in-the-US.pdf>, archived at <http://perma.cc/5WUG-9TUD>.

148. Several states also offer similar energy-efficiency tax credits. See DSIRE—DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, *Financial Incentives for Energy Efficiency*, <http://www.dsireusa.org/summarytables/finee.cfm> archived at <http://perma.cc/ZRZ6-FCMQ> (last visited July 29, 2014).

149. 26 U.S.C. § 25C (2006).

150. *Id.* § 25D.

151. CRANDILL-HOLICK & SHERLOCK, *supra* note 142, at 4.

152. Steven Nadel, *Energy Efficiency Tax Incentives in the Context of Tax Reform 4* (July 2012) (unpublished manuscript) (on file with the American Council for an Energy-Efficient

new home tax credit, which provides a credit of \$2000 for builders of homes that use 50% less energy for space heating and cooling, has significantly raised the market share of energy-efficient homes.<sup>153</sup> When first enacted in 2006, only 0.7% of new homes sold qualified for this credit.<sup>154</sup> By 2011, 11% of new homes sold qualified for the tax credit.<sup>155</sup> Similarly, tax credits for energy-efficiency improvements have also been shown to alter consumer behavior.<sup>156</sup> In 2006, 4.3 million taxpayers claimed tax credits for energy-efficiency improvements.<sup>157</sup> By 2009, this number rose to 6.8 million taxpayers.<sup>158</sup>

These tax credits have the ability to significantly reduce electricity demand and reduce air pollution and greenhouse gases.<sup>159</sup> Some studies have found that energy-efficiency tax incentives, if implemented on a nation-wide scale, could reduce current electricity consumption by 23% by 2020, potentially abating 1.1 gigatons<sup>160</sup> of greenhouse gases annually.<sup>161</sup> The potential is there to significantly reduce energy consumption and air pollution, but the current tax credit system's potential, particularly in regards to energy-efficiency tax credits, is not being fully exploited.

2. *Deficiencies in the Tax Credit System.*—While many taxpayers are taking advantage of these energy-efficiency tax credits, there are several problems with these tax credits which prevent them from effectively changing consumer behavior. They do not always spur behavior changes, they are not available to everyone, and they are not widely utilized by those that can use them.<sup>162</sup> With some modifications, however, a new tax credit could be implemented in a way that addresses the individual and collective action problems that have for so long hindered pollution reduction efforts.

One question that has plagued critics of these tax credits is whether the credits have actually caused additional energy-efficiency investment, or if they

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Economy), available at <http://aceee.org/files/pdf/white-paper/energy-efficiency-tax-incentives.pdf>.

153. *Id.*

154. *Id.* at 5, tbl.1.

155. *Id.*

156. *Id.*

157. *Id.* at 6.

158. *Id.*

159. *Id.* at 8.

160. *Id.* A gigaton is equivalent to one billion metric tons, which is equal to about 2.2 billion pounds. U.S. ENVTL. PROT. AGENCY, *Sources of Greenhouse Gas Emissions*, <http://www.epa.gov/climatechange/ghgemissions/sources.html>, archived at <http://perma.cc/7EFZ-VZUQ> (last updated Apr. 17, 2014) (follow “Million Metric Tons of CO<sub>2</sub> equivalent” hyperlink, located in the “Total U.S. Greenhouse Gas Emissions by Economic Sector in 2010” figure). As a comparison, a small car weighs approximately one metric ton. *Id.* In 2010, the United States produced 6.6 billion metric tons of greenhouse gases. *Id.* Thus, these energy-efficiency tax credits, if properly and fully implemented, could reduce the amount of greenhouse gas emissions by 1.1 billion metric tons. Nadel, *supra* note 152, at 8.

161. Granade et al., *supra* note 147, at iii.

162. CRANDILL-HOLLOCK & SHERLOCK, *supra* note 142, at 7-8, 11.

have simply rewarded consumers for investments that would have been made absent such tax incentives.<sup>163</sup> In other words, are they really changing individual behaviors in a socially-desirably way? In many cases, the answer is “no.”

There are several possible explanations for why the tax credits might not actually be altering individual behaviors. First, the savings associated with the tax credit are not realized until tax returns are filed, which might be months after the technology is purchased.<sup>164</sup> Thus, the high investment cost of the technology can discourage purchasing this technology if the incentive is not available until much later, especially if the household making the purchase does not have disposable income. Second, these tax credits are only available to taxpayers having income tax liability,<sup>165</sup> which only amounted to approximately 46% of U.S. households in 2011.<sup>166</sup> This means, 54% of U.S. households cannot benefit from these tax credits.<sup>167</sup> Third, these energy-efficiency tax credits seem to be limited to higher-income taxpayers,<sup>168</sup> which severely hinders the policy goal of encouraging energy-efficiency investments from individuals that cannot normally afford the costs of these investments.<sup>169</sup>

Despite their flaws, these tax credits do seem to be encouraging investments in energy-efficiency household technology. But, their potential is not being maximized. These credits do nothing to encourage collective action, and they only incentivize a small portion of the population.

*D. A Community-based Tax Credit: A Tax Credit that Drives Individual and Collective Behaviors*

This Note’s new proposed tax credit, the CCAT Credit, can repair some of the problems with the current tax credit system while also mobilizing a larger number of participants. The following is a general illustration of how this tax

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163. *Id.* at 7-8.

164. *Id.* at 8.

165. These Residential Energy Tax Credits are nonrefundable, meaning that they are not able to increase an individual’s tax refund, but instead can only reduce the amount a taxpayer owes. *See What Is the Difference Between a Refundable and a Nonrefundable Credit*, TURBOTAX, <http://turbotax.intuit.com/tax-tools/tax-tips/Tax-Deductions-and-Credits/What-Is-the-Difference-Between-a-Refundable-and-a-Nonrefundable-Credit-/INF20170.html>, *archived at* <http://perma.cc/H8KB-XP2E> (last visited May 6, 2014). Conversely, if these tax credits were “refundable,” they would not only reduce the amount of taxes owed, but could also be credited in the form of a tax refund to a taxpayer who has a negative tax liability that year. *See* RACHEL JOHNSON ET AL., TAX POLICY CENTER: URBAN INSTITUTE & BROOKINGS INSTITUTE, WHY SOME TAX UNITS PAY NO INCOME TAX 4 (2011), *available at* <http://www.taxpolicycenter.org/UploadedPDF/1001547-Why-No-Income-Tax.pdf>, *archived at* <http://perma.cc/JWP9-A6B4>.

166. CRANDILL-HOLLOCK & SHERLOCK, *supra* note 142, at 8.

167. *Id.*

168. *Id.* at 11 (“In 2009, roughly three-quarters (75.7%) of residential energy tax credits claims were made on tax returns with adjusted gross income (AGI) above \$50,000.”). *Id.* at 9.

169. *Id.* at 8-9.

credit would be implemented.

A state, such as Indiana, would set pollution-reduction goals that apply to consumer behavior.<sup>170</sup> Once the state sets a state-wide goal (e.g. reduced residential electricity by a specified amount of kilowatt hours (kWh)), then the state would apply this goal to communities or neighborhoods throughout the state.<sup>171</sup>

In order to be eligible for the tax credit, each community or neighborhood must meet the “community” goal (e.g. average household electricity consumption equaling 4500 kWh for the calendar year). If a community meets that goal, then the residents who individually met this goal in their household (e.g. reduced their individual electricity consumption below 4500 kWh) would individually receive the tax credit. Thus, if a neighborhood of 100 households meets the community-wide goal of 4500 kWh per household (on average), but only forty households individually met the goal, then only those 40 households would receive the tax credit.

*1. The CCAT Credit Can Modify Individual Behaviors.*—The CCAT Credit addresses many of the problems associated with the tax credits identified in the preceding section.<sup>172</sup> It does not require the purchase of energy-efficient technology, which can be expensive. It would be a refundable rather than a nonrefundable credit. And, it would target taxpayers of all income levels.

The first major difference between the CCAT Credit and the current tax credits<sup>173</sup> is the behavior it seeks to change. Most of the currently available tax credits, both federal<sup>174</sup> and state,<sup>175</sup> incentivize the purchasing of energy-efficient *technology*.<sup>176</sup> The CCAT Credit, however, focuses on pollution and energy reduction *behaviors*, which do not require expensive purchases. This increases its availability to many taxpayers who cannot afford to purchase expensive equipment, but can afford to make simple lifestyle changes that reduce electricity consumption. This means individuals can reduce their electricity consumption by any means—which can be as simple as turning off lights when not in use, replacing incandescent light bulbs with fluorescent or other low-wattage bulbs,

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170. So far, this Note has focused almost exclusively on the problem of residential energy consumption, but other pollution-reduction issues could be addressed by this tax credit as well, such as garbage reduction, increased recycling, and even reduced water consumption.

171. If necessary, these communities would be subdivided into smaller sections because collective action is much more difficult to induce in large communities for at least three reasons. OLSON, *supra* note 103, at 48. First, the larger the group, the less benefit each member receives. *Id.* Second, because of the small benefit each member receives, it is unlikely that any one member will pay the cost of providing some of the good. *Id.* And third, large groups are more expensive to start and operate. *Id.*

172. *See supra* Part III.C.2.

173. 26 U.S.C. § 25C (2006); *id.* § 25D.

174. *Id.*

175. DSIRE—DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, *supra* note 148.

176. CRANDILL-HOLLIK & SHERLOCK, *supra* note 142, at 4.

or any of the other no-to-low cost measures which reduce electricity consumption.<sup>177</sup> This provides individuals with much greater flexibility on how they reduce their electricity consumption and their contributions to air pollution.<sup>178</sup>

Second, the new tax credit would also be refundable, meaning that a much larger percentage of taxpayers could benefit from it.<sup>179</sup> Currently, only taxpayers with tax liability can benefit from the tax credit, thereby eliminating nearly half of the U.S. households from participation.<sup>180</sup> The use of a refundable tax credit would expand this incentive's availability to a much higher percentage of the population (specifically, it would be available to all individuals that file taxes, regardless of whether they owe income taxes).<sup>181</sup> And unless there is evidence that certain households are more responsive to the incentive, then "tax incentives should provide the same [incentive] to all households."<sup>182</sup>

Third, the new tax credit would target taxpayers at all income levels and not just high-income tax payers. As noted previously, in 2009, roughly 75% of the federal residential energy tax credits were claimed by individuals with adjusted gross incomes above \$50,000, even though 66% of tax payers have incomes below this threshold.<sup>183</sup> Part of the reason that high-income taxpayers take advantage of this current tax credit is because they can more easily afford to make investments in energy-efficient technology.<sup>184</sup> Also, the current tax credits target homeowners,<sup>185</sup> and thus renters are not as likely to take advantage of them.<sup>186</sup> The CCAT Credit does not target high income earners and homeowners. It would be available to all homeowners and renters, and it could be earned by practicing

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177. For other low-to-no cost electricity reduction measures, see INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, IN.GOV, <http://www.in.gov/oucc/2390.htm>, archived at <http://perma.cc/ZJ54-LYDZ> (last visited July 29, 2014).

178. This is akin to the growing use of performance standards over design standards in pollution regulation. See Cary Coglianese, Jennifer Nash & Todd Olmstead, Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection 1 (2002) (unpublished manuscript), available at <http://www.hks.harvard.edu/m-rcbg/Events/Papers/RPPREPORT3.pdf>, archived at <http://perma.cc/3EYX-U7UR>. When imposing pollution regulations on certain industries, a federal agency either mandates how the industry will reduce their pollution (design standards) or the agency will only specify the outcome required while giving the entity the opportunity to choose how to reduce their pollution (performance standards). *Id.* at 3-4. The latter gives the entity the flexibility to reduce pollution in the most cost-effective way they can find. *Id.* at 1.

179. Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 29-30 (2006).

180. CRANDILL-HOLLICK & SHERLOCK, *supra* note 142, at 8.

181. Batchelder et al., *supra* note 179, at 29-30.

182. *Id.* at 47.

183. CRANDILL-HOLLICK & SHERLOCK, *supra* note 142, at 9.

184. *Id.* at 11.

185. *Id.* at 9.

186. *Id.* at 7.

non-expensive behaviors.

These differences have the potential to significantly increase the availability of tax credits to individuals for acting in environmentally-favorable ways. This monetary incentive should help eliminate some of the barriers to changing individual consumer behaviors. However, the tax credit must still be able to induce changes in group behavior.

2. *The CCAT Credit Should Induce Collective Action in Communities.*— Collective action problems with regards to energy conservation and pollution are commonly called “social dilemmas.”<sup>187</sup> Social dilemmas are extensively studied in laboratory and field research, primarily because they pose the biggest obstacle to solving this country’s “most pressing environmental problems.”<sup>188</sup> When studying social dilemmas, researchers tend to focus on the effect of a particular variable on group behavior, such as the effects of communication, trust between group members, monetary incentives, and an individual’s perceived contribution to the group.<sup>189</sup> Through these studies, researchers have been able to isolate variables that can have a strong effect on cooperative group behavior, one of those being “group incentives.”<sup>190</sup>

The CCAT Credit is essentially a group incentive. Group incentives tie individual financial incentives to group goals.<sup>191</sup> Several studies show that group incentives can result in moderate reductions in electricity consumption.<sup>192</sup> In one study conducted by Penn State University, several dorms participated in a contest to determine which dorm could reduce its electricity consumption the most.<sup>193</sup> The winning dorm was awarded \$90 to spend as the residents wished.<sup>194</sup> Compared to control dorms not involved in the contest, the competing dorms reduced their electricity consumption by 4% to 14%.<sup>195</sup>

In another study conducted by Slavin, Wodarski, and Blackburn (1981), residents at a private apartment complex in Baltimore, Maryland, were invited to participate in an energy conservation program, which rewarded residents with financial incentives for reducing their electricity consumption below predicted consumption levels by each building in the apartment complex.<sup>196</sup> Electricity consumption was measured every two weeks, and residents earned payments between \$1.44 and \$1.78 for reductions in their electricity consumption.<sup>197</sup> This group incentive resulted in an average reduction of energy consumption by 6%

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187. Charles D. Samuelson, *Energy Conservation: A Social Dilemma Approach*, 5 SOC. BEHAV. 207, 207 (1990).

188. *See id.*

189. *Id.* at 212-16.

190. *Id.* at 216.

191. *Id.*

192. *Id.* at 216-18.

193. *Id.* at 216.

194. *Id.* at 217.

195. *Id.*

196. *Id.*

197. *Id.*

to 7% in the participating apartment buildings.<sup>198</sup>

These studies suggest that group incentives are potentially valuable tools in curbing energy consumption, and, consequently, pollution production. However, the results also do not show that these types of incentives are miracle pills for cleaning this country's polluted air. These studies have helped isolate some of the important factors that increase the effectiveness of group incentives.<sup>199</sup> One primary factor is the power of social incentives.<sup>200</sup> Social incentives include face-to-face interaction, social commendation for energy savings, high levels of trust between group members, knowledge about the program, discussions with other group members or neighbors about the program, highly visible announcements and flyers, and regular feedback on energy savings.<sup>201</sup>

Thus, it is not simply the financial incentive that induces collective action. Equally important is the power of social incentives.<sup>202</sup> If this CCAT Credit is designed to provide ample financial incentives for group performance while maximizing the effects of social incentives, then it could have a moderate-to-significant impact on energy conservation in small communities.

#### IV. THE COMMUNITY CLEAN AIR TAX CREDIT: EXTRA DETAILS

The purpose of this Note is to layout the basic idea of a community-based tax credit. It is also meant to provide just one example of how it could be implemented to reduce pollution—in this case, as a way to reduce residential electricity demand. In no way does it address all of the complex issues that would arise if it was enacted. Nonetheless, this section will address several issues that naturally arise when a tax program is implicated, such as the method of funding and ways to increase the program's effectiveness.

##### *A. The Funding of the CCAT Credit*

In a different era, before talks of the deficit and national debt occupied households across the country, there likely would have been less opposition to this type of tax credit. But today's economic struggles require state and national leaders to act responsibly with taxpayer dollars. This makes funding the CCAT Credit much more difficult. The exact terms for how to generate income for this solution are beyond the scope of this Note, but one possible solution is the implementation of a new tax.

A new tax could serve a dual purpose: raising revenue for the CCAT Credit and further altering consumer behavior. The revenue gained could be used to pay for the CCAT Credit program. The precise taxing method is beyond the scope of this Note, but some possible ideas include: a sales tax on certain consumer products that produce significant amounts of pollution, either as a result of their

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198. *Id.*

199. *Id.* at 218.

200. *Id.*

201. *See id.* at 216-18.

202. *Id.* at 218.

production<sup>203</sup> or during consumer-use of the product; a localized tax that targets the communities that produce the most pollution; a small, general sales tax on all consumer products; or simply a tax on the most egregious polluting entities. Again, identifying the precise method of taxation is not the goal of this Note.

Nonetheless, a tax targeted at consumers could help alter behavior by forcing consumers to internalize the costs of pollution—costs that they encourage when they participate in the market as consumers and users.<sup>204</sup> It would do so by first making consumers pay for their fair share of pollution when they purchase certain products on the market. It would also spark intense public reaction, leading to increased awareness of the tax and the CCAT Credit program, possibly leading to higher participation in the program.

This immense public reaction is not necessarily a bad thing. Throughout this country's history, taxes have provoked rapid and powerful reactions from the public.<sup>205</sup> This could substantially increase public awareness of the pollution problem in this country, and drive home the fact that individual behavior drives pollution. Society might begin to more fully understand the social costs of their behaviors because individuals would actually start paying for it.

The effectiveness of this tax, and more importantly, the corresponding CCAT credit, depends heavily on the public's awareness of the program. For example, a recent study<sup>206</sup> on gasoline taxes and consumer behavior found that an increase in the gasoline tax had a stronger effect on reducing gasoline consumption and new vehicle purchases than an equivalent increase in the gasoline price due to fluctuating oil prices.<sup>207</sup> Although this might seem odd (because consumers only see the final price of the gasoline at the pump, not the composition of the price), this study suggests that this is partially due to the public's awareness of the increased gasoline tax.<sup>208</sup> Similarly, the success of a new state pollution tax would likely hinge on the public's awareness of the tax and the opportunity to earn a CCAT Credit for behaving in environmentally-friendly ways.

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203. While it might seem like a politically unfeasible and unworkable idea, such a tax has been proposed. See Kimmel, *supra* note 86, at 507 (proposing an “Environmental Impact Index” which informs consumers how much pollution is produced in the production of a product and then charges a higher sales tax for products that resulted in more pollution during their production).

204. *Id.* at 545. “The consumer is an appropriate target of environmental enhancement legislation because consumer behavior greatly influences production decisions.” *Id.* at 527.

205. For example, the colonial reaction to the British-imposed Stamp Act, leading up to the American Revolutionary war, “was swift and, on occasion, riotous.” Pauline Maier, *Chronicle of the Revolution: The Stamp Act Riots & Tar and Feathering*, PBS.ORG, [http://www.pbs.org/ktca/liberty/popup\\_stampact.html](http://www.pbs.org/ktca/liberty/popup_stampact.html), archived at <http://perma.cc/K4U3-V3LU> (last visited July 29, 2014).

206. See Erich Muehlegger et al., *Gasoline Taxes and Consumer Behavior* (Nat'l Bureau of Econ. Research, Working Paper No. 17891, 2011) (arguing that gasoline tax increases are associated with larger reductions in gasoline consumption than proportionate increases in the tax-exclusive gasoline price), available at [http://economics.stanford.edu/files/muehlegger3\\_15.pdf](http://economics.stanford.edu/files/muehlegger3_15.pdf), archived at <http://perma.cc/BQ5F-HSNV>.

207. *Id.* at 17.

208. See *id.*



Furthermore, the tax could help induce stronger collective action. As Mancur Olson noted, there must be a sanction or incentive, distinct from the good being sought, in order to stimulate individuals to act in a group-oriented way.<sup>209</sup> The CCAT Credit serves as the incentive, but the state pollution sales tax could serve as the sanction, the combination of which could increase the effectiveness of this new CCAT Credit. It would provide an even stronger financial reason for individuals to alter their behaviors.

However, implementing a new tax on individuals for air pollution would face several obstacles, namely public opposition.<sup>210</sup> “General public opposition to taxes in the United States creates an almost insurmountable barrier to the enactment of new environmental taxes.”<sup>211</sup> However, strong public opposition does not always stop new legislation.<sup>212</sup>

The CCAT Credit, along with a corresponding tax that funds the Credit, have the potential to result in significant improvements to the quality of air in the United States, but they could simultaneously weaken the personal and psychological incentives to clean the environment.<sup>213</sup> Economists call this the “crowding out” effect, where extrinsic motivators (e.g., financial incentives) erode intrinsic motivators (e.g. environmental ethics or social norms), thereby reducing the individuals effort towards a group goal.<sup>214</sup> By providing monetary incentives for reducing air pollution, the purpose for many might no longer be to reduce pollution, but rather to earn money through a tax credit. The ultimate goal would be to change the mindset of the American public such that individuals behave in more environmentally-favorable ways because they care about the environmental, human health, and social implications of continued air pollution. While this may be the ultimate goal, it might be unreachable in the near future.

#### *B. Additional Ways to Increase the Effectiveness of the CCAT Credit*

This Note has focused on the potential ability of this new tax credit to incentivize individual and collective behaviors, specifically in regards to reducing electricity consumption. Encouraging environmentally-favorable *individual* and *collective* behaviors is its primary purpose. But, it could also be expanded to

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209. OLSON, *supra* note 103, at 48.

210. Babcock, *supra* note 82, at 172.

211. *Id.*

212. For example, Congress and President Obama signed the Patient Protection and Affordable Care Act into law in 2010, despite 56% of Americans opposing the law. See Patricia Zengerle, *Most Americans Oppose Health Law but Like Provisions*, REUTERS (June 24, 2012) (providing data collected in 2012, two years after the law was passed), <http://www.reuters.com/article/2012/06/24/us-usa-campaign-healthcare-idUSBRE85N01M20120624>, archived at <http://perma.cc/3MNQ-HB4P>.

213. See Nuno Teles, *Motivations and Incentives: From the “Crowding-out Effect” to “Peer-production”* 2-3 (2007) (unpublished manuscript), available at <http://www.dime-eu.org/files/active/0/Motivations-and-Incentives.pdf>, archived at <http://perma.cc/PK4V-WTAW>.

214. *Id.*

include other actors and to encourage other types of behavior.

As presented, the CCAT Credit financially benefits individual community members, but it provides no financial incentive to the community itself. If the community itself (i.e. the city, the town, or the local municipality) was also rewarded for having its community members collectively act to reduce their pollution contributions, then it could help activate and coordinate community action.

Conversely, if every community member were to receive a tax credit for environmentally-favorable actions performed by the local municipality, then communities as a whole would likely collectively encourage their elected leaders to make those environmentally-favorable changes. For example, a state could promise to pay each resident of a community a small tax credit for every high traffic intersection the city, town, or municipality converted into a round-about. Or, it could provide a tax credit to everyone if the municipality significantly improves traffic flow by making its traffic signals more efficient. This could invoke more political collective action, allowing individuals to further influence and affect environmental decision-making at the local government level.

#### CONCLUSION

Despite this country's efforts to reduce pollution, it has not gone far enough in protecting the environment and the health of its citizens. The focus thus far has been on the producers of pollution, while consumers have escaped responsibility. But, the consumer is increasingly contributing to the pollution problem in this country. The next step must be to address the consumer-pollution problem.

Any solution must address two enormous obstacles: modifying individual behavior and inducing collective action. An ideal solution must encourage both. Tax credits have long been used to alter individual behaviors by incentivizing socially-favorable behaviors.<sup>215</sup> Specifically, residential energy-efficiency tax credits have been used to reduce energy demand and pollution by incentivizing the purchase of high-efficiency residential technology.<sup>216</sup> Unfortunately, these tax credits are not fulfilling their potential.

A community-based tax credit can be used to further incentivize environmentally-favorable behaviors at both the individual and community level. By selectively rewarding individuals in communities that have collectively reduced their air pollution contributions, the CCAT Credit serves as one of the theoretical solutions to collective action—a selective incentive, separate from the public good being sought. It not only requires individuals to act, but it requires them to act as a group. Without both, no one can earn the tax credit.

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215. Goldberg, *supra* note 137, at 305.

216. Nadel, *supra* note 152, at 4.

For decades, this country has focused its pollution reduction efforts on federal regulations targeted at pollution emitters. This is an opportunity to give more responsibility and control to individuals, families, and communities. These are the groups that suffer the greatest consequences of air pollution. These are the groups that can make the greatest difference. We must incentivize them to do so.

# FOLLOW THE LEADER: WHY ALL STATES SHOULD REMOVE MINIMUM EMPLOYEE THRESHOLDS IN ANTIDISCRIMINATION STATUTES

DANIEL LEWALLEN\*

*The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.<sup>1</sup>*

## INTRODUCTION

A thirty-year-old woman, previously employed by a small computer software company, comes into a law firm with complaints regarding her recent termination. She describes the business: a three-person operation where most of the work is done in one room in a rented office space downtown. The owner of the business was always present and made it very clear to the woman that she was also subordinate to the general manager, whose desk was on the opposite side of a small partition.

The woman had many responsibilities, both administrative and operational; she loved the job itself. Yet, her work experience got progressively worse due to her bosses' inappropriate comments regarding her dress, appearance, and "duties" as an employee. She constantly had to put up with crude jokes and advances from the general manager and owner. Although she wanted to leave several times, she knew there were few options out there for a woman with a high school education. She depended on the money from this job to support her family. Eventually, she was terminated because she "wasn't being a team player" and "wouldn't go the extra mile to keep her job."

She comes to you, a young attorney who just moved to a new city after law school, in search of a remedy under antidiscrimination laws. Right off the bat, you realize that success under a federal cause of action is impossible because the employer is lacking the necessary number of employees for the Equal Employment Opportunity Commission ("EEOC") to have jurisdiction over the case.<sup>2</sup> Thus, you contemplate pursuing an action under your state's

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1. H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141.

2. *See* 42 U.S.C. § 2000e(b) (2006); *id.* § 12111 (2006) (For claims under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."); 29 U.S.C. § 630(b) (2006) (For claims under the Age Discrimination in Employment Act of 1967, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.").

antidiscrimination statute(s). Depending on this business' location, you may not have the option to pursue an action under state antidiscrimination statutes because the business may not have enough employees to be subject to the antidiscrimination laws in that particular state.

Although there are potentially valid reasons for minimum employee threshold, this Note will argue that these reasons are greatly outweighed by the potential dangers that stem from keeping these thresholds in place. The dangers can be compressed into an overarching problem: individuals who work for companies that do not meet minimum employee thresholds are not afforded the same protections as employees who work for companies that employ the requisite number of employees. Further, some of the reasons that justify the threshold at the federal level and keep state courts from agreeing on the issue are not necessarily applicable to state laws. Therefore, state legislators are in the best position to protect a large portion of the workforce that is currently not afforded the protection of antidiscrimination laws. This does not mean that the federal government has no role in making this happen; rather, this Note will argue that the best way to accomplish the objective of removing minimum employee thresholds is through cooperative federalism.

This Note first provides an overview of the history of antidiscrimination law and its current shape at the state and federal level. Part II takes a closer look at legislatures' rationales for minimum employee thresholds. Because state legislative history sheds very little light on the rationale behind state threshold numbers,<sup>3</sup> this Note focuses on the explanations given for the minimum threshold under Title VII of the Civil Rights Act of 1964 ("Title VII"). Part III explores the nature of today's economy and shows why individuals working at these small businesses are particularly vulnerable to discrimination and need to have remedies available to them. The Note focuses mainly on sexual harassment discrimination because more organizational and psychological research has been done in this area than other forms of discrimination. Part IV explores why states are best equipped to remove this threshold and why it should be the state legislatures, not the courts, that make this change. Finally, Part V presents a plan in which the federal government would work with states to remove these minimum employee thresholds from state antidiscrimination statutes.

## I. BRIEF HISTORY AND OVERVIEW OF ANTIDISCRIMINATION LAW

### A. *How Federal Antidiscrimination Law Came to Be*

1. *States Have Historically Led the Way in Developing Antidiscrimination Laws.*—The earliest post-Reconstruction efforts to end employment discrimination came in the 1940s in the form of state statutes.<sup>4</sup> These statutes

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3. Tammi J. Lees, Note, *The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L. REV. 861, 873 (Spring 2004).

4. Note, *Fair Employment Practices—A Comparison of State Legislation and Proposed Bills*, 24 N.Y.U. L. REV. 398, 399 (1949).

were usually implemented by state legislatures to protect their citizens from threats to their rights and privileges or any other potential undermining of a free democratic state.<sup>5</sup> The majority of these early antidiscrimination statutes were passed “as an exercise of police power, as a fulfillment of the provisions of the state constitution, as a declaration of public policy or as a combination of two or more such bases.”<sup>6</sup> Although a great deal of individuals feared the potential negative effects stemming from the passage of these laws,<sup>7</sup> by 1963, twenty-two States had some type of statute barring discrimination on the basis of race in private employment.<sup>8</sup>

2. *Federal Government Follows Suit.*—The failure of other states to follow suit in passing antidiscrimination laws, coupled with an increasingly influential civil rights movement, caused an increase in the legislative support for congressional action.<sup>9</sup> Along with the failure of some states to pass antidiscrimination in employment legislation, some states, particularly in the South, had statutes that called for discrimination in employment, further implying the need for the federal government to take action.<sup>10</sup>

On July 24, 1964, President Johnson signed Title VII, the first federal antidiscrimination statute, into law.<sup>11</sup> Among other things, the law states that:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.<sup>12</sup>

As enacted, Title VII followed state antidiscrimination laws closely and, in fact, included much of the same language.<sup>13</sup>

The EEOC enforces Title VII for federal discrimination claims.<sup>14</sup> Title VII prohibits discrimination in all areas of employment, including, “hiring and firing;

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5. *Id.*

6. *Id.* at 398.

7. See Robert G. Meiners, *Fair Employment Practices Legislation*, 62 DICK. L. REV. 31, 42-43 (1957-58) (explaining how people predicted riots, an unsteady business world, and the division of employees if antidiscrimination in employment laws were passed).

8. JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 15 (5th ed. 2001).

9. Lees, *supra* note 3, at 874.

10. See Meiners, *supra* note 7, at 42-43 (describing a Nevada law that made it illegal to hire individuals of certain national origins for public works and a South Carolina law that made it illegal for different races to work in the same room as one another).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

12. 42 U.S.C. § 2000e-2 (2006).

13. GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 6 (2d ed. 2007).

14. MARGARET C. JASPER, *EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII* 5 (1999); see also 42 U.S.C. § 2000e-4 (2006).

compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and disability leave; or other terms and conditions of employment.”<sup>15</sup> All federal claims filed with the EEOC must be filed within 180 days of the alleged discriminatory act for the individual to be entitled to file a private lawsuit.<sup>16</sup> The EEOC contracts with approximately ninety Fair Employment Practice Agencies (“FEPAs”) to process claims it receives.<sup>17</sup>

There are limitations in the federal antidiscrimination laws. For example, compensatory and punitive damages are not usually available to plaintiffs in disparate impact and indirect discrimination cases.<sup>18</sup> Furthermore, in reasonable accommodation cases, compensatory and punitive damages are not available if the employer has shown a good-faith effort to accommodate.<sup>19</sup> “Therefore, in contrast to intentional discrimination cases, the incentive for bringing disparate impact and reasonable accommodation cases is low.”<sup>20</sup> Likewise, several scholars have argued using economic analysis methods, that the Americans with Disabilities Act of 1990 (“ADA”) engenders a disincentive for hiring the disabled because it is a better financial decision to discriminate at the time of hiring than at the time of termination.<sup>21</sup> State antidiscrimination laws sometimes fill in these deficiencies in federal law, maintaining the importance of state laws in this area.<sup>22</sup>

3. *The Interplay Between Federal and State Antidiscrimination Laws.*—Title VII neither invalidates nor supersedes any state antidiscrimination laws, unless a state statute allows an action that would be unlawful under Title VII.<sup>23</sup> It specifically provides that “[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State.”<sup>24</sup> Both the Age Discrimination in Employment Act of 1967 (“ADEA”) and the ADA have similar language that provides that state antidiscrimination laws that

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15. JASPER, *supra* note 14, at 7.

16. *See* 42 U.S.C. § 2000e-5(e) (2006).

17. *State and Local Agencies*, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/field/indianapolis/fepa.cfm> (last visited June 3, 2014).

18. 42 U.S.C. § 1981a (2006); *but see* Smith v. City of Jackson, Miss., 544 U.S. 228, 239 (2005) (holding that a plaintiff may receive relief under a disparate-impact theory under the ADEA).

19. 42 U.S.C. § 1981a(3) (2006).

20. Julie Chi-hye Suk, Article, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV., 405, 454 (2006).

21. Zachary D. Schurin, *Monkey-Business: Connecticut’s Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the ADA as Justification for the Elimination of Second Injury Funds*, 7 CONN. PUB. INT. L.J. 135, 152-53 (2007-08).

22. *See infra* Part IV.D.2.

23. 42 U.S.C. § 2000e-7 (2006).

24. *Id.*

provide more protection will not be preempted by their federal counterparts.<sup>25</sup> As pointed out in an article written three years after Title VII was passed, Title VII “recognizes the continued effectiveness of state fair employment laws and provides that they will retain a vital and perhaps dominant role in this area.”<sup>26</sup> The aforementioned portions of the ADA and ADEA further solidify this concept.

### *B. The Current State of Minimum Employee Thresholds*

Today, an employer must have at least fifteen employees for an employee alleging discrimination to seek a federal remedy under Title VII for an employment discrimination claim based on race, color, religion, sex, national origin,<sup>27</sup> or disability.<sup>28</sup> To have a federal remedy for an employment discrimination claim based on age, an employer must have at least twenty employees.<sup>29</sup> Victims of these types of employment discrimination who work for businesses with fewer than fifteen employees are in a gap where they are not afforded the protection of federal antidiscrimination laws.<sup>30</sup>

Twenty states have lowered the number of employees an employer must have to incur liability for discriminatory acts, thus lessening this gap of unprotected workers in these states.<sup>31</sup> Fourteen states have completely removed the minimum

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25. 29 U.S.C. § 633(a) (2006); 42 U.S.C. § 12201(b) (2006).

26. Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U. L. REV. 907, 910 (1966-67).

27. 42 U.S.C. § 2000e(b) (2006).

28. *Id.* § 12111.

29. 29 U.S.C. § 630(b) (2006).

30. See David Hemken, *Twelfth Annual Review of Gender and Sexuality Law: Employment Law and Health Care Access Chapter: State Regulation of Sexual Harassment*, 12 GEO. J. GENDER & L. 647, 650 (2011) (“[M]any individuals working for small businesses do not fall under this umbrella of protection.”); see also 137 CONG. REC. 30660 (1991) (statement of Rep. Brooks) (“[W]hen a company has less than 15 employees, there are no damages available whatsoever because there is no cause of action under our current antidiscrimination statutes.”).

31. ARK. CODE § 16-123-102 (2012) (establishing that employers with nine or more employees can be held liable); CAL. GOV'T CODE § 12926 (2012) (establishing that employers with five or more employees may be held liable); CONN. GEN. STAT. § 46a-51 (2012) (establishing that employers with three or more employees may be held liable); DEL. CODE tit. 19, § 710(6) (2012) (establishing that employers with four or more employees may be held liable); IDAHO CODE § 67-5902 (2012) (establishing that employers with five or more employees may be held liable); IND. CODE § 22-9-1-3 (2012) (establishing that employers with six or more employees may be held liable); KAN. STAT. § 44-1002 (2012) (establishing that employers with four or more employees may be held liable); KY. REV. STAT. § 344.030(2) (2012) (establishing that employers with eight or more employees may be held liable); MASS. GEN. LAWS ch. 151B, § 1 (2012) (establishing that employers with six or more employees may be held liable); MO. STAT. §§ 213.010, 055 (2012) (establishing that employers with six or more employees may be held liable); N.H. REV. STAT. § 354-A:2(VII) (2012) (establishing that employers with six or more employees may be liable); N.M. STAT. § 28-1-2 (2012) (establishing that employers with four or more employees may be held



employee threshold and made all employers potentially liable for any discriminatory action in the employment context.<sup>32</sup> It should be noted that Mississippi does not have a state antidiscrimination in employment law and Alabama requires employers to have twenty employees to be subject to its antidiscrimination law.<sup>33</sup> Removing the minimum employee threshold at the state level will provide a remedy to employees alleging discrimination at all small companies, where currently no remedy may exist. States have also been more progressive in their state antidiscrimination statutes by expanding protection to certain classes not covered by federal antidiscrimination statutes and by providing more attractive remedy schemes to potential plaintiffs.<sup>34</sup>

## II. WHY THE MINIMUM EMPLOYEE THRESHOLD?

### A. *Development of the Minimum Employee Threshold*

Title VII was passed to eliminate discrimination in employment.<sup>35</sup> The importance of its passage in relation to the rest of the Civil Rights Act of 1964 was emphasized while it was being debated.<sup>36</sup> An antidiscrimination law that

liable); N.Y. EXEC. LAW § 292(5) (2012) (establishing that employers with four or more employees may be liable); OHIO REV. CODE § 4112.01 (2012) (establishing that employers with four or more employees may be held liable); 43 PA. STAT. § 954 (2012) (establishing that employers with four or more employees may be liable); R.I. GEN. LAWS § 28-5-6(7) (2012) (establishing that employers with four or more employees may be liable); TENN. CODE. § 4-21-102 (2012) (establishing that employers with eight or more employees may be liable); WASH. REV. CODE. § 49.60.040 (2012) (establishing that employers with eight or more employees may be liable); W. VA. CODE § 5-11-3 (2012) (establishing that employers with twelve or more employees may be liable); WYO. STAT. § 27-9-102 (2012) (establishing that employers with two or more employees may be liable).

32. See ALASKA STAT. 18.80.300(5) (2012); COLO. REV. STAT. 24-34-401(3) (2012); HAW. REV. STAT. ANN. § 378-1 (2012); ME. REV. STAT. tit. 5, § 4553 (2012); MICH. COMP. LAWS 37.2201(a) (2012); MINN. STAT. 363A.03 (2012); MONT. CODE 49-2-101(11) (2012); N.J. STAT. ANN. § 10:5-5(e) (2012); N.D. CENT. CODE 14-02.4-02(8) (2012); N.J. OKLA. STAT. tit. 25, § 1301(1)(a) (2012); OR. REV. STAT. § 659A.001(4) (2012); S.D. CODIFIED LAWS § 20-13-1(7) (2012); VT. STAT. ANN. tit. 21, § 495d(1) (2012); WIS. STAT. § 111.32(6)(a) (2012).

33. ALA. CODE § 25-1-20 (2012) (defining employer as “any person employing 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, including any agent of that person”).

34. See *infra* Part IV.D.

35. See H.R. REP. NO. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2401 (“The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.”).

36. See *id.* at 2513 (“The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed

extended to all areas of life other than employment would not be as influential as the legislature intended.<sup>37</sup> Because employment discrimination claims involve a statutory cause of action, those who sought to determine the purpose of the minimum employee threshold turned to legislative history.<sup>38</sup> Because Title VII only went through two House committee reviews, most of its legislative history can be found in the Congressional Record.<sup>39</sup> The original employee threshold for claims under Title VII was twenty-five,<sup>40</sup> but the Equal Employment Opportunity Act of 1972 (“EEOA”) changed this to fifteen.<sup>41</sup> “Many civil rights researchers believe that the 1972 EEOA enabled the EEOC to substantially increase its enforcement powers and coverage.”<sup>42</sup> At the time of EEOA’s passage, nine states, eight of which were in the South, still did not have fair employment practices (“FEP”) laws.<sup>43</sup>

When originally debating Title VII on the floor, although the issue was addressed, Congress deliberated little regarding the number of employees an employer should have in order to be subject to the law.<sup>44</sup> For example, senators estimated that roughly twenty-five percent of the workforce, anywhere from seventeen to eighteen and one-half million workers, would be excluded from coverage if the threshold was set at twenty-five.<sup>45</sup>

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to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one’s pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen. Testimony supporting the fact of discrimination in employment is overwhelming.”).

37. *Id.*

38. *See, e.g.,* *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 81-85 (3d Cir. 2003); *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) (all discussing legislative history of Title VII).

39. Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 426 (1994).

40. *Nesbit*, 347 F.3d at 82.

41. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 2, 78 Stat. 253.

42. Kenneth Y. Chay, *Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972*, 51 INDUS. & LAB. REL. REV. 608, 611 (1998).

43. *See id.* at 610 (“As of 1972, eight of the nine states with no FEP laws were located in the South (Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, Tennessee, and Virginia).”).

44. *See* 110 CONG. REC. 13085-93 (1964) (remarks of Sen. Humphrey Jr.) (Speaking in opposition to Senator Norris H. Cotton’s proposed amendment to raise the threshold to 100 employees, Senator Humphrey explained that only 1.75 percent of American businesses would be subject to the law if the threshold was raised to 100). The amendment failed. *Id.* at 13093. At the time of its original implementation, the law applied to only eight percent of employers. *Id.* at 13090; *see also id.* at 13092 (statement of Sen. Morse) (“I know of no reason why we should set small businessmen aside and say, ‘You can continue discrimination with immunity.’”).

45. *See* 110 CONG. REC. 9123 (1964) (remarks of Sen. Aiken) (estimating that 18.5 million employees, roughly twenty-five percent of the workforce, would be excluded from coverage). *But*

Congress addressed the issue of lowering the threshold from twenty-five to eight in greater detail on the floor in 1972, and Senator Ervin voiced his concern regarding the burden that a minimum employee threshold may put on the associational rights of small businesses.<sup>46</sup> It has been argued that this is the only justifiable reason for a minimum employee threshold and should be limited to those businesses where the employer has sufficient associational interests in its employees.<sup>47</sup> Senator Fannin, on the other hand, emphasized the potential costs businesses may have to incur in their efforts to adhere to federal employment regulations.<sup>48</sup> House Report 92-238, supporting an eight-employee threshold, highlighted the importance of closing the gap of individuals who are unable to seek a remedy under Title VII.<sup>49</sup> Eventually, Congress settled on lowering the minimum threshold number to fifteen as a political compromise.<sup>50</sup>

### *B. Justification for the Minimum Employee Threshold*

The overarching reason for implementing a minimum employee threshold for actions against employers is to protect small businesses from federal regulation.<sup>51</sup>

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*see* 110 CONG. REC. 9801 (1964) (remarks of Sen. Stennis) (suggesting that this number was closer to seventeen million).

46. *See* 118 CONG. REC. 3171 (1972) (remarks of Sen. Ervin) (“[W]hen we get below the coverage of 25, we run into the situation where most of the employment is done on the basis of friends of the employers. The businessman wants members of his own church. He wants members of his own race. He wants people of the same national origin. . . . When we reduce the number below 25, we are taking away some of the most cherished liberties of Americans. There are the most intimate relations between the small businessman and various of his employees. We are entitled to let the man invest his capital, his skills, and his talents in a business instead of having the Government tell him whom he shall hire, whom he shall promote, and whom he shall discharge in order to make his business a success.”); *see also* Bonfield, *supra* note 26, at 912 (“More precisely, in framing these acts legislatures have sometimes sought to consciously reconcile equal employment opportunity for all members of our polity with freedom of association.”).

47. *See* Bonfield, *supra* note 26, at 922-24 (arguing that the only satisfactory justification for a minimum employee threshold is when a business’ associational rights outweigh the right to equal opportunity).

48. 118 CONG. REC. 2410 (1972) (statement of Sen. Fannin) (“Men and women who are very able and eager to run small businesses find that they are overwhelmed by paperwork and regulations and redtape.”).

49. *See* H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155 (“[T]he committee feels that the Commission’s remedial power should also be available to all segments of the work force. With the amendment proposed by the bill, Federal equal employment protection will be assured to virtually every segment of the Nation’s work force.”).

50. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 82 (3d Cir. 2003).

51. Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1063 (2005); Eric Allen Harris, Note, *The Americans with Disabilities Act: Equal Opportunity for Individuals with Disabilities, in Some Large Businesses, in Some Major Cities, Sometimes . . .*, 69 U. PITT. L. REV.

Courts and scholars have broken this main principle down and explained that Congress extended this protection to small businesses for three reasons: to protect small businesses from the high costs of complying with complex federal employment law,<sup>52</sup> to protect the associational interests of small businesses,<sup>53</sup> and to protect businesses from the potential high costs that are associated with litigating a federal lawsuit.<sup>54</sup> Congress even reiterated the overarching principle of protecting small business by stating, “Title VII already addresses the unique needs of small businesses by exempting employers with fewer than 15 employees.”<sup>55</sup>

Others have suggested that the threshold was to ensure Congress did not exceed its authority under the Commerce Clause.<sup>56</sup> This argument does not carry much weight due to the political environment at the time of Title VII’s passage. As the *Nesbit* court explained after exploring the issue in great detail, “the fifteen-employee threshold appears motivated by policy—to spare small companies the expense of complying with Title VII—rather than Commerce Clause considerations.”<sup>57</sup> The Supreme Court of Colorado, a state that has removed the employee threshold entirely,<sup>58</sup> explains that the purpose of its nondiscrimination statute was to eliminate unfair or discriminatory employment practices altogether.<sup>59</sup> Presumably, Colorado’s intent was to put the policy of eliminating discriminatory employment practices above the potential burden that might be placed on small businesses.

Several studies have been conducted regarding the economic impact of employment discrimination and antidiscrimination laws.<sup>60</sup> One of these studies,

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657, 669 (2008).

52. *See* *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (“The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance . . .”).

53. *Jendusa v. Cancer Treatment Ctrs. of Am.*, 868 F. Supp. 1006, 1013 (N.D. Ill. 1994).

54. *See* *Miller v Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (“Title VII limits liability to employers with fifteen or more employees and the ADEA limits liability to employers with twenty or more employees, 29 U.S.C. § 630(b), in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.”). *But see* Lamberson, *supra* note 39, at 427 (“Ability to pay and the burden of defending a suit were simply not considerations Congress had in mind when limiting the term ‘employer’ in Title VII.”).

55. S. REP. NO. 102-286, at 13 (1992).

56. Mandell, *supra* note 51, at 1060-62.

57. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 82 (3d Cir. 2003); *see also* Mandell, *supra* note 51, at 1062 (“At the time of Title VII’s adoption, given the Court’s jurisprudence on the breadth of congressional authority in statutes utilizing the ‘affecting commerce’ formulation, the argument that the minimum employee threshold was necessary to satisfy the Commerce Clause made little sense.”).

58. COLO. REV. STAT. 24-34-401(3) (2012).

59. *Brooke v. Restaurant Servs.*, 906 P.2d 66, 71 (Colo. 1995).

60. *See generally* Stewart J. Schwab, *Employment Discrimination, in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 296, 310 (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly

conducted by Kenneth Chay, explored the impact of the 1972 lowering of the federal minimum employee threshold from twenty-five to fifteen on employment and earnings of African American workers in the South.<sup>61</sup> He concluded that the amendment lowering the federal threshold positively impacted the employment and earnings of African American workers in the South, particularly in certain industries and with those companies that had not previously been subject to Title VII.<sup>62</sup>

### III. WHY EMPLOYEES AT SMALL BUSINESSES NEED PROTECTION

For whatever reason, workplace harassment and discrimination is often associated with big business.<sup>63</sup> Yet, there are three main reasons why employees who work for small businesses are in need of the protection provided by antidiscrimination statutes. First, a significant portion of the population works at what is considered a small business.<sup>64</sup> Second, there are certain features of small businesses that potentially make harassment go unpunished or make the effects of harassment more salient.<sup>65</sup> Finally, the current economic environment shows that those employees working in a harassment-filled environment may not have the option to seek employment elsewhere.<sup>66</sup>

#### A. *The Amount of Employees Working for Small Businesses*

At the time of its passage, approximately eight percent, an amount described as “modest,” of employers were subject to Title VII.<sup>67</sup> When speaking in opposition to an amendment that would raise the threshold to 100 employees, Senator Humphrey argued, “[W]hat Senator Cotton is suggesting is that [T]itle VII should cover somewhat less than 1 3/4 percent of the employers in this country—an infinitesimal number.”<sup>68</sup> Because the law was passed during a time when civil rights were at the forefront of American politics,<sup>69</sup> it is understandable that Congress took a conservative or “modest” approach. There was great

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Lobel eds., 2009) (“Unlike law-and-economics scholarship in some other areas, the scholarship in employment discrimination has gone beyond model building and taken a serious empirical look at discrimination litigation and the effects of antidiscrimination law.”).

61. Chay, *supra* note 42.

62. *See id.* at 631 (“[T]his study finds that black men in the high-impact industries in the South achieved large improvements in economic status after 1972. Black employment shares grew 0.5 – 1.1 points more per year and the black-white earnings gap narrowed . . .”).

63. David Wolinsky, *How Sexual Harassment Affects Small Businesses*, NBC CHICAGO (Oct. 13, 2011), <http://www.nbcchicago.com/blogs/inc-well/How-Sexual-Harassment-Affects-Small-Businesses-131214864.html>, archived at <http://perma.cc/4E9S-YUXC>.

64. *See infra* Part III.A.

65. *See infra* Part III.B.

66. *See infra* Part III.C.

67. 110 CONG. REC. 13090 (1964) (remarks of Sen. Humphrey Jr.).

68. *Id.*

69. Lees, *supra* note 3, at 873.

concern that extending the Act to small businesses would actually increase bitterness, hatred, and violence.<sup>70</sup> When the issue of the number of employees who were protected under Title VII arose again in 1971, the House Report again tried to persuade Congress that too many people were unprotected.<sup>71</sup>

In 2010, roughly 16.4 million employees worked for businesses that employed less than fifteen employees.<sup>72</sup> This means that roughly 14.7 percent of employees who worked in America did not work for a business that was subject to Title VII.<sup>73</sup> Of the roughly 7.4 million establishments, defined as “[a] single physical location where business is conducted or where services or industrial operations are performed,”<sup>74</sup> approximately 4.9 million of them are subject to Title VII.<sup>75</sup> Thus, nearly sixty-six percent of all establishments in the country do not need to comply with federal anti-discrimination statutes. As one writer put it, “[A]mazingly, in most states in America, a small employer can still discriminate to its heart’s content.”<sup>76</sup> Although Title VII applies to a greater number of employers today, roughly thirty-four percent, than the eight percent at the time of its implementation, it is still a far cry from providing Title VII remedies to “all segments of the workforce.”<sup>77</sup>

### *B. Nature of Small Businesses*

Several factors may explain why harassment and discrimination occur in small businesses. First, these smaller businesses are less likely to have formal written procedures to safeguard against discrimination.<sup>78</sup> The implementation of strong anti-harassment policies would likely diminish the probability of this type of behavior in the future.<sup>79</sup> Second, the work environment may be less formal,

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70. See 110 CONG. REC. 13087 (1964) (statement of Sen. Cotton).

71. See H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2155 (“[A] large segment of the Nation’s work force is excluded from an effective Federal remedy to redress employment discrimination.”).

72. U.S. Census Bureau, *Statistics of U.S. Businesses Main*, <http://www.census.gov/econ/sub/>, archived at <http://perma.cc/MPU4-TXZQ> (last visited June 3, 2014). Census data is broken down by employers with zero to four; five to nine; ten to fourteen; and fifteen to nineteen employees. I have taken half of the number of employees who currently work at businesses with ten to nineteen employees and added that figure to the number of employees who work for businesses with zero to nine employees.

73. *Id.*

74. U.S. Census Bureau, *Statistics of U.S. Businesses: Definitions*, <http://www.census.gov/econ/sub/definitions.html>, archived at <http://perma.cc/EZW7-USZ2> (last visited June 3, 2014).

75. U.S. Census Bureau, *Statistics of U.S. Businesses Main*, <http://www.census.gov/econ/sub/>, archived at <http://perma.cc/JRQ8-KV73> (last visited June 3, 2014).

76. GAVIN S. APPLEBY, HARASSMENT AND DISCRIMINATION: AND OTHER WORKPLACE LANDMINES 11 (2008).

77. H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2155.

78. Hemken, *supra* note 30, at 650.

79. Scott J. Vitell, Erin Baca Anderson, & Troy A. Festervand, *Ethical Problems, Conflicts*

thus leading to more harassment.<sup>80</sup> As one employment lawyer suggests, “Many times, owners or managers see their businesses as their own personal fiefdoms and they don't think the laws apply to them.”<sup>81</sup> Depending on the state in which the person's business is located and the size of the business, the owner or manager may be correct.<sup>82</sup> This same employment attorney goes on to explain that the fact that many of these businesses function as families can cause other employees to overlook any inappropriate behavior.<sup>83</sup>

In addition to a potential lack of formal policies and a less formal environment, a supervisor or manager of a small business plays a large role in shaping other employees' thoughts regarding what constitutes appropriate behavior for the organization.<sup>84</sup> Immediate supervisors' behaviors, in particular, have a great impact on how other employees perceive the climate in an organization.<sup>85</sup> Therefore, if a manager or boss in a small business portrays an attitude of tolerance regarding discriminatory behavior, a climate of tolerance is likely going to exist throughout the business because this person is likely to be the only manager or boss in the office. In an office like the one described in the hypothetical, it would not take long for other employees to come to the conclusion that the organization tolerates this type of behavior. The likelihood of sexual harassment is much greater in environments where this type of behavior is perceived as socially permissible.<sup>86</sup>

Along with the reasons that potentially explain why harassment occurs in small businesses, the effect of harassment on subjected employees in small businesses must be further explored. The effects of harassment on an employee in a small business will likely be more salient than in a larger business.<sup>87</sup> This increased impact on the employee alleging discrimination can be explained by the climate of tolerance that was established by the supervisor's permissive behavior of such actions.<sup>88</sup>

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*and Beliefs of Small Business Professionals*, 28 J. BUS. ETHICS 15, 23 (2000).

80. Hemken, *supra* note 30, at 650.

81. Wolinsky, *supra* note 63.

82. *See supra* notes 31-32.

83. Wolinsky, *supra* note 63.

84. Sandra L. Robinson & Anne M. O'Leary-Kelly, *Monkey See, Monkey Do: The Influence of Work Groups on the Antisocial Behavior of Employees*, ACAD. MGMT. J. 658, 658-72 (1998).

85. Jane E. Mullen & E. Kevin Kelloway, *Safety Leadership: A Longitudinal Study of the Effects of Transformational Leadership on Safety Outcomes*, 82 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 253, 255 (2009).

86. ALAN M. GOLDSTEIN & IRVING B. WEINER, HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 266 (John Wiley & Sons, Inc., 11th ed. 2003).

87. Junghyun Lee, *The Effects of Leadership Behavior on Workplace Harassment, Employee Outcomes, and Organizational Effectiveness in Small Businesses*, 19-20 (Jan. 31, 2012) (unpublished Ph.D. dissertation, The George Washington University) (on file with Falvey Memorial Library, Villanova University), available at <http://gradworks.umi.com/3489453.pdf> (last visited June 3, 2014).

88. *Id.* at 48.

Studies have shown that when a victim works in an environment that is tolerant of harassment, the effects of the tolerant environment with regard to psychological well-being, physical health, job withdrawal, and life satisfaction are actually more detrimental than the experiences of harassment themselves.<sup>89</sup> When an employee works at a smaller business that has an environment that is tolerant of discriminatory behavior—particularly when this attitude comes from an immediate supervisor—the employee is not likely to report the incident.<sup>90</sup> An employee is also less likely to seek effective coping methods, such as avoidance or support from other employees where the employee works at a business where everyone is tolerant of such behavior.<sup>91</sup>

It should also be noted that at the time when antidiscrimination in employment laws were being passed at both the state and federal levels, a small business owner might not have had a great deal of concern regarding harassment and discrimination regulations. Today, on the other hand, it is a topic that is consistently brought up to individuals seeking to start a small business.<sup>92</sup> There are certain types of laws affecting a business of which an entrepreneur should be aware. Therefore, an argument centered on the idea that those seeking to start a small business are unaware of or should not be subject to antidiscrimination regulations is not likely realistic.

### C. Economic Climate

In addition to the effects of harassment being more salient to an employee in a small business, these employees should be offered protection when the economy is struggling. An employee will make decisions on how to respond to

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89. See *id.* (quoting M.S. Stockdale et al., *The Sexual Harassment of Men: Evidence for a Broader Theory of Sexual Harassment and Sexual Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 630, 640 (1999)) (“[W]aiting for the [sexual harassment] shoe to drop is more anxiety provoking than the experience of [sexual harassment] itself when the organizational climate condones or does not actively dissuade such behavior.”).

90. Deborah E. Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 THE ACAD. MGMT. REV. 687, 708 (1997).

91. Lee, *supra* note 87, at 1.

92. See, e.g., APPLEBY, *supra* note 76, at 6 (“[S]mart employers not only establish the right policies, they send the right messages . . . . The best employers even go beyond the . . . preventative devices and the limits of the law.”); *Discrimination and Sexual Harassment Policies*, ENTREPRENEUR.COM, <http://www.entrepreneur.com/article/80140>, archived at <http://perma.cc/LQE-7XSU> (last visited June 3, 2014) (excerpted from THE STAFF OF ENTREPRENEUR MEDIA, *START YOUR OWN BUSINESS: THE ONLY START-UP BOOK YOU’LL EVER NEED* (5th ed. 2010) and Larry Rosenfeld, *Do I Need a Sexual Harassment Policy?*, ENTREPRENEUR.COM (Oct. 21, 2001), <http://www.entrepreneur.com/article/4548420>, 2013) (“Concerns over the discrimination are more important than ever in today’s increasingly diverse business world. . . . The best policy is to make sure that everyone in your workplace understands what constitutes harassment and discrimination—and also understands the benefits of a diverse workplace.”).



situations, and their outcome expectations will be different based on the state of the economy at the time the situation occurs.<sup>93</sup> As one study showed, “[d]uring periods of economic weakness, such as high unemployment, slow economic growth, and depressed consumer confidence, a target of [sexual harassment] may be less likely to report an incident for fear of retaliation or retribution culminating in job loss.”<sup>94</sup>

The unlikelihood of an employee reporting harassment, coupled with the fact that the employee will be unlikely to seek other coping methods, such as avoidance or co-worker support, gives the employee very few options. As a May 2012 article points out, “[a]t a time of high unemployment, lackluster job growth and major uncertainty in world financial markets, many employees feel stuck in their jobs, unable to consider a career move even if they’re unhappy.”<sup>95</sup> At the time this Note was submitted, the nation’s unemployment numbers were at roughly 7.9%.<sup>96</sup> Like the woman in the hypothetical who depends on the income to support a family, simply getting a different job is not necessarily an option for a lot of the population, especially those employees who are not in high demand. Her only option without having protection under antidiscrimination statutes may be to “stick it out” at a job where she is being harassed, something that is clearly against public policy.

#### IV. WHY STATE LAWS SHOULD REMOVE THE MINIMUM EMPLOYEE THRESHOLD

##### *A. Avoiding a Potential Constitutional Problem*

One might argue that, rather than allow state laws to remove this threshold, the end result might be better accomplished by removing the employee threshold from federal civil rights statutes. After all, federal statutes can offer a plaintiff certain benefits, such as punitive damages under Title VII.<sup>97</sup> Federal antidiscrimination statutes were enacted under Congress’s Commerce Clause power.<sup>98</sup> The same section of the statute that lays out the minimum employee threshold also specifies that the defendant must be “in an industry affecting commerce.”<sup>99</sup> Courts have differed on whether Title VII’s minimum employee

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93. Knapp et al., *supra* note 90, at 705.

94. *Id.*

95. Susan Adams, *New Survey: Majority of Employees Dissatisfied*, FORBES (May 18, 2012), available at <http://www.forbes.com/sites/susanadams/2012/05/18/new-survey-majority-of-employees-dissatisfied/>, archived at <http://perma.cc/3QD6-H5VU>.

96. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Unemployment Rate*, UNITED STATES DEPARTMENT OF LABOR, <http://data.bls.gov/timeseries/LNS14000000>, archived at <http://perma.cc/U4ZA-QZ7G> (last visited June 3, 2014).

97. 42 U.S.C. § 1981a(b) (2006).

98. U.S. CONST. art. I, § 8, cl. 3; *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991).

99. 42 U.S.C. § 2000e(b) (2006).

threshold in particular is tied to its congressional power under the Commerce Clause.<sup>100</sup> As previously discussed, scholars have disregarded the view that the minimum employee threshold was added in order to satisfy the Commerce Clause because the standard required to satisfy the “affecting commerce” element at that time was very low.<sup>101</sup>

Although the minimum employee threshold arguably was not essential to passing Title VII, removing it from federal antidiscrimination statutes today could lead to constitutionality questions. The Supreme Court has limited congressional power under the Commerce Clause since its decision in *United States v. Lopez* in 1995.<sup>102</sup> Imagine a local, family-owned fruit stand where the entire product is grown in the family’s backyard or a small candle shop that sells all of its products in one state and does not have a website. Without going into an aggregate effects analysis,<sup>103</sup> it is easy to conceive that congressional Commerce Clause powers could be raised in these and similar situations if the threshold is removed from federal statutes. Conversely, states are not limited by the Commerce Clause and are able to pass antidiscrimination laws under their police powers even if the activity regulated does not affect interstate commerce.<sup>104</sup>

There are also limits to Congress passing federal antidiscrimination laws under Section 5 of the Fourteenth Amendment.<sup>105</sup> The concern in these cases is

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100. See *Willis*, 948 F.2d at 311 (noting that Congress determined that “any employer with 15 or more employees necessarily implicates interstate commerce”). But see *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003) (“[T]he requirements that an employer be ‘in an industry affecting commerce’ and have ‘fifteen or more employees’ are separate and independent, and that it is a mistake to conflate the two.”).

101. Mandell, *supra* note 51, at 1061.

102. 514 U.S. 549, 567 (1995) (holding that Congress does not have authority under the Commerce Clause to regulate possession of firearms in a school zone because this activity is “in no sense economic activity”); see also *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that Congress does not have the authority under the Commerce Clause to regulate “violent criminal conduct”).

103. See *Wickard v. Filburn*, 317 U.S. 111, 114-29 (1942) (upholding the application of federal crop quotas against an individual farmer who grew wheat largely for use on his own farm and not for sale in the interstate market). *Wickard* established the idea that Congress may regulate intrastate activities that, in isolation, may not affect interstate commerce, but may regulate those activities if they affect interstate commerce in the aggregate. See *id.* at 127-28 (stating “[t]hat appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial”).

104. *Mayor of N.Y.C. v. Miln*, 36 U.S. 102, 133-40 (1837) (explaining that police powers are “complete, unqualified, and exclusive” and that they “extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people”).

105. For a thorough analysis of these limitations, see Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

the potential development of a general federal police power.<sup>106</sup> Yet, states do have police powers,<sup>107</sup> and they are not burdened by the limitations of the Commerce Clause.<sup>108</sup> Therefore, states that remove the minimum threshold from their antidiscrimination statutes will not have the same constitutional concerns that Congress would have in removing the threshold from federal antidiscrimination statutes.

### *B. Prevent Further Flooding of EEOC*

Assuming that Congress could meet any constitutional barriers, removing the threshold would also add to an already over-burdened EEOC workload.<sup>109</sup> When discussing the change to lower the threshold from fifteen to eight, the minority report of the House Committee on Education and Labor stated “[t]he figures projected for the extension of Title VII jurisdiction to include all persons employed in establishments which employ eight or more full time employees have been derived from a projected 25% increase in the Commission’s workload due to the extended coverage.”<sup>110</sup>

Although this argument was first raised in 1971 when discussing the lowering of the minimum employee threshold, it would still be an issue today because there is a major backlog of cases with the EEOC.<sup>111</sup> Further, the EEOC’s staffing level has dropped by nearly thirty percent between 2000 and 2008.<sup>112</sup> While the EEOC’s staffing has continuously diminished, “the number of discrimination charges filed with the EEOC reached historic levels, peaking between 2008 and 2010.”<sup>113</sup> As the EEOC’s own budget justification explains, “[t]he convergence of these factors yielded a growing backlog of unresolved discrimination charges.”<sup>114</sup> Removing the minimum employee threshold from the federal antidiscrimination statutes would essentially mean that the amount of businesses that must adhere to these statutes would triple.<sup>115</sup>

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106. *Id.* at 506-07.

107. *Morrison*, 529 U.S. at 618 (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States.”).

108. U.S. CONST. art. I, § 8, cl. 3.

109. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION 1 (2011), available at <http://www.eeoc.gov/eeoc/plan/2012budget.cfm>, archived at <http://perma.cc/Z4H3-JBRA>.

110. H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2141.

111. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION 1 (2011), available at <http://www.eeoc.gov/eeoc/plan/2012budget.cfm>, archived at <http://perma.cc/K8BT-6VL3>.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *supra* Part III.A.

*C. State Courts Cannot Agree How to Interpret Antidiscrimination Statutes*

Another argument might be to let state courts decide whether or not state legislatures intended to extend this protection to all employees. Some state courts, despite having a minimum threshold, have decided that a plaintiff can have a cause of action against an employer, even if that employer does not meet the minimum, based on a general public policy argument against discrimination.<sup>116</sup> For example, in *Molesworth v. Brandon*, the Maryland Supreme Court allowed an employee to bring a wrongful discharge claim based on sex discrimination even though the employer fell below the state's employee threshold of fifteen employees.<sup>117</sup> The court, after looking at other statutes, executive orders, and a constitutional amendment that were "ubiquitous" in expressing a public policy against sex discrimination, allowed the employee to bring her claim.<sup>118</sup>

Other state courts have concluded that the state legislature, by including a minimum employee threshold, did not believe small businesses should be subject to antidiscrimination suits; these courts usually reasoned that the legislature chose to include an employee minimum as a way to recognize the public policy of protecting small businesses.<sup>119</sup> For example, in *Chavez v. Sievers*, the Nevada Supreme Court did not allow an employee to bring a claim for tortious discharge based on racial discrimination.<sup>120</sup> The court recognized Nevada's public policy against racial discrimination but ultimately reasoned that it was the duty of the legislature, not the court, to draw the lines between those employers subject to

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116. See *Badih v. Myers*, 43 Cal. Rptr. 2d 229, 232-33 (1995); *Molesworth v. Brandon*, 672 A.2d 608, 616 (Md. 1996) (holding that "the General Assembly did not intend to permit small employers to discriminate against their employees, but rather intended to promote a policy of ending sex discrimination statewide"); *Collins v. Rizkana*, 652 N.E.2d 653, 660 (Ohio 1995); *Roberts v. Dudley*, 993 P.2d 901, 908 (Wash. 2000) ("The statutory remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purpose of applying the statutory remedy does not alter or otherwise undo to any degree this state's public policy against employment discrimination."); *Williamson v. Greene*, 490 S.E.2d 23, 33 (W. Va. 1997).

117. *Molesworth*, 672 A.2d at 616.

118. *Id.* at 613.

119. See, e.g., *Thibodeau v. Design Grp. One Architects, LLC*, 802 A.2d 731, 747 (Conn. 2002) ("In sum, we see no reason why the legislature would have excluded small employers from the act unless it had decided, as a matter of policy, that such employers should be shielded from liability for employment discrimination."); *Weaver v. Harpster*, 975 A.2d 555, 570 (Pa. 2009) ("If the legislature chooses to expand statutes to cover more employers, it is clearly within its authority to do so. Our role, however, does not include expanding statutes beyond their terms."); *Chavez v. Sievers*, 43 P.3d 1022, 1028 (Nev. 2002) ("Nevada's Legislature has created statutory remedies for employment discrimination and has explicitly exempted small employers from the remedies available."); *Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1267 (Utah 2000).

120. *Chavez*, 43 P.3d at 1026.

antidiscrimination statutes and those employers who are not.<sup>121</sup> The court cites to *Badillo v. Am. Brands*,<sup>122</sup> where the court explains, “Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function.”<sup>123</sup> It is clear that leaving the responsibility of removing the minimum employee threshold to state courts will lead to the same problem that currently exists: some employees will be protected by state antidiscrimination statutes or common law tort claims and other employees will not have either option at their disposal.

*D. Leaving It up to the States—Choosing the Best Method Without Leaving Anyone Out*

*1. Letting States Decide Increases Competition.*—There are several advantages of implementing a national public policy in a decentralized fashion; these advantages can be broken down into “public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation.”<sup>124</sup> Two of these advantages—achieving economic efficiency through competition and encouraging experimentation—will be explored in greater detail.

First, competition among states in an area of such great importance as worker protection could lead to greater protection for workers in order attract individuals to the state.<sup>125</sup> One might argue that leaving these choices up to the states may create a “race to the bottom” situation where states try to exclude more people from protection or provide employees with lessened remedial measures, such as a lack of punitive damages or statutory caps. It could just as easily be argued that states will want to stand out by providing employees with greater protection than federal laws through increased statutory remedies. This would, in turn, create a “race to the top” scenario where state legislatures are trying to attract residents by establishing themselves as worker-friendly states that protect employees and punish businesses with discriminatory practices.<sup>126</sup>

Justice Brandeis explains the importance of states acting as laboratories:

Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk

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121. *Id.* at 1025-26.

122. *Badillo v. Am. Brands*, 16 P.3d 435 (Nev. 2001).

123. *Id.* at 440.

124. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994); see also *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991).

125. Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 357-58 (2007).

126. *Id.* at 358.

to the rest of the country.<sup>127</sup>

Simply eliminating the thresholds across the board does not take this experimental capacity from the states. Rather, among other things, states would retain the ability to experiment when it comes to who is protected by their state antidiscrimination laws, the process by which an employee must follow in pursuing action against an employer, and the adjudication methods available to the employee. By no means would removing the employee threshold from all states result in cookie-cutter implementation of state antidiscrimination laws.

2. *States Have Been on the Forefront of Expanding Discrimination Protection.*—Evidence shows that states have continued their trend of being ahead of their federal counterpart when it comes to antidiscrimination law.<sup>128</sup> States have already passed antidiscrimination statutes that provide greater protection to employees than protection provided by federal antidiscrimination statutes; the states are doing this by expanding the classes to which protection is offered and through more extensive administrative requirements.<sup>129</sup>

The most glaring example of this is the fact that many states have extended protection to employees based on sexual orientation, something that is not included in the federal antidiscrimination statutes.<sup>130</sup> State statutes have also protected individuals based on “gender- or stereotype-related classifications such as pregnancy, childbirth (and related medical conditions such as childbearing capacity, sterilization, and fertility), marital status (including a change thereof and domestic partnership), relationship with a person of another race, breastfeeding, parenthood, personal appearance, family status, and family responsibilities (actual or perceived).”<sup>131</sup> Other states have allowed any individual to bring a claim for age discrimination, whereas the ADEA only allows individuals over the age of forty to bring such a claim.<sup>132</sup> Further, state statutes have defined the term “disability” broader than the ADA has.<sup>133</sup> Others have removed the necessity to have a record of a disability, thus offering more protection to more individuals than the protection provided by their federal counterpart.<sup>134</sup>

Along with expanding its coverage beyond that of the federal statutes, certain states have provided more attractive statutory remedy schemes and adjudication procedures than those provided by federal antidiscrimination statutes.<sup>135</sup> Title VII

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127. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

128. *See supra* Part I.A.1

129. Hemken, *supra* note 30, at 649-55.

130. *See, e.g.*, CAL. GOV'T CODE § 12920 (2012) HAW. REV. STAT. § 368-1 (2012); 775 ILL. COMP. STAT. 5/1-102(A) (2012); N.J. Stat. § 10:5-12 (2013); WASH. REV. CODE § 49.60.180 (2007).

131. *See* Hemken, *supra* note 30, at 649-55.

132. Sperino, *supra* note 125, at 357.

133. *Id.*

134. Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 627 (2004).

135. For a complete breakdown of state antidiscrimination statutory schemes, see Joseph J.

and the ADA have statutory caps based on the size of the employer,<sup>136</sup> while state law remedies for status discrimination often exceed those available under federal law.<sup>137</sup> Some states allow plaintiffs to recover both compensatory and punitive damages without any cap.<sup>138</sup> Further, a potential plaintiff may be able to avoid the high cost of litigation by using administrative remedies instead. Illinois, for instance, allows administrative resolution of any claim brought under the Illinois Human Rights Act.<sup>139</sup>

States have also imposed more stringent administrative requirements on employers under their state antidiscrimination statutes than those imposed by Title VII, sometimes requiring affirmative action to prevent discrimination.<sup>140</sup> For example, California, Connecticut, and Maine already require certain businesses to provide harassment training to supervisors and managers.<sup>141</sup> “All three states have very specific requirements concerning the content of sexual harassment training, record keeping, refreshment courses, and question and answer sessions.”<sup>142</sup> Other states have been at the forefront of innovation in their antidiscrimination statutes. Some require the posting or distribution of brochures of state policies.<sup>143</sup> Others encourage the prevention of harassment before it

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Shelton, *John H. Fanning Labor Law Writing Competition Winner: In the Wake of Garrett: State Law Alternatives to the Americans with Disabilities Act*, 52 CATH. U.L. REV. 837 (2003).

136. 42 U.S.C. § 1981a(b)(3) (2006).

137. Henry H. Drummonds, Article, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 496 (1993).

138. See N.J. STAT. ANN. § 10:5-3 (2012); OHIO REV. CODE ANN. § 4112.99 (2012); *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1218-20 (Ohio 1999) (interpreting Ohio’s antidiscrimination law as permitting punitive damages).

139. 775 ILL. COMP. STAT. 5/7A-101 to 5/7B-104 (2012).

140. See Hemken, *supra* note 30, at 652 (“In addition to the expanded class of employees protected, many states now require employers to take affirmative action to prevent sexual harassment in the workplace.”).

141. See CAL. GOV’T CODE § 12950.1 (2012) (requiring an employer with more than fifty employees to provide sexual harassment training to supervisors within six months of taking a position); CONN. GEN. STAT. § 46a-54(15)(B) (2012) (requiring an employer with more than fifty employees to provide sexual harassment training to supervisors within six months of taking a position); ME. REV. STAT. ANN. tit. 26, § 807(3) (2012) (requiring sexual harassment training for all employees who work for employers with fifteen or more employees within one year).

142. Hemken, *supra* note 30, at 653; see also CAL. GOV’T CODE § 12950.1 (2012); CONN. GEN. STAT. § 46a-54(15)(B) (2012); ME. REV. STAT. ANN. tit. 26, § 807(3) (2012).

143. MASS. GEN. LAWS ch. 151B, § 3A (2012) (requiring employers to annually provide a copy of their sexual harassment policy to employees); ME. REV. STAT. ANN. tit. 26, § 807(1) (2012) (“An employer shall post in a prominent and accessible location in the workplace a poster providing, at a minimum, the following information: the illegality of sexual harassment; a description of sexual harassment, utilizing examples; the complaint process available through the commission; and directions on how to contact the commission.”).

starts.<sup>144</sup> These procedures help to accomplish the most effective way of eliminating harassment in the workplace: prevention.<sup>145</sup>

It is clear that states are already beginning to act as laboratories in determining to whom protection is offered and compensation methods; thus, requiring the states to remove the minimum threshold will not thwart the states' ability to act as laboratories. Rather, it will simply ensure whatever scheme a state devises will extend to all employees, regardless of the size of the employer.

#### V. HOW TO ACCOMPLISH—COOPERATIVE FEDERALISM

The interrelationship between the federal government and state governments regarding employment laws is a topic of great debate.<sup>146</sup> As previously discussed, states have been at the forefront of extending protection and developing attractive remedy schemes.<sup>147</sup> The federal government must work with the states to extend protection to all employees if it is truly serious about eliminating discrimination in the workplace for all employees through its antidiscrimination statutes.<sup>148</sup> The best way to do this is for the federal government to offer states an incentive for removing minimum employee thresholds or a punishment for failing to remove their thresholds.

Cooperative federalism in its ideal form consists of state and federal governments working together to forward a federal policy.<sup>149</sup> In this case, the federal policy would be the elimination of discrimination in the employment sector.<sup>150</sup> The federal government could offer states that remove minimum employee thresholds certain benefits, specifically those that would bolster small businesses.

Conversely, the federal government could also lower or eliminate the amount of benefits a state's small businesses receive if the state refuses to remove its minimum employee threshold. In doing so, any concerns regarding a race to the bottom scenario would be all but silenced. The concern that states would limit the amount of protection to employees in order to become considered "business

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144. HAW. CODE R. § 12-46-109(g) (2012).

145. Chi-hye Suk, *supra* note 20, at 469 (quoting 29 C.F.R. § 1607.4 (2013)).

146. Drummonds, *supra* note 137, at 471-73.

147. *See supra* Part IV.D.

148. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (explaining that Title VII and the ADEA were passed to eliminate "discrimination in the workplace") (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)).

149. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998).

150. *See* H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 ("The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.").



friendly” states would not have any traction. Instead, when a state removed its minimum employee threshold, it would be forwarding two important policies: protecting its employees from discriminatory practices and displaying its support for small businesses.

*A. Method One—Using a Metaphorical Carrot*

One potential method of support the federal government could provide to states to attract small businesses would be to increase the amount of grants offered or provide low-interest loans to small businesses. This method of providing a proverbial carrot to states could go a long way in increasing the speed at which states remove minimum employee thresholds.

The best incentive-based method to facilitate this cooperative relationship between the state and federal government is by using a program that is already in existence: the State Small Business Credit Initiative (“SSBCI”). On September 27, 2010, President Obama signed into law the Small Business Jobs Act of 2010.<sup>151</sup> The law created the SSBCI, which was designed to increase lending to small businesses and manufacturers by fifteen billion dollars.<sup>152</sup> The overall objective of the initiative is to leverage ten dollars in private investment into small businesses for every one dollar spent by the government.<sup>153</sup> It does this by providing “direct funding to states for programs that expand access to credit for small businesses.”<sup>154</sup>

Each state develops its own program, whereby states are able to build on old models of small business development or come up with innovative new models.<sup>155</sup> To receive funds, states must submit their plans detailing how the program will expand credit to small businesses, particularly in “underserved communities” to the United States Department of the Treasury (“Treasury”).<sup>156</sup> The Treasury has an SSBCI staff that reviews these plans and either approves or denies the program.<sup>157</sup> These funds must be drawn from by March of 2017.<sup>158</sup>

The connection between this program and the removal of a state’s minimum

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151. Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

152. *State Small Business Credit Initiative (SSBCI)*, U.S. DEPT. OF THE TREASURY, <http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx>, archived at <http://perma.cc/EJ4V-MKZU> (last updated Sept. 30, 2013). See 12 U.S.C. §§ 5701-5710 (2010).

153. Interview by Janet Hamer with Don Graves, Deputy Assistant Sec’y for the Office of Small Bus., U.S. Treasury Dep’t, transcript available at [http://www.frbatlanta.org/pubs/partnersupdate/12no3\\_graves\\_interview.cfm](http://www.frbatlanta.org/pubs/partnersupdate/12no3_graves_interview.cfm), archived at <http://perma.cc/N8CS-K5JU> [hereinafter Graves Interview].

154. Clifton Kellogg, *Treasury’s State Small Business Credit Initiative: A Funding Resource Option for Small Business Lenders*, COMMERCIAL INSIGHTS at 1 (October 2010), <http://www.aba.com/Tools/Ebulletins/CommInsights/RMI-1012-b.pdf>, archived at <http://perma.cc/69FN-56YL>.

155. See Graves Interview, *supra* note 153.

156. Kellogg, *supra* note 154, at 1.

157. *Id.*

158. *Id.* at 2.

employee threshold seems relatively straightforward. In order for a state to receive its funds from the Treasury, the state must first eliminate any minimum employee threshold from its state antidiscrimination statute. In the case of Mississippi, which does not currently have a state antidiscrimination law, there must be an antidiscrimination in employment statute passed that does not contain a minimum employee threshold.

### *B. Method Two—Using a Metaphorical Stick*

The federal government could also choose more of a “stick” method whereby it penalizes those states that fail to remove minimum employee thresholds from their antidiscrimination statutes.

The aforementioned method using the SSBCI as incentive to get states to remove their thresholds could also be seen as a utilization of the stick method. Because it is a program that is already being implemented, one might see it framed in the following manner: if a state fails to remove its threshold, it will not receive federal SSBCI funding. Either way, it provides states an incentive to remove their thresholds while offering assistance to small businesses within the state.

Another potential method to accomplish this would be to collect a portion of punitive damages collected on employment discrimination suits in those states that have split-recovery statutes. These statutes allow a state to receive a portion of a plaintiff’s punitive damage award in order to fulfill the true purpose of a punitive damage award: to deter and punish.<sup>159</sup> Although this would be an effective method of punishing those states that have not removed their minimum employee thresholds, currently only seven states have passed split-recovery statutes, so this stick method would not be wide-reaching enough to accomplish its purpose.<sup>160</sup>

### *C. Avoiding a Coercion Problem*

One might argue that these methods, particularly the withholding of small business loans to those states that fail to remove their thresholds, might be considered too coercive on the states. In *National Federation of Independent Businesses v. Sebelius*, the Supreme Court of the United States held that withholding all federal Medicaid funding from those states that do not take part in the Medicaid expansion was too coercive on the states.<sup>161</sup> The Court applied the principles laid out in *South Dakota v. Dole*,<sup>162</sup> *New York v. United States*,<sup>163</sup> and *Printz v. United States*,<sup>164</sup> in order to determine whether Congress’s threat of

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159. Bethany Rabe, Note, *The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy But Bad Law*, 2008 UTAH L. REV. 333, 340-42.

160. See *id.* for a complete breakdown of split-recovery statutes.

161. 132 S. Ct. 2566, 2607 (2012).

162. 483 U.S. 203, 210-12 (1987).

163. 505 U.S. 144, 188 (1992).

164. 521 U.S. 898, 933 (1997).

cutting off all federal Medicaid funding to states for failure to expand Medicaid was a proper use of its Spending Clause power or if this threat was too coercive on the states.<sup>165</sup>

Chief Justice Roberts, with whom Justices Breyer and Kagan joined, highlighted Congress's right to offer grants to the states that had accompanying conditions, but also emphasized the importance of preserving the states' right to choose whether or not to participate in the expansion.<sup>166</sup> He explained that the financial incentive to expand Medicaid was not "relatively mild encouragement" but that "it is a gun to the head" of the states.<sup>167</sup> He concluded that the Patient Protection and Affordable Care Act as written took this ability to choose away from the states, making that particular portion of the Act unconstitutional.<sup>168</sup> Part of the Court's reasoning centered on the fact that federal Medicaid funding potentially made up more than ten percent of a state's overall budget, leaving the states without any real option other than abiding by the expansion.<sup>169</sup> Although the Court specifically explained that it was not going to set a definitive percentage of a state's budget that would constitute coercive action on the part of Congress, it held that a potential ten percent loss is "surely beyond it."<sup>170</sup>

The proposed methods of cooperative federalism would not likely be considered too coercive on the states. In order to determine that Congress was being too coercive using similar reasoning to that used in *Sebelius*, it would need to be shown that Congress basically removed all ability to choose whether or not to remove the minimum employee threshold from the states.<sup>171</sup> Or, put another way, is the incentive of these small business loans for the states to remove their minimum employee thresholds "relatively mild encouragement" or is it "a gun to the head?"<sup>172</sup>

First, it would be helpful to look at what percentage of a state's budget is made up of the SSBCI funds. Looking at three states that have not lowered their minimum employee threshold from fifteen—Arizona, North Carolina, and South Carolina—it will be relatively clear that the portion of these states' budgets coming from SSBCI funds is not very significant. Arizona had a budget of \$8.3 billion in 2011 and has received \$18.2 million in SSBCI funds in roughly two years, approximately \$9.1 million per year; North Carolina had a budget of \$18.5 billion in 2011 and has received roughly \$46.1 million in SSBCI funds over the last two years, roughly \$23.05 million per year; South Carolina had a budget of \$5.1 billion in 2011 and has received roughly \$18 million in SSBCI funds, approximately \$9 million per year.<sup>173</sup> This amounts to approximately 0.11, 0.12,

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165. *Sebelius*, 132 S. Ct. at 2601-08.

166. *Id.* at 2608.

167. *Id.* (quoting *Dole*, 483 U.S. at 211).

168. *Id.*

169. *Id.* at 2605.

170. *Id.* at 2606.

171. *Id.* at 2608.

172. *Id.* (quoting *Dole*, 483 U.S. at 211).

173. *See State Small Business Credit Initiative (SSBCI)*, U.S. DEPT. OF THE TREASURY,

and 0.18 percent of these states' budgets, respectively.

The financial incentive for states to remove their minimum employee thresholds would not be so coercive as to find the incentive unconstitutional. States would continue to have a choice regarding whether to remove their threshold, but in doing so, the states would provide the protection of antidiscrimination laws to all workers while potentially helping the small businesses within their state receive favorable loans. The dual incentive provided to states should make this an attractive proposition, even factoring in any potential additional administrative costs that might go along with the increased number of people who would be protected by the elimination of the threshold.

#### CONCLUSION

As one commentator explained prior to the passage of any federal antidiscrimination laws, "[I]f it is wrong for an employer with thirteen employees to discriminate, it is equally wrong for the employer with twelve or six or one."<sup>174</sup> Some states have accepted this notion and passed legislation accordingly in the form of antidiscrimination laws without minimum employee thresholds.<sup>175</sup> In doing so, these states have ensured that all businesses, regardless of the number of individuals employed there, must comply with state antidiscrimination laws. Those states that have not removed their minimum employee thresholds have continued a decades-long trend of putting the policy of protecting small businesses above the protection of potentially vulnerable workers from discrimination in the workplace. Although there is something to be said about holding onto tradition and history, as President Barack Obama said in his second-term Presidential Inaugural Address, "[W]e have always understood that when times change, so must we."<sup>176</sup> One could speculate that the complete removal of minimum employee thresholds could go a long way in eliminating discrimination across the board, because empirical evidence has shown that lowering the minimum employee threshold at the federal level has decreased the amount of discrimination in certain areas.<sup>177</sup>

Individuals working in small businesses may need the protection offered to them by antidiscrimination laws more than, or at least as much as, individuals who work for businesses that employ a greater number of workers. The informality of both the environments and written policies of small businesses may

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<http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx>, archived at <http://perma.cc/K2DW-6PX2> (last updated Apr. 29, 2014); see also *Fiscal Survey of States*, THE NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, <http://www.nasbo.org/publications-data/fiscal-survey-of-the-states>, archived at <http://perma.cc/G46X-A2ZL> (last visited June 3, 2014).

174. Meiners, *supra* note 7, at 32.

175. See *supra* note 32.

176. President Barack Obama, *Inaugural Address by President Barack Obama* (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>, archived at <http://perma.cc/6FJM-2JJP>.

177. See Chay, *supra* note 42, at 631.

lead to environments that do not address the seriousness of discriminatory actions. Further, when owners and managers of small businesses portray an attitude of tolerance regarding these activities, the attitude reaches other employees quickly assuming that the employees are working in close proximity to one another. Finally, workers that work in these types of environments will likely be constantly aware that this type of behavior may happen, making an “everyday” workday a miserable experience.

States have always been at the forefront of antidiscrimination law in America.<sup>178</sup> States continue to hold that distinction by establishing broader categories of protection and offering other remedial and administrative advantages to plaintiffs in antidiscrimination suits.<sup>179</sup> In the past, the federal government has been able to follow suit by passing its own laws that mirror state laws.<sup>180</sup> The federal government can play a role in the extension of antidiscrimination protection to all workers, even though current Commerce Clause jurisprudence might not lend itself well to this event reoccurring.<sup>181</sup> By providing an incentive for states to remove their minimum employee thresholds, the federal government would be displaying its commitment to ending discrimination in the workplace for good. Although the quoted language at the outset of this Note was stated more than four decades ago, the federal government has a chance to see the underlying idea become a reality by encouraging states to protect all of their workers.

If the federal government is serious about removing discriminatory practices from the workplace, it needs to encourage states to remove minimum employee thresholds from state antidiscrimination statutes. This does not mean that all states will have the exact same laws leading to the exact same outcomes; states can continue to execute fifty separate experiments based on their priorities. Regardless of the state in which a business operates, one thing should be present: every employee should be afforded protection from discrimination in the workplace. With a bit of cooperation between the federal government and the states, this concept that was once a sensible idea could become a reality.

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178. Lees, *supra* note 3, at 873.

179. *See supra* Part IV.D.2.

180. RUTHERGLEN, *supra* note 13, at 6.

181. *See supra* Part IV.A.

# CHILDREN AND THE DUTY TO REPORT: THE DOUBLE STANDARD OF CHILD ABUSE AND ANTI-BULLYING LAWS

CHRISTOPHER PARK\*

## INTRODUCTION

In September 2010, fifteen-year-old Billy Lucas took his own life after being bullied at his Indiana high school.<sup>1</sup> Less than a month later another Indiana teenager, fourteen-year-old Jamarcus Bell, did the same after being subjected to a similar pattern of bullying.<sup>2</sup> In May 2012, a Bloomington High School North student, fifteen-year-old Tori Swoape, took her life as a result of incessant bullying at school.<sup>3</sup> In 2012, in response to such bullying incidents, one Indiana mom launched a campaign urging schools, parents, and legislators to be tougher on bullying.<sup>4</sup> However, despite such individual and legislative efforts,<sup>5</sup> bullying remains a problem in Indiana.

Bullying is not confined solely to Indiana. It affects nearly thirty percent of school-aged youth each month in the United States.<sup>6</sup> In response, forty-nine states have enacted anti-bullying legislation in one form or another.<sup>7</sup> While these laws are an important step to combat bullying, a recent study by the National Education Association (NEA) questions their effectiveness.<sup>8</sup> The NEA study surveyed 5064 NEA members, including 2153 professional staff (mainly

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1. See Richard Essex, *Bullying May Have Pushed 15-Year-Old to Suicide*, WTHR EYEWITNESS NEWS (Sep. 13, 2010, 11:15 PM), <http://www.wthr.com/Global/story.asp?S=13147899>, archived at <http://perma.cc/3UXG-CMNE> (noting that friends reported Lucas took his own life due to bullying).

2. Daniel Miller, *Memorial Remembers HSE Bullying Victim*, NEWS 8 WISH TV (Oct. 25, 2010, 10:58 PM), [http://www.wishtv.com/dpp/news/local/hamilton\\_county/memorial-rememebrrhse-bullying-victim](http://www.wishtv.com/dpp/news/local/hamilton_county/memorial-rememebrrhse-bullying-victim), archived at <http://perma.cc/EF4S-JYWP>.

3. Aishah Hasnie, *Ind. Mom Says Daughter was Bullied Before Committing Suicide*, SUN SENTINEL (May 10, 2012, 9:41 PM), <http://www.sun-sentinel.com/news/broward/wxin-ind-mom-says-daughter-was-bullied-before-committing-suicide-20120510,-11,2171509.column>, archived at <http://perma.cc/B472-GHSQ>.

4. Jenny Inglee, *Fed Up Indiana Mom Fights for Stronger Anti-Bullying Laws*, TAKE PART (Jun. 11, 2012), <http://www.takepart.com/article/2012/06/11/fed-indiana-mother-fights-stronger-anti-bullying-laws>, archived at <http://perma.cc/6X6S-EZ3W>.

5. See IND. CODE §§ 20-33-8-0.2, -13.5 (2012).

6. CATHERINE P. BRADSHAW ET AL., NAT'L EDUC. ASS'N, FINDINGS FROM THE NATIONAL EDUCATION ASSOCIATION'S NATIONWIDE STUDY OF BULLYING: TEACHERS' AND EDUCATION SUPPORT PROFESSIONALS' PERSPECTIVES, at vii (2011), available at [http://www.nea.org/assets/docs/Nationwide\\_Bullying\\_Research\\_Findings.pdf](http://www.nea.org/assets/docs/Nationwide_Bullying_Research_Findings.pdf), archived at <http://perma.cc/UPT2-UV3Z>.

7. See BULLY POLICE USA, <http://www.bullypolice.org> (noting that Montana is the only state without anti-bullying legislation) (last visited June 11, 2014).

8. BRADSHAW ET AL., *supra* note 6, at vii-viii.

teachers) and 2901 education support professionals (ESPs) (school employees who are not teachers).<sup>9</sup> Of the NEA members surveyed, forty-three percent stated that bullying was a “moderate or major problem at their school.”<sup>10</sup> In addition, sixty-two percent had witnessed bullying “two or more times in the last month.”<sup>11</sup>

This Note evaluates anti-bullying legislation both nationally and in Indiana. Due to the similarities between bullying and child abuse, this Note advocates for the creation of a mandatory duty to report bullying that is similar to the existing child abuse reporting laws in most states. Part I discusses the current framework on bullying, the costs of bullying, and current efforts to combat the bullying problem. Part II considers the duty to report and how it is used with respect to child abuse. Finally, Part III proposes a duty to report with regard to bullying and discusses its implementation, with the ultimate goal of significantly reducing the number of bullying incidents.

### I. THE CURRENT FRAMEWORK ON BULLYING

To understand the current framework on bullying, it is important to understand the definition of bullying. Although this definition varies from state to state,<sup>12</sup> the United States Department of Health and Human Services defines bullying as “unwanted, aggressive behavior among school aged children.”<sup>13</sup> This part of the definition supplies the mens rea for bullying as “[h]uman aggression is any behavior directed toward another individual that is carried out with the proximate (immediate) intent to cause harm.”<sup>14</sup> Furthermore, bullying also involves two key components: imbalance of power and repetition.<sup>15</sup>

The imbalance of power exists between the bully and the victim.<sup>16</sup> In other words, the bully has power over the victim through “physical strength, access to embarrassing information, or popularity” and uses that power “to control or harm others.”<sup>17</sup> Repetition is defined as bullying behavior that happens more than

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9. *Id.* at vii.

10. *Id.* at vii-viii.

11. *Id.* at viii.

12. DENA T. SACCO ET AL., AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS 4-5 (2012), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State\\_Anti\\_bullying\\_Legislation\\_Overview\\_0.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf), archived at <http://perma.cc/8CR7-4KT5>.

13. U.S. DEP'T OF HEALTH & HUMAN SERV., *Bullying Definition*, STOPBULLYING.GOV, <http://www.stopbullying.gov/what-is-bullying/definition/index.html>, archived at <http://perma.cc/AT22-6LXE> (last visited June 11, 2014).

14. CRAIG A. ANDERSON & BRAD J. BUSHMAN, *Human Aggression*, 53 ANN. REV. PSYCHOL. 27, 28 (2002), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev.psych.53.100901.135231>, archived at <http://perma.cc/CA5F-8JWZ>.

15. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 13.

16. *Id.*

17. *Id.*

once, or has the possibility of happening more than once.<sup>18</sup> These two requirements are important to distinguish bullying from mere teasing, which is a lesser form of abuse between students.

Bullying can be categorized into three different types: verbal, social or relational, and physical.<sup>19</sup> Verbal is defined as “saying or writing mean things,” which includes “teasing, name-calling, inappropriate sexual comments, taunting, [and] threatening to cause harm.”<sup>20</sup> Social or relational bullying involves “hurting someone’s reputation or relationships,” which includes intentionally excluding someone, telling other children not to befriend someone, contributing to rumors about someone, and embarrassing someone in public.<sup>21</sup> Finally, physical bullying involves causing injury to a “person’s body or possessions,” such as spitting, stealing or breaking someone’s possessions, and making rude hand gestures.<sup>22</sup>

These definitions are closest to a national definition of bullying, and are used by various researchers in nationwide bullying publications and studies.<sup>23</sup> Despite the wide use of this definition at a national level, however, most anti-bullying statutes at the state level either leave bullying undefined or define it inconsistently with the national definition.<sup>24</sup>

Specifically, although forty-two states define bullying or similar conduct, only four states mention an imbalance of power between the bully and victim.<sup>25</sup>

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. BRADSHAW ET AL., *supra* note 6, at 1 (“Bullying is broadly defined as intentional and repeated acts of a threatening or demeaning nature that occur through direct verbal (e.g., threatening, name calling), direct physical (e.g., hitting, kicking), and indirect (e.g., spreading rumors, influencing relationships, cyberbullying) means and that typically occur in situations in which there is a power or status difference.”) (internal citations omitted); DAVID P. FARRINGTON & MARIA M. TFOFI, THE CAMPBELL COLLABORATION CRIME AND JUSTICE GROUP, SCHOOL-BASED PROGRAMS TO REDUCE BULLYING AND VICTIMIZATION 4 (2009), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/229377.pdf>, *archived at* <http://perma.cc/A6UF-NN5M> (“The definition of school bullying includes several key elements: physical, verbal, or psychological attack or intimidation that is intended to cause fear, distress, or harm to the victim; an imbalance of power (psychological or physical), with a more powerful child (or children) oppressing less powerful ones; and repeated incidents between the same children over a prolonged period. School bullying can occur in school or on the way to or from school.”); RANA SAMPSON, U.S. DEP’T OF JUSTICE, BULLYING IN SCHOOLS, 12 PROBLEM-ORIENTED GUIDES FOR POLICE SERIES 1, at 2 (2002), *available at* <http://www.cops.usdoj.gov/pdf/e12011405.pdf>, *archived at* <http://perma.cc/8E3F-DUCN> (“Bullying has two key components: repeated harmful acts and an imbalance of power. It involves repeated physical, verbal or psychological attacks or intimidation directed against a victim who cannot properly defend him- or herself because of size or strength, or because the victim is outnumbered or less psychologically resilient.”).

24. SACCO ET AL., *supra* note 12, at 4-6; *see also* S.B. 130, 87th Legis. Assemb. (S.D. 2012).

25. SACCO ET AL., *supra* note 12, at 5.



Additionally, just nine states define bullying as only behavior that is “repetitive, systematic, or continuous,” with five states defining bullying as only encompassing “severe or pervasive conduct.”<sup>26</sup> This prevalent disconnect between the national and state level definitions of bullying may lead to confusion among teachers who are in charge of protecting students against bullying and make it difficult to collect data on bullying at a national level.

Indiana’s bullying definition, while including some elements of the national definition, omits other key elements.<sup>27</sup> The definition is codified in Indiana Code section 20-33-8-0.2 and defines bullying as “overt, unwanted repeated acts or gestures,” which include “(1) verbal or written communications or images transmitted; (2) physical acts committed; or (3) any other behaviors, that are committed by a student or group of students against another student with the intent to harass, ridicule, humiliate, intimidate, or harm the targeted student.”<sup>28</sup> The key omission by Indiana, and many other states, is the lack of a provision addressing the imbalance of power between bully and victim.<sup>29</sup> This omission may lead to confusion among teachers applying the statute and the misclassification of student-on-student altercations as incidences of bullying.

#### A. *The Effects of Bullying*

This Note adopts a definition of bullying from the “national” definition—unwanted, aggressive behavior involving an imbalance of power that is repeated or has the potential to be repeated. With a precise definition, it is now possible to discuss the effects of bullying on the children involved.

The first and most obvious child affected is the victim. Victimization increases the likelihood of depression, anxiety, health complaints, decreased academic achievement, and decreased school participation.<sup>30</sup> Bullying victims are also more likely to “miss, skip, or drop out of school.”<sup>31</sup> Other effects of victimization, particularly violent victimization, include higher risk of subsequent victimization, substance abuse, and other criminal behavior.<sup>32</sup> Victims of bullying may also lash out against others: of the fifteen school shootings in the

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26. *Id.* at 4-5.

27. IND. CODE § 20-33-8-0.2 (2012).

28. *Id.*

29. SACCO ET AL., *supra* note 12, at 5.

30. U.S. DEP’T OF HEALTH & HUMAN SERV., *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/effects/index.html> archived at <http://perma.cc/994M-HAP2> (last visited Apr. 28, 2014); see also Susan M. Swearer Napolitano et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 EDUC. RES. 38, 38 (2010), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1140&context=edpsychpapers>, archived at <http://perma.cc/9JDF-CWDE>; SCOTT MENARD ET AL., U.S. DEP’T OF JUSTICE, EVALUATION OF BULLY-PROOFING YOUR SCHOOL: FINAL REPORT 3-4 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221078.pdf>, archived at <http://perma.cc/T7SX-8VZN>.

31. U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 30.

32. MENARD ET AL., *supra* note 30, at 3-4.

1990s, twelve shooters had a history of being bullied.<sup>33</sup>

The effects of bullying, however, are not limited to the child victims. Perpetrators of bullying are more likely to abuse substances in both adolescence and adulthood, fight, commit acts of vandalism, drop out of school, engage in early sexual activity, have criminal convictions, and be abusive towards romantic partners.<sup>34</sup> Increased suicidal ideation has also been reported for bullies, specifically bullies who are also victims of bullying.<sup>35</sup>

Student bystanders are also affected by bullying; children who witness bullying are more likely to experience many of the same effects as victims and bullies, which include increased use of tobacco, alcohol, and other drugs, mental health problems, and delinquency from school.<sup>36</sup> One study found that elementary school students who attended schools with a bullying prevention program, which had been in place for two or more years, had higher achievement than a similar group of students in control schools.<sup>37</sup> Notably, students who transferred from a school with a bullying prevention program to one without experienced decreased academic achievement.<sup>38</sup>

### *B. Current Legal Efforts to Combat Bullying*

The widespread prevalence of bullying and its well-documented negative effects have spurred a variety of legislation designed to combat bullying.<sup>39</sup> Most of this legislation, however, is at the state level because the federal government likely lacks authority to enact such legislation.<sup>40</sup>

Despite the lack of a federal anti-bullying statute, the United States Department of Education (DOE) issued a letter in 2010 stating that some peer abuse in schools may fall under one or more federal antidiscrimination statutes enforced by the DOE's Office for Civil Rights.<sup>41</sup> Notably, these statutes would only take effect when the bullying is based on "race, color, national origin, sex,

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33. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 30.

34. *Id.*; *see also* Napolitano et al., *supra* note 30, at 38-40; MENARD ET AL., *supra* note 30, at 3-4.

35. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 30.

36. *Id.*

37. Napolitano et al., *supra* note 30, at 39.

38. *Id.*

39. *See supra* Part I.A; *see also, e.g.*, IND. CODE § 20-33-8-13.5 (2012).

40. U.S. DEP'T OF HEALTH & HUMAN SERV., *Federal Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/federal> archived at <http://perma.cc/QS8H-SBDG> (last visited Apr. 28, 2014); *see also* United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that Congress lacked the authority to regulate guns in schools under the Commerce Clause because allowing it to do so would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

41. Russlynn Ali, *Dear Colleague Letter: Harassment and Bullying*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>, archived at <http://perma.cc/K942-CHJG>.

or disability,” and the discrimination is “sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”<sup>42</sup> Among the statutes that may be implicated by the DOE’s letter in this way and provide a framework to combat bullying are Title IX of the Education Amendments Act of 1972,<sup>43</sup> Title VI of the Civil Rights Act of 1964,<sup>44</sup> Section 504 of the Rehabilitation Act of 1973,<sup>45</sup> Title II of the Americans with Disabilities Act,<sup>46</sup> the Individuals with Disabilities Education Act,<sup>47</sup> the No Child Left Behind Act,<sup>48</sup> and the Safe and Drug-Free Schools and Communities Act.<sup>49</sup>

This federal legislative framework addressing bullying is limited, however, in that it only addresses severe, discriminatory bullying in schools. This may change soon given that several federal bills addressing bullying are currently pending.<sup>50</sup> Two bills, the Bullying Prevention and Intervention Act of 2011<sup>51</sup> and the Empowering Local Educational Decisionmaking Act of 2011,<sup>52</sup> would provide funding for educational programs designed to combat bullying.<sup>53</sup> Additionally, the Safe Schools Improvement Act of 2011<sup>54</sup> and the Anti-Bullying and Harassment Act of 2011<sup>55</sup> would require states to report incidences of bullying in schools.<sup>56</sup> However, as of November 2012, none of the aforementioned bills has been enacted.

The absence of a specific and comprehensive federal anti-bullying law, combined with the widespread problem of bullying, has prompted forty-nine states to enact some form of anti-bullying legislation.<sup>57</sup> Nevertheless, these statutes vary greatly from state to state.<sup>58</sup> The DOE noted that state legislation generally “emphasize[s] traditional approaches to managing bullying misconduct that involve[s] reporting and investigating bullying complaints and imposing disciplinary actions.”<sup>59</sup> Thirty-six states either require or encourage the “creation

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42. *Id.*

43. 20 U.S.C. §§ 1681-88 (2006).

44. 42 U.S.C. §§ 2000d-2000d-7 (2006).

45. 29 U.S.C. § 794 (2006).

46. 42 U.S.C. §§ 12131-12165 (2006).

47. 20 U.S.C. §§ 1400-1482 (2006).

48. *Id.* §§ 7101-7165.

49. SACCO ET AL., *supra* note 12, at 18-19.

50. *Id.* at 14-16.

51. Bullying Prevention and Intervention Act, H.R. 83, 112th Cong. (2011-2012).

52. Empowering Local Educational Decisionmaking Act, S. 1569, 112th Cong. (2011-2012).

53. SACCO ET AL., *supra* note 12, at 14-15.

54. Safe Schools Improvement Act of 2011, S. 506, 112th Cong. (2011-2012).

55. Anti-Bullying and Harassment Act of 2011, H.R. 975, 112th Cong. (2011-2012).

56. SACCO ET AL., *supra* note 12, at 15-16.

57. BULLY POLICE USA, *supra* note 7.

58. *See* SACCO ET AL., *supra* note 12, at 4-13 (discussing differences in state anti-bullying legislation).

59. *Id.* at 7 (citing U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES,

of school procedures for investigating incidents of bullying.”<sup>60</sup> Similarly, thirty-seven states require or encourage school districts to provide disciplinary consequences for bullying.<sup>61</sup> Reporting provisions are not as prevalent, however, with only seventeen states mandating staff report bullying incidents of which they are aware.<sup>62</sup>

While these state statutes are a good start to combat bullying, there remains room for improvement. Bully Police USA, a watchdog organization, reports on state anti-bullying laws and assigns a grade to each.<sup>63</sup> Grades are based on a number of factors including the use of the word “bullying” with a definition and the inclusion of reporting procedures.<sup>64</sup> According to Bully Police USA, only thirteen states received a perfect A++ rating for their bullying laws and thirty-one states received an A- or better.<sup>65</sup> Indiana is one of those thirty-one states to receive an A-, showing that improvement is possible.<sup>66</sup>

Indiana has two statutes addressing bullying: the definitional statute, Indiana Code section 20-33-8-0.2, discussed above,<sup>67</sup> and Indiana Code section 20-33-8-13.5, titled “Discipline rules prohibiting bullying required.” This statute is divided into three main parts.<sup>68</sup> The first part requires school corporations adopt rules that “(1) prohibit bullying; and (2) include provisions concerning education, parental involvement, reporting, investigation, and intervention.”<sup>69</sup> The second part discusses when the statute applies, which generally includes any activities on school grounds or the use of school property during or around school hours.<sup>70</sup> The third part extends the protection offered by the statute to cyberbullying.<sup>71</sup> The statute also has a provision noting that the statute does not give rise “to a cause of action against a person or school corporation based on an allegation of noncompliance.”<sup>72</sup>

Bully Police USA points out a number of areas for improvement for Indiana.<sup>73</sup> The first area is the inclusion of a provision protecting against

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at xvi (2011)).

60. *Id.*

61. *Id.* at 8.

62. *Id.* at 7.

63. BULLY POLICE USA, *supra* note 7.

64. *See Making the Grade*, BULLY POLICE USA, <http://www.bullypolice.org/grade.html> (last visited Apr. 25, 2014).

65. BULLY POLICE USA, *supra* note 7.

66. *Id.*

67. *See* IND. CODE § 20-33-8-0.2 (2012).

68. *Id.* § 20-33-8-13.5.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Indiana*, BULLY POLICE USA, [http://www.bullypolice.org/in\\_law.html](http://www.bullypolice.org/in_law.html) (last visited Apr. 25, 2014).

“reprisal, retaliation or false accusation.”<sup>74</sup> This section is intended to provide for more accurate reports by punishing false ones and to protect the victim from being victimized twice, once initially and once in retaliation, for discussing his abuser.<sup>75</sup> The second area of improvement is a greater focus on bullying victims with a provision for counseling victims.<sup>76</sup> Lastly, Bully Police USA suggests a provision for accountability reports and consequences for noncompliant schools.<sup>77</sup> These measures are designed to evaluate school performance and to suggest improvements to school policies.<sup>78</sup> Although all of these are helpful suggestions for improvement, this Note will focus on reporting, specifically in the context of a mandatory duty to report bullying, because of the potentially significant impact of reporting on decreasing bullying, as illustrated by the child abuse reporting laws.

## II. THE DUTY TO REPORT

The duty to report is not a new legal concept. As early as the Thirteenth Century, Anglo-Saxon law recognized a duty to report felonies to authorities.<sup>79</sup> These early laws also made it a felony, called misprision, for failing to report a felony of which the individual had knowledge.<sup>80</sup> Although the law eventually made its way to the United States, federal courts have narrowed the law’s effect by interpreting it to require active concealment of the felony.<sup>81</sup> However, more recently, state legislatures have begun codifying statutes that require people to disclose their knowledge of certain crimes.<sup>82</sup>

### A. *The Duty to Report Generally*

Today, reporting statutes in the United States generally fall into two categories: protecting helpless victims and preventing widespread or systematic harms.<sup>83</sup> In the first category, “helpless” means the individuals “are not capable of protecting themselves from further harm either by escaping from their assailants or by seeking the protection of law enforcement.”<sup>84</sup> Two groups, children and the elderly, are most commonly singled out for protection by these statutes because they are perceived to be physically weaker and dependent on

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74. *Making the Grade*, *supra* note 64.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Alison M. Arcuri, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 474 (2000).

80. *Id.*

81. *Id.* at 475-76.

82. Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 9 (2002).

83. *Id.* at 11.

84. *Id.* at 13.

others.<sup>85</sup> The category of people required to report varies from state to state, but most statutes include some kind of “reasonable suspicion” before the duty to report triggers.<sup>86</sup>

The second category of reporting statutes imposes mandatory reporting duties on persons who have knowledge of actions that may have far reaching consequences. Examples of these statutes include requiring financial institutions to report suspicions of fraud and requiring persons to report the release hazardous materials.<sup>87</sup> These laws differ from those in the first category in that they are triggered by any suspicion of illegal activity, and are not limited by the “reasonable” qualifier.<sup>88</sup> Because of the similarities between bullying and child abuse,<sup>89</sup> this Note will focus on the first category of reporting laws, specifically mandatory child abuse reporting laws.

### *B. The Duty to Report in the Child Abuse Context*

Child abuse, unfortunately a perpetual problem,<sup>90</sup> has been combated by various legal remedies over the centuries.<sup>91</sup> As early as 1642, Massachusetts had a law allowing magistrates to “remove children from parents who did not ‘train up’ their children properly.”<sup>92</sup> In the 1800s, abusive parents were subjected to criminal prosecutions.<sup>93</sup> Even without child protection statutes, judges had inherent authority to stop child abuse.<sup>94</sup> However, one of the largest breakthroughs in child abuse prevention came in 1875 with the establishment of the first organization devoted “entirely to child protection”: the New York Society for the Prevention of Cruelty to Children (NYSPPC).<sup>95</sup>

As news of the NYSPCC spread, other nongovernmental child protection agencies began to spring up that mirrored the NYSPCC. The first juvenile court was established in 1899, and twenty years later all but three states had juvenile courts.<sup>96</sup> It was not until the Great Depression, however, that child protection switched from nongovernmental agencies to those sponsored by the government.<sup>97</sup>

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85. *Id.*

86. *Id.* at 14-16.

87. *Id.* at 24-33.

88. *Id.* at 25.

89. *See infra* Part III (discussing the similarities between bullying and child abuse).

90. Thompson, *supra* note 82, at 13.

91. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 450 (2008), available at [http://www.americanbar.org/content/dam/aba/publishing/insights\\_law\\_society/ChildProtectionHistory.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/insights_law_society/ChildProtectionHistory.authcheckdam.pdf), archived at <http://perma.cc/L2RC-4TQ8>.

92. *Id.*

93. *Id.* at 449-50.

94. *Id.* at 450.

95. *Id.* at 449.

96. *Id.* at 452.

97. *Id.* at 452-53.

The Great Depression crippled many nongovernmental child protection organizations as their primary source of income was from charitable contributions.<sup>98</sup> The number of such organizations continued to decline: at the beginning of the Twentieth Century, there were nearly three hundred nongovernmental child protection agencies and by 1956 that number had declined to eighty-four; by 1967, only ten remained.<sup>99</sup> Instead, governmental agencies started to assume responsibility for the protection of children as early as 1912 with the creation of the federal Children's Bureau,<sup>100</sup> although it was not until 1962 that child abuse received one of the most important reforms to date: mandatory reporting laws.<sup>101</sup>

The mandatory reporting laws arose following publication of *The Battered-Child Syndrome*,<sup>102</sup> a pivotal article that brought national media attention to the problem of child abuse. The Children's Bureau held "two meetings to determine how the Bureau could more effectively help states respond to child abuse."<sup>103</sup> At these meetings, attendees recommended that states require doctors to report suspicions of child abuse to the police or child welfare services.<sup>104</sup> This meeting marked the beginning of child abuse reporting laws with the first four enacted in 1963; by 1967, all fifty states had reporting laws.<sup>105</sup> To put into perspective how quickly these statutes were adopted, "it takes an average of 25.6 years for a new legal concept with broad public support to diffuse across the fifty states."<sup>106</sup> Child abuse reporting laws, however, took only four years for all states to adopt them.

Many states consulted the Children's Bureau's model child abuse reporting law when creating their own, which "mandated that physicians report child abuse to the appropriate police authority."<sup>107</sup> However, as states expanded and reformed their reporting laws, different approaches to combating child abuse emerged.<sup>108</sup> In response, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.<sup>109</sup>

CAPTA provides funding for child abuse prevention to states that meet certain conditions.<sup>110</sup> After CAPTA, state laws became more uniform partially

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98. *Id.* at 453.

99. *Id.* at 453-54.

100. *Id.* at 453.

101. *Id.* at 455-56.

102. See C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962).

103. Myers, *supra* note 91, at 455-56.

104. *Id.* at 456.

105. *Id.*

106. Thomas L. Hafemesiter, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 840-41 (2010).

107. *Id.* at 839.

108. See *id.* at 841-43.

109. *Id.* at 842.

110. *Id.* at 842-43 ("[A] state was required to meet ten conditions, which included establishing provisions for the reporting of known or suspected child abuse; granting immunity to good faith

due to the conditional funding by CAPTA, but also due to efforts to create model legislation to guide the states.<sup>111</sup> Today, most child abuse reporting statutes follow a similar formula: “(1) purpose of the statute; (2) definitions; (3) professionals required to report; (4) standard of certainty reporters must attain; (5) penalties for failure to report; (6) immunity for good faith reports; (7) abrogation of certain communication privileges; and (8) reporting procedures.”<sup>112</sup>

Despite the wide use of these mostly uniform statutes, mandatory child abuse reporting laws are not without critics.<sup>113</sup> Most of these criticisms focus on the low rate of substantiation of child abuse referrals: only three in five referrals to Child Protective Services (CPS) agencies were investigated,<sup>114</sup> and of those investigated, seven in ten were found to be unsubstantiated.<sup>115</sup> Nevertheless, child abuse referrals may not be investigated for a number of reasons, including the fact that the “alleged victim was older than 18 years” or “response by another service agency was deemed more appropriate.”<sup>116</sup> The number of substantiated reports of child abuse is, however, high: over 435,000 reports concluded the allegation or risk of maltreatment was “supported or founded by State law or policy.”<sup>117</sup>

Although state CPS agencies received an estimated 3.3 million referrals in 2010,<sup>118</sup> many incidents of child abuse never reach CPS.<sup>119</sup> Recognizing this,

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reporters; ensuring the confidentiality of reports; implementing mechanisms that ensure the prompt investigation of reports and the delivery of needed services; enhancing cooperation among law enforcement, courts, and state agencies providing services; appointing guardians ad litem to represent the children in judicial proceedings; and disseminating to the public information about child abuse and the mechanisms available to combat it.”).

111. *Id.* at 843.

112. Thompson, *supra* note 82, at 14. *See, e.g.*, (1) IND. CODE § 31-33-1-1 (2012); (2) IND. CODE § 31-9-2-14 (2012); (3) IND. CODE §§ 31-33-5-1 to -3 (2012); (4) IND. CODE § 31-33-5-1 (2012); (5) IND. CODE § 31-33-22-1 (2012); (6) IND. CODE §§ 31-33-6-1 to -3 (2012); (7) IND. CODE § 31-32-11-1 (2012); and (8) IND. CODE §§ 31-33-5-17-4 to -4, 31-33-7-4 and 31-33-7-5 to -6.6 (2012).

113. *See* Hafemesiter, *supra* note 106, at 899-908. Various chapters of Victims of Child Abuse Laws (VOCAL) and other similar organizations have also sprung up around the country. *See, e.g.*, FIGHTING CHILD PROTECTIVE SERVICES FALSE ACCUSATIONS, <http://www.fightcps.com> archived at <http://perma.cc/978V-DBHB> (last updated Mar. 1, 2013).

114. U.S. DEP'T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2010, at 5 (2011), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>, archived at <http://perma.cc/W27Q-L9Q4> (“60.7 percent [of referrals] were screened in.”).

115. *Id.* at 7 (“Of the 1,793,724 reports that received an investigation, . . . 1,262,118 were found to be unsubstantiated.”).

116. *Id.* at 5.

117. *Id.* at 6-7.

118. *Id.* at 5.

119. KENNETH BURGDORF, U.S. DEP'T OF HEALTH & HUMAN SERV., RECOGNITION AND REPORTING OF CHILD MALTREATMENT: FINDINGS FROM THE NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 4 (1980), available at <http://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/18254.pdf?w+=NATIVE%28%27IPDET+PH+IS+%27>



Congress mandated the first National Incidence Study (NIS-1) of child maltreatment in 1974, which was designed to estimate all incidences of child abuse in the United States, as opposed to just those received by CPS.<sup>120</sup> Since NIS-1, three similar studies have been done with the purpose of “provid[ing] updated estimates of the incidence of child abuse and neglect in the United States and measur[ing] changes in incidence from the earlier studies.”<sup>121</sup> The study uses a sentinel survey method,<sup>122</sup> and measures child maltreatment using two definitional standards: the Harm Standard and the Endangerment Standard.<sup>123</sup>

The Harm Standard, in use since NIS-1, is “relatively stringent in that it generally requires that an act or omission result in demonstrable harm in order to be classified as abuse or neglect.”<sup>124</sup> The Endangerment Standard, in use since NIS-2, includes all children under the Harm Standard but also “counts children who were not yet harmed by abuse or neglect if a sentinel thought that the maltreatment endangered the children or if a CPS investigation substantiated or indicated their maltreatment.”<sup>125</sup>

Each standard has its own advantages and disadvantages,<sup>126</sup> but under the more lenient Endangerment Standard, it was estimated that nearly three million

%27nis-1%27%27%27%29&upp=0&rpp=-10&order=+NATIVE%28%27year%2Fdescend%27%29&r=1&m=6, archived at <http://perma.cc/6X42-7Z3E> (“although(“[A]lthough substantial numbers of abused and neglected children are recognized as such and are reported to the state and/or local Child Protective Services (CPS) agency, reported children . . . represent only ‘the top of the iceberg.’”).

120. ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUMAN SERV., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 1 (2010), available at [http://www.acf.hhs.gov/sites/default/files/opre/nis4\\_report\\_congress\\_full\\_pdf\\_jan2010.pdf](http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf), archived at <http://perma.cc/3E7L-P5SZ>.

121. *Id.*

122. *Id.* at 2 (“In [the sentinel survey method], community professionals who work in certain categories of agencies and who typically encounter children and families in the course of their job duties serve as lookouts for victims of child abuse and neglect. In each county, these professionals, called ‘sentinels,’ represent all staff that have contact with children and families in police and sheriffs’ departments, public schools, day care centers, hospitals, voluntary social service agencies, mental health agencies, the county juvenile probation and public health departments, public housing, and shelters for runaway and homeless youth and for victims of domestic violence. . . . [The sentinels] submitted data forms on any children they encountered who were maltreated during the study data period.”).

123. *Id.* at 3.

124. *Id.*

125. *Id.*

126. *Id.* The Harm Standard has the advantage of strong objectivity and consistency in that it has been in use since NIS-1. *Id.* However, the Harm Standard is so stringent that it excludes “many children whom CPS substantiates or indicates as abused or neglected.” *Id.* Conversely, the Endangerment Standard lacks the strong objectivity of the Harm Standard, but includes a “broader array of perpetrators, including adult caretakers other than parents in certain maltreatment categories and teenage caretakers as perpetrators of sexual abuse.” *Id.*

children experienced maltreatment during the study year.<sup>127</sup> The Child Maltreatment report from the same year, which uses data collected by CPS agencies, estimated the number of victims of child abuse or neglect at 905,000 based on substantiated reports.<sup>128</sup> These numbers suggest that CPS agencies handle nearly one third of all cases of child abuse in the United States.<sup>129</sup> While the percentage of substantiated reports received by CPS is low, the number of cases of child maltreatment handled by CPS is significant based on the total estimated incidences.

However, both proponents and critics of mandatory child abuse reporting laws agree that the implementation of these laws has increased the reported and investigated incidences of suspected child abuse.<sup>130</sup> In 1974, approximately 60,000 cases were reported; by 1980, over one million cases were reported.<sup>131</sup> The number increased to nearly three million in 2000,<sup>132</sup> and has remained relatively constant at an estimated 3.3 million since 2005.<sup>133</sup> These numbers suggest that the reporting laws brought the problem of child abuse and neglect into focus.<sup>134</sup>

The reporting laws also allowed better tracking of child abuse. In 1963, one researcher noted that “[t]he amount of systematic research on the problem of child abuse and neglect is conspicuously scant.”<sup>135</sup> However, the body of research using statistics gathered from reporting laws grew rapidly soon after the

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127. *Id.* at 6.

128. U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2006, at iii (2008), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf>, archived at <http://perma.cc/LZ86-8WKA>.

129. SEDLAK ET AL., *supra* note 120, at 1. The two thirds of children who were not handled by CPS were recognized by community professionals as maltreated, but were either not reported to CPS or were screened out without investigation. *Id.*

130. Myers, *supra* note 91, at 456; see also Reena Kapoor & Howard Zonana, *Forensic Evaluations and Mandated Reporting of Child Abuse*, 38 J. AM. ACAD. PSYCHIATRY L. 49, 51 (2010), available at <http://www.jaapl.org/content/38/1/49.full.pdf+html>, archived at <http://perma.cc/ZZ7M-UGUR> (questioning “the efficacy of reporting laws in achieving their ultimate goal: protecting children from harm,” but stating “[t]here is no question that mandated reporting laws have led to an increase in the number of cases of suspected child abuse that are reported and investigated each year”. . . . Nevertheless, there remains some question about the efficacy of reporting laws in achieving their ultimate goal: protecting children from harm.”).

131. Myers, *supra* note 91, at 456.

132. *Id.*

133. Compare U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2005, at 5 (2007), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf>, archived at <http://perma.cc/37U2-M6GH> (“Approximately 3.3 million allegations of child abuse and neglect including 6.0 million children were made to CPS agencies.”), with U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., *supra* note 114, at 65 (“CPS agencies received an estimated 3.3 million referrals during FFY 2010.”).

134. Myers, *supra* note 91, at 456.

135. Elizabeth Elmer, *Identification of Abused Children*, 10 CHILD. 180, 180 (1963).

enactment of these reporting laws. Part of CAPTA created a National Center on Child Abuse and Neglect (NCCAN) and instructed it to “make a full and complete study and investigation of the national incidence of child abuse and neglect.”<sup>136</sup> The result of this study is the NIS-1, which used data from both CPS and non-CPS agencies.<sup>137</sup>

Another effort by the Children’s Division of the American Humane Association, the National Study on Child Neglect and Abuse Reporting, began collecting data from all fifty states in 1976.<sup>138</sup> This study “collect[ed] and analyze[d] statistical information from all 50 states about reports of suspected child abuse and neglect received by Child Protective Services agencies.”<sup>139</sup> In 1988, the National Data Archive on Child Abuse and Neglect (NDACAN) began collecting data from “leading researchers and national data collection efforts,” making them available to the research community for further analysis.<sup>140</sup> More recent efforts have included the Child Maltreatment report series beginning in 1995<sup>141</sup> and the Child Welfare Outcomes Report, last updated December 2010.<sup>142</sup>

The large body of research using these statistics has given state legislatures the opportunity to modify their child abuse reporting laws based on what approaches have been effective in other jurisdictions or instances. Initially, “only physicians were required to report suspected child abuse.”<sup>143</sup> However, states gradually expanded the category of mandated reporters, and by the end of the 1970s, many states included nurses, teachers, school officials, social workers, and police officers.<sup>144</sup> These professions were added as mandatory reporters to discover child abuse at an earlier stage because they were thought to come into contact with children more often than other professions.<sup>145</sup> Today, research shows that the most frequent reporters of child abuse are “teachers (16.9%), police officers or lawyers (16.3%), and social services staff (10.6%).”<sup>146</sup>

In the 1980s and 1990s, “public awareness of the scope and impact of child abuse increased,” which was brought about by published reporting statistics<sup>147</sup>

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136. BURG DORF, *supra* note 119, at 3.

137. *Id.* at 12.

138. *Id.* at 4.

139. *Id.*

140. NAT’L DATA ARCHIVE ON CHILD ABUSE & NEGLECT, Bronfenbrenner Ctr. for Translational Research, *Nat’l Data Archive on Child Abuse & Neglect*, COLL. OF HUMAN ECOLOGY, CORNELL UNIV., <http://www.ndacan.cornell.edu/>, archived at <http://perma.cc/8GJ6-ANDE> (last visited Apr. 28, 2014).

141. Admin. for Children & Families, *Children’s Bureau*, U.S. DEP’T OF HEALTH & HUMAN SERV., [http://www.acf.hhs.gov/programs/cb/resource-library/search?topic\[3493\]=3493](http://www.acf.hhs.gov/programs/cb/resource-library/search?topic[3493]=3493), archived at <http://perma.cc/693F-LPUN> (last visited Apr. 28, 2014).

142. *Id.*

143. Hafemeister, *supra* note 106, at 851.

144. *Id.*

145. *Id.* at 852.

146. *Id.*

147. *Id.* at 842 nn.157-59, 867 n.321.

and a series of widely publicized cases.<sup>148</sup> Current reporting laws reflect this literature by being “more likely to assign at least some responsibility to both social services and criminal justice agencies for responding to child abuse reports.”<sup>149</sup>

In sum, although mandatory child abuse reporting laws have been criticized,<sup>150</sup> these laws have resulted in a large number of substantiated investigations by CPS agencies<sup>151</sup> and raised awareness of the problem of child abuse.<sup>152</sup> This has allowed statistics to be gathered, research to be presented, and laws to be adjusted in response to this research. Recognizing these benefits of mandatory reporting laws, as well as their limitations, Part III discusses how to apply mandatory reporting to bullying.

### III. APPLYING THE DUTY TO REPORT TO BULLYING

Given the importance of reporting in the field of child abuse, it is useful to add a duty to report in the bullying context. However, this raises the question of what a model reporting statute for bullying should look like. First, the creation of a duty to report bullying should not be an exact replica of existing mandatory child abuse reporting laws. There are certainly sound ideas to be borrowed from child abuse reporting laws, and while bullying and child abuse are similar<sup>153</sup> the two are different enough to warrant their own specialized statutes.<sup>154</sup> Second, the duty to report bullying should both aid the discovery and investigation of bullying incidents, as well as collect data on the prevalence of bullying. It is important to have empirical research to suggest areas of improvement.

This Part proposes that the Indiana Code should include a new duty to report bullying. Currently, eighteen states have provisions requiring school staff to report incidents of bullying.<sup>155</sup> However, besides limiting mandatory reporters to school staff, or sometimes students and staff, sixteen states do not define bullying as requiring an imbalance of power,<sup>156</sup> and one state, Delaware, leaves

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148. *Id.* at 844 n.177.

149. *Id.* at 867.

150. *Id.* at 899-908.

151. *See* U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., *supra* note 114, at 6-7.

152. Hafemeister, *supra* note 106, at 829 (“Mandatory reporting laws . . . have to some extent exposed the prevalence of child abuse in the nation and raised public awareness of its existence.”).

153. *See infra* Part III.B.

154. One key difference between the two is that bullying generally happens at school, which means reporters such as social workers won’t be exposed to such incidents as often and therefore should not be mandated reporters. Mandatory child abuse reporting laws also have their own flaws. *See supra* Part II.

155. SACCO ET AL., *supra* note 12, at A-30-A-31 (noting that Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Kentucky, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, and West Virginia. Alaska, Rhode Island, and South Carolina also require that students report incidents of bullying).

156. *Id.* at 5.

out the element of repetition from its definition.<sup>157</sup> This is a key omission, as one study noted “the provision of a definition [of bullying] (or not) would yield different prevalence rates in self-reported bullying.”<sup>158</sup> Massachusetts has one of the most comprehensive anti-bullying statutes<sup>159</sup> which creates a model prevention and intervention plan.<sup>160</sup> Nevertheless, even the Massachusetts statute has two important flaws: there is no intent requirement for bullying<sup>161</sup> nor is there any requirement for the “reporting of bullying incidents or statistics summarizing such incidents.”<sup>162</sup> These flaws are important because intent is a necessary element of bullying<sup>163</sup> and without statistics, legislatures will not be able to determine what anti-bullying methods have been effective.

#### A. Proposed Duty to Report Bullying in Indiana

Before considering any new statutory provisions in Indiana, the existing problems in the current definitional statute must be addressed. Additionally, where possible, efforts can be made to minimally alter the existing statute without completely rewriting it, and to address any pending substantive amendments.<sup>164</sup>

Several amendments have been proposed to Indiana’s definitional bullying statute, Indiana Code section 20-33-8-0.2.<sup>165</sup> One such proposal would add “in any manner (including digitally or electronically)” after “verbal or written

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157. *Id.* at A-1.

158. Napolitano et al., *supra* note 30, at 41 (“How one defines bullying has important implications for assessing the construct. Indeed, Vaillancourt et al. (2008) examined . . . [m]ore than 1,700 students (ages 8-18) [whom] were randomly assigned to either a definition or no definition condition and asked to report on their experiences with bullying as a victim or perpetrator. Provision of a standardized definition of bullying was related to different prevalence rates – students who were provided a definition reported being bullied less and bullying others more than students who were not given a definition.”).

159. *See* MASS. GEN. LAWS ch. 71, § 37O (2010); *see also* Emily Bazelon, *Bullies Beware*, SLATE, Apr. 30, 2010, [http://www.slate.com/articles/life/bulle/2010/04/bullies\\_beware.html](http://www.slate.com/articles/life/bulle/2010/04/bullies_beware.html), archived at <http://perma.cc/Y87K-YS3C> (“[L]awmakers unanimously passed a bullying prevention law . . . that is probably the most comprehensive one in the country.”).

160. MASS. DEP’T OF ELEMENTARY AND SECONDARY EDUC., MODEL BULLYING PREVENTION AND INTERVENTION PLAN, (2010), available at <http://www.doe.mass.edu/bullying/ModelPlan.pdf>, archived at <http://perma.cc/K48Q-EBAB>.

161. SACCO ET AL., *supra* note 12, at A-2-A-3.

162. *See id.* at A-53-A-56; *but see* H.B. 4063, 2011, 187th Gen. Court 2011 (Ma. 2012) (“SECTION 1. Section 37O of chapter 71 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by inserting after the word ‘retaliation,’ in line 89, the following words:- ‘including procedures for collecting, maintaining and reporting bullying incident data required under subsection (k).’”).

163. *See supra* notes 13-14 and accompanying text.

164. H.B. 1259, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012).

165. *Id.*

communications transmitted.”<sup>166</sup> This provision would clarify the inclusion of cyberbullying in the overarching definition of bullying, a necessary component to receive the highest rating by Bully Police USA.<sup>167</sup> However, Indiana already partially address cyberbullying in Indiana Code section 20-33-8-13.5(c).<sup>168</sup>

The second proposed amendment adds a significant portion to the end of the statute:

and create for the other student an objectively hostile school environment that: (1) places the student in reasonable fear of harm to the student’s person or property; (2) has a substantially detrimental effect on the student’s physical or mental health; (3) has the effect of substantially interfering with the student’s academic performance; or (4) has the effect of substantially interfering with the student’s ability to participate in or benefit from the services, activities, and privileges provided by the school.<sup>169</sup>

This language tracks that of other state statutes<sup>170</sup> and incorporates language similar to federal discrimination laws.<sup>171</sup> This provision is likely designed to separate minor incidents of teasing from major ones that have a significant negative effect on the victimized student.

Nonetheless, these amendments still omit a necessary component of bullying: an imbalance of power between the perpetrator and the victim.<sup>172</sup> Without this crucial, limiting component, incidents, which may still require a response by staff, will be incorrectly labeled as bullying. This will lead to an over-reporting of bullying incidents, which makes finding actual incidences of bullying more difficult and biases data.

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166. *Id.* (“As used in this chapter, ‘bullying’ means overt, repeated acts or gestures, including (1) verbal or written communications transmitted in any manner (including digitally or electronically) . . .”).

167. *Making the Grade*, *supra* note 64 (“States with a cyberbullying clause will receive a plus after obtaining an A rating.”).

168. IND. CODE § 20-33-8-13.5 (2012) (“The discipline rules described in subsection (a) must prohibit bullying through the use of data or computer software that is accessed through a: (1) computer; (2) computer system; or (3) computer network; of a school corporation.”).

169. H.B. 1259, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012). *See supra* notes 27-28 and accompanying text.

170. *See e.g.*, MASS. GEN. LAWS ch. 71, § 37O (2010) (“‘Bullying’, the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: . . . (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim . . .”).

171. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18-19 (1993) (considering the “definition of a discriminatorily ‘abusive work environment’ (also known as a ‘hostile work environment’) under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1988 ed., Supp. III).”).

172. U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 13.

With the definition of bullying amended in this way, the duty to report can be implemented. The proposed reporting statute attempts to follow Indiana's mandatory child abuse reporting statute to ensure ease of implementation, but deviates where necessary to avoid the flaws mentioned in Part II. The proposed statute includes provisions regarding who shall report, to whom the report shall be made, when the report shall be made, what shall be included in the report, and penalties for failing to report.

*1. Who Shall Report.*—Indiana has the broadest possible list of mandatory child abuse reporters, requiring any “individual” to make a report of suspected child abuse.<sup>173</sup> However, the majority of reports of child abuse made to CPS, nearly sixty percent, are still made by professionals.<sup>174</sup> More importantly, professionals accounted for over seventy percent of substantiated or indicated<sup>175</sup> child abuse reports made to CPS.<sup>176</sup> Nonprofessionals and other sources,<sup>177</sup> on the other hand, accounted for nearly forty-five percent of unsubstantiated reports and over two-thirds of intentionally false reports.<sup>178</sup> Professionals are most likely better at identifying child abuse because of their training and expertise, and they are also less likely to abuse the reporting system. As a result, the bullying reporting statute should not include all individuals as mandatory reporters, and should limit the professionals classified as mandatory reporters.

For example, school administrators, teachers, and ESPs should all be required to report bullying and should receive training to help them identify it. These individuals should be mandated reporters for the same reasons doctors were the first mandated reporters of child abuse: they have the “requisite training and expertise to identify abuse and [are] ideally situated to discern the existence of this abuse.”<sup>179</sup>

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173. IND. CODE § 31-33-5-1 (2012).

174. U.S. DEP'T OF HEALTH & HUMAN SERV. ET AL., *supra* note 114, at 7-8 (“Professional report sources are persons who encountered the child as part of their occupation, such as child daycare providers and medical personnel. . . . Nonprofessional report sources are persons who did not have a relationship with the child based on their occupation, such as friends, relatives, and neighbors.”).

175. *Id.* at 7 (“Substantiated: An investigation disposition that concludes that the allegation of maltreatment or risk of maltreatment was supported or founded by State law or State policy. Indicated: An investigation disposition that concludes that maltreatment could not be substantiated under State law or policy, but there was reason to suspect that the child may have been maltreated or was at-risk of maltreatment. This is applicable only to States that distinguish between substantiated and indicated dispositions.”).

176. U.S. DEP'T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2008 9 fig. 2-3 (2010), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>, archived at <http://perma.cc/9SJM-73K4>.

177. *Id.* at 6-7 (explaining the category of “other” is for unknown sources or sources that do not fit into the professional or nonprofessional category, which may include “clergy members, sports coaches, camp counselors, bystanders, volunteers, and foster siblings”).

178. *Id.* at 9 fig. 2-3.

179. Hafemesiter, *supra* note 106, at 851; see also Marc Edelman, *How to Prevent High*

Proper training for school personnel is important, but according to an NEA study, only about half of ESPs and school professionals received training on bullying policies and prevention.<sup>180</sup> Indiana requires each school corporation to have a school safety specialist.<sup>181</sup> To be certified, each school safety specialist must complete a curriculum created by the Indiana Department of Education that “must include training in identifying, preventing, and intervening in bullying.”<sup>182</sup> The school safety specialist and the Department of Education work with the safe school committees to develop a plan that addresses bullying and provides training to school staff.<sup>183</sup> Nevertheless, by making all school personnel mandatory reporters of bullying, proper training is crucial and the efficacy of this training should be evaluated after an initial period.

The only other category of mandated reporters for bullying that should be included are health care professionals, but with some limitations. Most notably, health care professionals should only be required to report physical bullying that is visible on the patient. There is already an Indiana statute requiring health care providers to “photograph, x-ray and physically examine trauma visible on [a] child”<sup>184</sup> in the case of child abuse, and a similar one should be enacted for bullying. A similar statute would ensure the most severe, physical cases of bullying are investigated without placing an onerous burden on health care professionals that may conflict with patient confidentiality.<sup>185</sup>

There is also the question of anonymous reporting. While students should certainly not be mandated reporters,<sup>186</sup> there should be a mechanism in place for

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*School Hazing: A Legal, Ethical and Social Primer*, 81 NOTRE DAME L. REV. 309, 330 (2005) (“Applying a duty to report hazing to school personnel is reasonable because school personnel are in an authoritative position, which provides them with legal authority to restrict the freedom of minors.”). Although Edelman is discussing hazing, defined as “any activity expected of someone that joins a group, which humiliates, degrades, abuses, or endangers its victims,” the reasoning behind using school personnel as reporters applies to bullying as well. *Id.* at 310.

180. BRADSHAW ET AL., *supra* note 6, at 14 fig. 7.

181. IND. CODE § 5-2-10.1-9 (2012).

182. *Id.* § 5-2-10.1-11.

183. *Id.* § 5-2-10.1-12 (“(a) Each school within a school corporation shall establish a safe school committee. . . . [A] safe school committee [develops] a plan and policy for the school that addresses . . . bullying . . . [and] professional development needs for faculty and staff to implement methods that decrease [bullying].”).

184. *Id.* § 31-33-10-1.

185. U.S. DEP’T OF HEALTH & HUMAN SERV., *HIPAA Frequent Questions*, HHS.GOV, <http://www.hhs.gov/hipaafaq/permitted/require/909.html> archived at <http://perma.cc/KMB-5HCD> (last updated Aug. 8, 2005). See generally Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. § 160 and 164 (2013) (protecting the privacy of individually identifiable health information).

186. See Edelman, *supra* note 179, at 329 (“Society cannot realistically expect high school students to act as whistleblowers. Student victims are too often ashamed to report hazing, and student witnesses often fear that hazers will retaliate against them if they report.”). Although this article concerns hazing, the reasoning behind not requiring students to be mandatory reporters



anonymous reporting by students. On the other hand, although school personnel will have a duty to report, they cannot be everywhere at once. Furthermore, studies indicate that bullied students often do not tell anyone about instances of bullying.<sup>187</sup> An amendment to the Indiana Code was proposed that would allow for anonymous reporting, but as of January 2013, it has not passed.<sup>188</sup> Allowing for anonymous reporting by students would provide another avenue to discover, and therefore help eliminate, bullying.

2. *To Whom Shall the Report Be Made.*—Although it is difficult to predict how many reports will be generated by these mandatory reporting laws, and therefore it is difficult to predict how many people will be needed to handle the reports, a logical recipient and investigator of reports is the safe school committee.<sup>189</sup> First, each school already has a safe school committee in place, as required by Indiana law.<sup>190</sup> Second, the safe school committee develops and implements the plan to reduce bullying,<sup>191</sup> so the committee is familiar with the subject matter. Lastly, and perhaps most importantly, the safe school committee is accustomed to the standards, procedures, and personnel at the specific school.<sup>192</sup> Staff will be more comfortable dealing with people with whom they are familiar and will be available to answer any questions the safe school committee may have about their reports. Accordingly, almost all bullying incidents would be handled within the school, and law enforcement intervention should be unnecessary in all but the rarest of cases.<sup>193</sup>

The safe school committee would investigate and handle any reported bullying incidents, but data concerning these incidents must also be collected to evaluate and improve anti-bullying measures. To accomplish this, all bullying reports from a school corporation should be sent to its school safety specialist for collection and analysis. This would allow the school safety specialist to determine which areas of the anti-bullying procedure need the most improvement and to adjust the safety plan<sup>194</sup> of the school corporation accordingly. Ultimately, these reports should then be sent to the Indiana Department of Education to determine the effectiveness of the mandatory reporting law and anti-bullying

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applies to bullying as well.

187. FARRINGTON & TFOFL, *supra* note 23, at 84.

188. H.B. 1259, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012).

189. *See* IND. CODE § 5-2-10.1-12 (2012) (discussing the establishment of a safe school committee).

190. *Id.*

191. *Id.*

192. *Id.* (discussing that the safe school committee is established within the school corporation and “may be a subcommittee of the committee that develops the strategic and continuous school improvement and achievement plan”).

193. One example of an incident requiring law enforcement intervention would be the federal hate crime laws. *See* SACCO ET AL., *supra* note 12, at 20-21 (mentioning the possible applicability of 18 U.S.C. § 245 and 18 U.S.C. § 249 to severe cases of bullying involving discrimination based on “race, color, religion, or national origin”).

194. *See* IND. CODE § 5-2-10.1-9 (2012) (discussing school safety plans).

legislation in general. Accordingly, the Indiana Department of Education would be able to determine the school corporations with the most effective anti-bullying policies and should use this information to make improvements in other school corporations that have a higher incidence of bullying.

3. *When Shall the Report Be Made.*—Reports of bullying incidents by school staff should be made as soon as they are witnessed in order to ensure a prompt response. In theory, the more quickly these incidents are addressed, the less harm will come to the students involved. However, the reports from the safe school committee should not be sent to the school safety specialist until the incident has been resolved. There are multiple reasons for this, but one of the most important is to determine if the report concerned an actual incidence of bullying. If mandatory child abuse reporting laws are any indication,<sup>195</sup> there will inevitably be some unsubstantiated bullying reports. The number of bullying incidents received by school safety specialists would therefore seem artificially high if they did not contain a final resolution.

To strike a balance between efficiency and quantity of data, reports by school safety specialists to the Department of Education should be made at the end of each school year. School safety specialists already have other duties to perform,<sup>196</sup> and requiring a semiannual or quarterly report may be too burdensome. Furthermore, any changes in anti-bullying policy will take some time to implement, and the positive or negative effects of these changes may not be apparent for a few months or even a year. Notably, the reports to the Department of Education function solely to evaluate statewide anti-bullying policies, and school safety specialists should be focusing primarily on preventing and dealing with bullying.

4. *What Shall Be Included in the Report.*—The Department of Education should disseminate a standard, statewide bullying report form to schools, which would include various sections. The first, and possibly most important section, should be a checklist of the definition of bullying.<sup>197</sup> Providing a definition and requiring that school personnel and anonymous students check the elements off a list will help eliminate reports that do not involve bullying.<sup>198</sup> School staff should be free to handle minor teasing incidents that do not rise to the level of bullying on their own without having to write a report. The type of bullying—verbal, physical, or relational—should also be included in the report.

The second section on the report should indicate the location where the bullying occurred. Since bullying is a phenomenon that is repeated or has the potential to be repeated, bullying may span several locations. However, by indicating the location on the report, if applicable, schools will be able to identify problem areas where bullying is most likely to occur. Once these areas are identified, schools can increase their supervision, which is “perhaps the greatest

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195. See *supra* notes 114-17 and accompanying text.

196. See IND. CODE § 5-2-10.1-9 (2012) (mandating safety specialist duties).

197. See discussion *supra* Part I.

198. See *supra* notes 158-59 and accompanying text.

deterrent to bullying behavior.”<sup>199</sup>

The last necessary section on the bullying report form should include a description of the bullying incident. This section should include the students involved, any relevant statements by those involved, injuries sustained by the victimized student, and an overall description of what happened. If the report is made by school personnel, the name of the person making the report should also be included, allowing the safe school committee to contact the staff member if they need additional information.

Reports made to the school safety specialist and then to the Department of Education should include information in addition to that which is included in the report to the safe school committee. These reports should include demographic items, such as the school name and location, the involved students’ age and gender, whether the bully is a repeat offender, whether the victim has been bullied before, the profession of the person who made the initial report, and the disposition of the incident. In the words of Sherlock Holmes, “Data! Data! Data! . . . I can’t make bricks without clay.”<sup>200</sup> By knowing which schools and age groups have the most problems, whether bullies and victims are receiving help, and which reporters are the most effective, school safety specialists and the Department of Education will be able to improve anti-bullying efforts.

5. *Penalties for Failure to Report.*—Indiana classifies the failure to report child abuse as a Class B misdemeanor,<sup>201</sup> which is punishable by not more than 180 days in jail and a fine of not more than \$1,000.<sup>202</sup> However, the penalty for not reporting bullying may be nuanced.

School personnel should not be subject to criminal penalties for failing to report bullying. The distinction is that child abuse can occur anywhere, and therefore criminal penalties are one of the few means of enforcing a mandatory reporting duty. Bullying, on the other hand, is typically confined to school grounds and related areas, such as buses and school sponsored field trips. Therefore, discipline for staff members’ failure to report a bullying incident should be relegated to the school’s administration. The school should propagate a list of penalties for failing to report bullying to school personnel, which would include increasing penalties for repeat offenders. Handling discipline this way will also decrease the number of unsubstantiated reports because teachers will not be concerned about being subjected to criminal penalties.

Healthcare personnel, however, should be subjected to the same penalties for failing to report bullying as they are for failing to report child abuse. First,

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199. See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 656-57 (2004) (noting “[w]here adults are absent or inattentive, intervention cannot take place, and those students who are willing to bully are going to be waiting for opportunities to do so without incurring the consequences of a staff member willing and ready to intervene”).

200. ARTHUR CONAN DOYLE, *The Adventure of the Copper Beeches*, in THE COMPLETE SHERLOCK HOLMES, VOLUME I, at 377, 383 (2004).

201. IND. CODE § 31-33-22-1 (2012).

202. *Id.* § 35-50-3-3.

healthcare personnel are outside the school administration's control, and any school penalties imposed would be ineffective. Second, healthcare personnel are not being asked to report a new type of abuse, but rather abuse similar to that which they must report now except from a different perpetrator: the student's peers. Third, the number of severe, physical bullying cases that healthcare personnel must report should be small, so few healthcare workers will be affected by the imposition of this penalty. The overall impact on healthcare workers by adding bullying to the list of reportable conditions should be minimal, but it is crucial to stop the most severe, physical cases of bullying.

### *B. Reasons to Expect This Scheme to Work*

Although there is no anti-bullying scheme that is guaranteed to work, there are a number of reasons to expect the proposed duty to report will be effective. One reason is that bullying and child abuse are remarkably similar.<sup>203</sup> Both forms of abuse involve an imbalance of power, which the perpetrator uses to inflict physical and psychological harm.<sup>204</sup> Additionally, victims of child abuse and bullying suffer similar physical and psychological effects.<sup>205</sup> These similarities lend themselves to a similar legal framework.

The principal difference between bullying and child abuse is the identity of the perpetrator: in the former the perpetrator is a fellow student, and in the latter the perpetrator is an adult.<sup>206</sup> Since school personnel must already report suspicions of child abuse, however, "it seems logical they should be required to report abuse that occurs right in the school itself, and bullying at school involves abuse of a child."<sup>207</sup>

Mandatory reporting laws in the child abuse context have already proven to be effective in raising awareness, collecting data, and preventing instances of

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203. Weddle, *supra* note 199, at 657 ("[Bullying] is, in fact, a form of child abuse perpetrated by the child's peers.").

204. *See supra* notes 15, 83-85 and accompanying text.

205. Mitali R. Vyas, *School Shooters: Perpetrators or Victims? The Need for Expanding Battered Child Syndrome to Include Peer Harassment in School-Violence Prosecutions*, 41 STETSON L. REV. 215, 238, 242 (2011) ("The lasting psychological effects for those who are victims of chronic bullying, [and] those who are diagnosed with battered child syndrome . . . are extremely similar, as is the nature and extent of the abuse . . ."; "the nature of the abuse is the same [for bullying and child abuse]: incessant intentional harm through physical, emotional, and psychological means. Victims of peer harassment and victims of parental abuse also experience similar psychological consequences that affect the way they function in society and react to external stimuli.").

206. *Id.* at 244 ("With battered child syndrome, the abuse is from parents or guardians; with bullying victims, the abuse is from peers."); *see also* Jill Grim, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 173 (2008) ("The only difference between child abuse and peer harassment is that with peer harassment the child is abused by other students and not someone outside of the school.").

207. Grim, *supra* note 206, at 173.

child abuse.<sup>208</sup> The similarities between bullying and child abuse indicate that a similar reporting duty for bullying would also be effective. However, despite the effectiveness of child abuse reporting laws, these laws have also been criticized.<sup>209</sup> The proposed mandatory reporting duty for bullying aims to address these criticisms while preserving the effectiveness of mandatory child abuse reporting laws.

One of the main arguments against mandatory child abuse reporting laws is the small number of reports that are actually substantiated.<sup>210</sup> There are two likely explanations for this: 1) reports are being filed by people who are inexperienced at identifying child abuse, and 2) when an incident questionably involves child abuse, reports are being filed to avoid criminal liability. The proposed reporting scheme for bullying attempts to deal with this concern in three ways.

First, a clear definition is provided on the reporting form, which clearly states what constitutes bullying. Second, only school personnel are required to report all types of bullying; healthcare professionals are required to report only physical bullying. As noted above, many of the unsubstantiated child abuse reports come from nonprofessionals,<sup>211</sup> but school personnel would be trained to identify bullying as part of the program implemented by the Department of Education and the school safety specialist. Notably, healthcare professionals are already trained to identify and report child abuse, which is substantially similar to physical bullying. Third, criminal penalties would not be imposed on school personnel for failing to report. School personnel would therefore be more cautious about filing a bullying report rather than filing one just to avoid liability.

Another reason to expect this scheme to be effective is that it is relatively easy to implement. Where possible, efforts should be made to modify existing statutes rather than to create entirely new ones. This involves modifying not only Indiana's bullying statutes, but also adopting and modifying some of Indiana's child abuse statutes to apply to bullying, such as the reporting requirements and penalties for healthcare personnel. Additionally, existing school personnel, including safe school committee members and the school safety specialist, would be used to handle reports of bullying. Although personnel may have to be added depending on the volume of bullying reports, no completely new positions must be created and reports will not be delegated to "already-taxed child protection agencies."<sup>212</sup>

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208. *See supra* Part II.B.

209. *See supra* note 113 and accompanying text. *But see* Jessica Martin, *Scathing Critiques of Mandated Reporting Laws, Child Protective Services Have "Little Basis in Reality," Say Child Welfare Experts*, WASHINGTON UNIV. IN ST. LOUIS, June 19, 2007, <http://news.wustl.edu/news/Pages/9635.aspx>, archived at <http://perma.cc/RNJ9-SBJD>.

210. *See supra* note 113 and accompanying text.

211. *See supra* notes 177-78 and accompanying text; *see also* Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 164 (1986) (noting the inclusion of "any person" as a mandated reporter for child abuse was "controversial" and that "substantiation rates for reports from nonprofessionals are very low").

212. Jessica R. Givelber, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile*

Ultimately, this reporting scheme should be effective because of the importance of both school-wide and nation-wide awareness of the problem of bullying. Nation-wide awareness refers to the public's knowledge and understanding of the problem.<sup>213</sup> For child abuse, nation-wide awareness began with Dr. John Caffey, whose publication entitled *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, suggested that the children under study suffered from abuse.<sup>214</sup> Medical interest in child abuse grew and culminated in the publication of *The Battered Child Syndrome* by Henry Kempe and his colleagues in 1962.<sup>215</sup> As medical research on child abuse grew, so did the media's interest in the problem.<sup>216</sup> With the problem of child abuse now widely publicized, laws were quickly created to address it.<sup>217</sup> Despite criticism of these laws,<sup>218</sup> hundreds of thousands of cases of child abuse are dealt with each year because of the laws.<sup>219</sup>

Although bullying received similar national media attention after a string of school shootings allegedly caused by bullying that began in 1999 with Columbine High School, "there is a growing recognition that many current laws do not adequately address harassment and bullying."<sup>220</sup> The problem with much of the anti-bullying legislation is that it appears to be a knee-jerk reaction to the gruesome school shootings rather than sound policy based on research. In a review of bullying-related cases in the United States, one author noted that "employed piecemeal, punitive tactics such as progressive discipline, mediation, conflict resolution, and so-called 'zero tolerance' policies, if unsupported by the entire school community, do not reduce bullying."<sup>221</sup> This comment not only illustrates the deficiencies of current anti-bullying legislation, but also suggests a way to fix them: school-wide support for anti-bullying strategies.

The goal of the proposed mandatory reporting scheme for bullying is to reduce or eliminate bullying, and it has been designed with that goal in mind. Most of the research up to this point has shown one method to be consistently effective in reducing bullying: a school climate that is hostile to bullying

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*Response to Bystander Indifference*, 67 *FORDHAM L. REV.* 3169, 3188 (1999).

213. Myers, *supra* note 91, at 454-55.

214. *Id.*

215. *Id.* at 455.

216. *Id.*

217. *Id.*

218. *See supra* note 113 and accompanying text.

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

220. John Dayton et al., *Model Anti-Bullying Legislation: Promoting Student Safety, Civility, and Achievement Through Law and Policy Reform*, 272 *ED. LAW REP.* 19, 23 (2011).

221. Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 *ALB. L. REV.* 147, 152 (2009); *see also* Weddle, *supra* note 199, at 679 ("The [anti-bullying] statutes seem to be based on the premise that bullying is easily discovered and that a list of consequences for bullying will address the problem. Those premises, as the educational research has demonstrated repeatedly, are false . . .").

partially due to the involvement and supervision by school personnel;<sup>222</sup> the mandatory reporting duty seeks to establish such a climate. All school personnel will be required to intervene in bullying situations, which will have a multiplicative effect on intervention since school personnel feel more comfortable intervening if others are likely to as well.<sup>223</sup> Problem areas for bullying in the schools will be identified, so supervision may be increased. Even in areas without school personnel, bullies will be under the constant threat of an anonymous report by the victim or another student. It is not the severity of penalties that will stop bullying, but a school environment that declares bullying will be discovered and not tolerated.

#### CONCLUSION

Bullying is a problem that has plagued the United States for some time now, and its negative effects on those involved have spurred various forms of legislation. Much of the current legislation, however, does not reflect research-based strategies to reduce bullying. The result has been laws that seem effective in theory, but in reality have little to no effect.

In contrast, a mandatory duty to report has already proven to be effective in the child abuse context, and the similarities between the two imply it would also be effective when applied to bullying. Nevertheless, as the research suggests, this is not the only strategy that would be effective; it is merely one means of establishing a school climate that is hostile to bullying, albeit an important one.

The real advantage of a mandatory duty to report bullying is its proven effectiveness in the child abuse context and its ease of implementation. In proposing such a duty, adjustments must be made to avoid the missteps of mandatory child abuse reporting laws, while preserving their core effectiveness. The nature of reporting laws also allows data to be collected on a large scale.

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222. See Weddle, *supra* note 199, at 656-57 (“[T]eachers and administrators must actively supervise, constantly alert for indications that bullying is going on behind their backs and constantly ready to stop bullying in its initial stages. Perhaps the greatest deterrent to bullying behavior is the presence of adults who are watching and are willing to intervene . . . intervention must take place early in the development of bullying relationships if it is to be truly effective.”). See also BRADSHAW ET AL., *supra* note 6, at viii (“Staff who were more connected to their school were more likely to feel comfortable intervening in all forms of bullying. Staff with higher feelings of connectedness were also more likely to report being comfortable intervening in several different types of bullying situations.”), and Napolitano et al., *supra* note 30, at 39 (“[L]ess structure and supervision are associated with concomitant increases in student bullying, particularly in locations such as playgrounds, lunchrooms, and hallways.” (citations omitted)).

223. BRADSHAW ET AL., *supra* note 6, at ix (“Two factors were significantly correlated with greater comfort intervening in bullying situations: 1) having effective strategies and 2) perceiving that others in the school were also likely to intervene.”).

Therefore, a mandatory duty to report bullying is not only likely to be the most effective strategy and the easiest to implement, but it also facilitates the collection of data that may be used to evaluate its effectiveness based on empirical research. This is exactly the type of law that must be implemented to protect this nation's students from bullying.



# MISSING THE MARK: IMPLICATIONS OF *SUNBEAM PRODUCTS, INC. v. CHICAGO AMERICAN MANUFACTURING* ON TRADEMARK LICENSES IN BANKRUPTCY

JANEL QALLIU\*

## INTRODUCTION

In the more than twenty years following the landmark decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*,<sup>1</sup> the issue of what happens to a trademark licensee's rights after a debtor licensor's bankruptcy remained static. Now, in the wake of two circuit court opinions—dicta in *In re Exide Technologies*,<sup>2</sup> and more notably, the holding in *Sunbeam Products, Inc. v. Chicago American Manufacturing*<sup>3</sup>—this topic has been brought back to the forefront of debate. These cases raise issues of whether other jurisdictions will follow suit and how these decisions affect the rights of licensors, licensees, and the public who rely on the quality of the trademarked products.

Part I of this Note provides background on the Fourth Circuit's decision in *Lubrizol*.<sup>4</sup> That controversial decision triggered Congress to enact the Intellectual Property Bankruptcy Protection Act.<sup>5</sup> Congress passed that Act to protect the rights of some intellectual property licensees, but did not explicitly safeguard trademark licensees.<sup>6</sup> This omission has caused courts confusion about how to handle trademark licenses in bankruptcy.

Part II discusses *Exide*—the case that foreshadowed the issue ultimately decided in *Sunbeam*: Licensees trademark usage rights continue even after the debtor rejects the contract in bankruptcy.<sup>7</sup> Although the decision in *Exide* was not determinative on the issue, the dicta in Judge Ambro's concurrence guided the Seventh Circuit's reasoning and ultimate decision in *Sunbeam*.<sup>8</sup>

Parts III and IV of this Note examine the Seventh Circuit's decision in *Sunbeam* and suggests that it is flawed. This discussion focuses on how trademarks differ from other forms of intellectual property and why protecting licensees' use of trademarks should remain outside Section 365(n) of the

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1. 756 F.2d 1043, 1048 (4th Cir. 1985).
2. 607 F.3d 957, 966-67 (3d Cir. 2010).
3. 686 F.3d 372, 377-78 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).
4. *Lubrizol*, 756 F.2d at 1048.
5. 134 CONG. REC. H9302, H9303 (daily ed. Oct. 3, 1988) (statement of Rep. Edwards).
6. Intellectual Property Bankruptcy Protection Act, Pub. L. No. 100-506, 102 Stat. 2538 (1988) (codified at 11 U.S.C. §§ 101(35A), 365(n) (2000)).
7. *Sunbeam*, 686 F.3d at 377.
8. *Id.* at 375.

Bankruptcy Code and, additionally, why their use should not be maintained after the debtor's rejection under Section 365(g).

Part V suggests that the Supreme Court should weigh in on how trademark licenses should be addressed in the event of the licensor's bankruptcy. This would provide much-needed guidance to courts struggling with this issue.

Finally, Part VI of this discussion proposes a solution to cases involving trademark licensees rights in bankruptcy. Bankruptcy courts have long used equity to resolve issues when there are interstices in the code.<sup>9</sup> This course is the one intended by Congress and is best suited to provide justice to non-debtor licensees while preserving the purposes of trademark and bankruptcy law.

#### I. HISTORICAL BACKGROUND:

##### A. *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*

To fully understand the evolution of how bankruptcy courts treat intellectual property, one must look to the Fourth Circuit's 1985 decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*<sup>10</sup> The court in *Lubrizol* held that a patent license was not protected when rejected by the licensor in bankruptcy.<sup>11</sup> On the heels of this startling decision, Congress amended the Bankruptcy Code to protect certain types of intellectual property.<sup>12</sup> Some worried that decisions like the one in *Lubrizol* "may have a chilling effect on transactions involving the licensing of intellectual property, and, correspondingly, on the development of new technology."<sup>13</sup> *Lubrizol* not only sparked a change in the bankruptcy code, but courts around the country looked to the decision to guide their analysis of cases involving trademark licenses in bankruptcy.<sup>14</sup>

In *Lubrizol*, the debtor, Richmond Metal Finishers (RMF), granted a nonexclusive patent license to Lubrizol for a metal coating process.<sup>15</sup> Less than a year after finalizing the contract and before Lubrizol began using the patent, RMF filed for bankruptcy pursuant to Chapter 11 and rejected the contract with Lubrizol so that it could sell the technology license unencumbered.<sup>16</sup>

Under the contract, RMF owed continuing obligations to Lubrizol to defend against infringement suits, indemnify Lubrizol for losses, and to reduce

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9. See *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) (citing *Katchen v. Landy*, 382 U.S. 323, 327 (1966); *U.S. Nat'l Bank v. Chase Nat'l Bank*, 331 U.S. 28, 36 (1947); *Pepper v. Litton*, 308 U.S. 295, 303-04 (1939)).

10. 756 F.2d 1043, 1048 (4th Cir. 1985).

11. *Id.*

12. 134 CONG. REC. H9302, H9303 (daily ed. Oct. 3, 1988) (statement of Rep. Edwards).

13. *Id.*

14. *In re HQ Global Holdings, Inc.*, 290 B.R. 507 (Bankr. D. Del. 2003); *In re Blackstone Potato Chip Co.*, 109 B.R. 557 (Bankr. D.R.I. 1990).

15. *Lubrizol*, 756 F.2d at 1045.

16. *Id.*

Lubrizol's royalty rate if subsequent licensees received a better rate.<sup>17</sup> Lubrizol owed RMF the duty of submitting quarterly reports and paying royalties.<sup>18</sup> Because both parties had remaining obligations to one another of which "failure [to perform] would constitute a material breach,"<sup>19</sup> the court found that the contract was executory and, therefore, fell under the purview of Sections 365(a) and (g) of the Bankruptcy Code.<sup>20</sup>

Section 365(a) allows a bankruptcy trustee to assume or reject an executory contract with court approval,<sup>21</sup> and Section (g) states that rejection of such agreement constitutes a breach of contract.<sup>22</sup> The court declared that Lubrizol could seek monetary damages for RMF's breach of contract but could not request specific performance and retain usage rights of the patent.<sup>23</sup> However, the court noted,

It cannot be gainsaid that allowing rejection of such contracts as executory imposes serious burdens upon contracting parties such as Lubrizol. Nor can it be doubted that allowing rejections in this and comparable cases could have a general chilling effect upon the willingness of such parties to contract at all with businesses in possible financial difficulty.<sup>24</sup>

Although the court conceded these points, it concluded that because Congress plainly provided how to deal with the rejection of executory contracts in bankruptcy, while knowing the consequences for intellectual property licensees, the court could not use equitable principles to resolve the matter.<sup>25</sup>

The court in *Lubrizol* also considered if RMF used sound business judgment in moving to reject the patent license agreement with Lubrizol.<sup>26</sup> The court found that RMF had, in fact, used sound judgment because its licensing agreement with Lubrizol represented its principal asset and its ability to reclaim the patent to sell or license on more profitable terms was RMF's best chance to regain success after

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17. *Id.*

18. *Id.* at 1046.

19. *Id.* at 1045 (quoting *Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers' Union*, 734 F.2d 1029, 1022 (4th Cir. 1984) (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973))); see also *In re Exide Techs.*, 607 F.3d 957, 962 (3d Cir. 2010) (citing *In re Columbia Gas Sys. Inc.*, 50 F3d 233, 238 (3d Cir. 1995) (an executory contract is one "on which performance is due to some extent on both sides").

20. *Lubrizol*, 756 F.2d at 1048.

21. 11 U.S.C. § 365(a) (2006).

22. *Id.*

23. *Lubrizol*, 756 F.2d at 1048.

24. *Id.*

25. *Id.*

26. *Id.* at 1047 (internal citation omitted) ("[T]he rule is that courts should defer to—should not interfere with—decisions of corporate directors upon matters entrusted to their business judgment except upon a finding of bad faith or gross abuse of their 'business discretion'").

its bankruptcy.<sup>27</sup> Accordingly, the court agreed with the bankruptcy court's decision allowing RMF to reject its patent licensing agreement with Lubrizol.<sup>28</sup>

*B. Intellectual Property Bankruptcy Protection Act*

The decision in *Lubrizol* inspired Congress to enact the Intellectual Property Bankruptcy Protection Act three years later.<sup>29</sup> Under this new provision, Section 365(n), licensees can continue to use the intellectual property when the licensor enters bankruptcy and rejects the agreement.<sup>30</sup>

If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms . . . or (B) to retain its rights . . . under such contract, to such intellectual property . . . as such rights existed immediately before the case commenced.<sup>31</sup>

This Act did not provide clarity for trademark licenses, however, because the definition of “intellectual property” outlined in the Bankruptcy Code includes copyrights, patents, and trade secrets, but does not include trademarks.<sup>32</sup>

The term ‘intellectual property’ means—(A) trade secret; (B) invention, process, design, or plant protected under title 35 [35 USCS §§ 1 et seq.]; (C) patent application; (D) plant variety; (E) work of authorship protected under title 17 [17 USCS §§ 101 et seq.]; or (F) mask work protected under chapter 9 of title 17 [17 USCS §§ 901 et seq.]; to the extent protected by applicable non-bankruptcy law.<sup>33</sup>

Congress was reluctant to add trademarks to the definition of intellectual property without further research because of trademarks' unique characteristics, such as the need for the licensor's quality control over the trademark.<sup>34</sup>

This omission led to confusion about how to handle trademark licenses in bankruptcy. Because Congress omitted trademarks in its definition of “intellectual property” for bankruptcy purposes, many courts continued to use the reasoning applied in the Fourth Circuit's decision in *Lubrizol*<sup>35</sup> when deciding a

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27. *Id.*

28. *Id.* at 1048.

29. Intellectual Property Bankruptcy Protection Act §§ 101(35A), 365(n).

30. 11 U.S.C. § 365(n) (2006).

31. *Id.*

32. 11 U.S.C. § 101(35A) (2006).

33. *Id.*

34. S. REP. NO. 100-505, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3204.

35. *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985).

trademark licensee's rights in the event of the licensor's bankruptcy.<sup>36</sup>

## II. *SUNBEAM'S* PRECURSOR—*IN RE EXIDE TECHNOLOGIES*

The next influential decision, albeit in dicta, to influence other courts in the disposition of trademark licenses in bankruptcy came over twenty years later in *In re Exide Technologies*.<sup>37</sup> However, because the Third Circuit's majority opinion in *Exide* relied on the notion that the contract at issue could not be rejected in bankruptcy because it was not executory, it did not give way to changing how courts assess executory trademark licenses in bankruptcy.<sup>38</sup> Judge Ambro's concurrence, however, did shed light on a different way to analyze these types of cases.<sup>39</sup> His dicta broke from the long held view that *Lubrizol* should be used in cases involving trademarks, and influenced the Seventh Circuit's decision in *Sunbeam Products, Inc. v. Chicago American Manufacturing*.<sup>40</sup>

### A. *Majority's Opinion*

Exide, a global battery producer, licensed the majority of its industrial battery business to EnerSys, including use of its "Exide" trademark.<sup>41</sup> Exide granted EnerSys a royalty-free, exclusive trademark license to use for the industrial batteries.<sup>42</sup> Meanwhile, Exide continued to use its trademark on other products.<sup>43</sup>

Years later, Exide attempted to regain the use of the trademark to consolidate its company under one unified trademark and reenter the industrial battery market.<sup>44</sup> Despite Exide's desire to regain the trademark, EnerSys refused to agree.<sup>45</sup> As a result, Exide was unable to use its own trademark for this product and directly competed against EnerSys's product branded "Exide."<sup>46</sup> Nine years after the contract's inception, Exide filed for Chapter 11 bankruptcy and moved

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36. See *In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009) (bankruptcy deprives licensee of right to continue to use the trademark); *In re HQ Global Holdings*, 290 B.R. 507, 512-13 (Bankr. D. Del. 2003) (franchisees can no longer use trademarks upon debtor's rejection but only have a breach of contract claim and can sue for money damages); *Raima UK Ltd. v. Centura Software Corp.*, 281 B.R. 660, 669-71 (Bankr. N.D. Cal. 2002) (holding that trademark licensee's rights are not protected under 11 U.S.C. § 365(n)); *In re Blackstone Potato Chip*, 109 B.R. 557, 562 (Bankr. D.R.I. 1990) (holding that debtor who filed Chapter 11 bankruptcy could reject trademark and trade name licensing agreement).

37. *In re Exide Techs.*, 607 F.3d 957, 964-68 (3d Cir. 2010).

38. *Id.* at 964.

39. *Id.* at 964-68.

40. 686 F.3d 372, 377-78 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

41. *In re Exide*, 607 F.3d at 961.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

to reject its agreement with EnerSys.<sup>47</sup>

The court in *Exide* held that the contract was “not an executory contract because it [did] not contain at least one ongoing material obligation for EnerSys.”<sup>48</sup> EnerSys had used the trademark for ten years, paid the full purchase price, and assumed Exide’s liabilities associated with its industrial battery business.<sup>49</sup> The court stated that EnerSys’s continuing obligations to meet quality standards, use restrictions, and indemnity and further assurances obligations “did not outweigh the substantial performance rendered and benefits received by EnerSys.”<sup>50</sup>

Because the debtor’s agreement with the licensee of exclusive and royalty-free use of the trademark was not an executory contract, the court held that it could not be rejected in bankruptcy.<sup>51</sup> Since the Third Circuit found the contract was not executory, it did not address Section 365(a) of the Bankruptcy Code nor the *Lubrizol* decision.<sup>52</sup> Based on the court’s reasoning why the contract was not executory,<sup>53</sup> this decision cannot easily be applied to non-exclusive contracts, where there is the potential to have substantial obligations remaining for both parties to fulfill.

#### B. Judge Ambro’s Concurrence

Judge Ambro agreed with the majority’s decision in *Exide*, but opined that the bankruptcy court’s decision to rely on *Lubrizol* because of Congress’ omission of trademarks in the Bankruptcy Code’s definition of “intellectual property” was misguided.<sup>54</sup> Instead of drawing this negative inference, he suggested that courts look at a rejection in bankruptcy the same way as they do a rejection of an executory contract—that “it ‘merely frees the estate from the obligation to perform’ and ‘has absolutely no effect upon the contract’s continued existence.’”<sup>55</sup> Judge Ambro concluded that courts should not allow a licensor to “take back trademark rights it bargained away. This makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve.”<sup>56</sup>

In addition, Judge Ambro reasoned that the court should apply equity when deciding trademark licensees’ rights in the event of the licensor’s bankruptcy.<sup>57</sup>

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47. *Id.*

48. *Id.* at 964.

49. *Id.*

50. *Id.* at 963.

51. *Id.* at 966-67.

52. *Id.* at 964.

53. *Id.* at 966-67.

54. *Id.* at 964-65.

55. *Id.* at 967 (quoting *Thompkins v. Lil’ Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007) (internal citations omitted)).

56. *Id.* at 967-68.

57. *Id.* at 967.

He suggested that courts' use of equity would be a viable alternative to blindly applying *Lubrizol* to each case involving trademark licenses in bankruptcy.<sup>58</sup>

III. THE SEVENTH CIRCUIT'S SPLIT FROM *LUBRIZOL*—  
*SUNBEAM PRODUCTS, INC. V. CHICAGO AMERICAN MANUFACTURING*

The Seventh Circuit in *Sunbeam Products, Inc. v. Chicago American Manufacturing*<sup>59</sup> explicitly rejected as unpersuasive the Fourth Circuit's decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*<sup>60</sup> This landmark decision might pave the way for other courts to take a second look at how to treat cases involving trademark licenses in bankruptcy.

Lakewood Engineering and Manufacturing Co., a manufacturer of consumer goods, entered into an agreement with Chicago American Manufacturing (CAM) to allow CAM to use its patents and trademark on the manufacture and distribution of box fans.<sup>61</sup> Lakewood was struggling financially, and three months after its agreement with CAM, Lakewood's creditors filed an involuntary bankruptcy petition against it and the court assigned a trustee.<sup>62</sup>

Sunbeam Products, a direct competitor of Lakewood, wanted to purchase Lakewood's assets—including the patents and trademark, but did not want CAM to continue using the patents and trademark under its existing contract with Lakewood.<sup>63</sup> Invoking Section 365(a) of the Bankruptcy Code, the trustee moved to reject the contract between Lakewood and CAM.<sup>64</sup>

A. *Bankruptcy Court*

The bankruptcy court applied equitable principles and held that CAM could continue manufacturing and selling the Lakewood branded box fans.<sup>65</sup> Judge Hollis based the ruling based on the fact that CAM had invested considerable resources in manufacturing the fans.<sup>66</sup> Because of this equitable approach, the court did not address whether Section 365(a) of the Bankruptcy Code allowed the trademark licensee to continue to use the trademark upon the licensor's rejection in bankruptcy.<sup>67</sup>

The court was persuaded by Judge Ambro's reasoning in *Exide* which examined congressional reports showing Congress's intent to study trademark licenses further before including them in Section 365(n), and allowing bankruptcy courts, in the meantime, to apply equitable principles to cases involving

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58. *Id.*

59. 686 F.3d 372, 375-78 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

60. 756 F.2d 1043, 1048 (4th Cir. 1985).

61. *Sunbeam*, 686 F.3d at 374.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Szilagyi v. Chi. Am. Mfg., LLC*, 459 B.R. 306, 347 (Bankr. N.D. Ill. 2011).

66. *Id.* at 346.

67. *Id.* at 345.

trademark licenses in bankruptcy.<sup>68</sup> The bankruptcy court explained that

It would not follow, in lockstep fashion, those few trial courts to have decided that the non-binding *Lubrizol* holding is the only possible outcome. Instead of bemoaning the ‘chilling effect’ *Lubrizol* might impose on licensees, the court will step into the breach, as it were, and begin the ‘development of equitable treatment’ Congress anticipated would occur.<sup>69</sup>

### *B. Seventh Circuit Court of Appeals*

The Seventh Circuit Court of Appeals affirmed the bankruptcy court’s decision, but disagreed with the lower court’s use of equity to render its decision in favor of CAM because it concluded that the Bankruptcy Code provisions at issue trump the use of equity.<sup>70</sup> It reasoned that allowing courts to use equity would produce inconsistent and varying results.<sup>71</sup>

The court also refused to apply *Lubrizol* in the case.<sup>72</sup> It concluded that *Lubrizol* incorrectly focused on whether the contract at issue was executory and did not provide direction on whether rejection cancels the other party’s rights.<sup>73</sup>

Although the court determined that the Bankruptcy Code’s definition of “intellectual property” did not include trademarks, it found that was only an omission and was not determinative.<sup>74</sup> The court allowed CAM to continue using the Lakewood trademark and patents because of Section 365(g) of the Bankruptcy Code which describes, “[t]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease.”<sup>75</sup> The court stated, “What §365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party’s rights remain in place.”<sup>76</sup>

The court acknowledged that “bankruptcy law does provide means for eliminating rights under some contracts,” including using avoidance powers under Sections 544 through 551 of the Bankruptcy Code, but that the trustee did not use any of those powers in this case.<sup>77</sup> The trustee argued for rejection of the

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68. *Id.* at 344 (citing *In re Exide Techs.*, 607 F.3d 957, 966-67 (3d Cir. 2010) (quoting S. REP. NO. 100-505, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3204)).

69. *Id.* at 345.

70. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 375 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012) (citing *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989)).

71. *Id.* at 375-76.

72. *Id.* at 376 (“Like Judge Ambro [in *Exide*], we too think *Lubrizol* mistaken.”).

73. *Id.* at 377.

74. *Id.* at 375.

75. *Id.* at 376-77.

76. *Id.* at 377.

77. *Id.*; *see also* 11 U.S.C. §§ 544-551 (2006).



contract under Section 365(a), which the court concluded did not eliminate the rights of CAM to use the trademark after rejection, but only relieved Sunbeam from further performance.<sup>78</sup>

Accordingly, the Seventh Circuit held that CAM's right to continue use of the trademark was preserved.<sup>79</sup> The Court distributed the *Sunbeam* opinion to all judges, but an *en banc* hearing was not favored.<sup>80</sup>

#### IV. WHY THE *SUNBEAM* DECISION IS FLAWED

There are several reasons why the Seventh Circuit's decision in *Sunbeam Products, Inc. v. Chicago American Manufacturing*<sup>81</sup> is wrong.<sup>82</sup> Because Congress excluded trademarks from the protections afforded by the Intellectual Property Bankruptcy Protection Act,<sup>83</sup> courts must find alternative ways to analyze these types of cases. However, using the reasoning of the *Sunbeam* decision offends the intent of Congress, the characteristics that make trademarks unique, the purposes of bankruptcy, and the ability of courts to make decisions based on equitable principles.

##### A. Rejection Under Section 365(g)

In *Sunbeam*, the Seventh Circuit Court of Appeals determined that Section 365(g) of the Bankruptcy Code, which states that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease,"<sup>84</sup> meant a licensee's rights remain in place even after the licensor rejects the contract in bankruptcy.<sup>85</sup> However, if courts interpret Section 365(g) to mean that rejection does not "vaporize" a licensee's rights to continue to use the trademark as the court in *Sunbeam* concluded,<sup>86</sup> then does that not obviate the need for Congress's enactment of Section 365(n), which allows licensees the right to use certain types of intellectual property after rejection? Doing so would simply duplicate Section 365(g) and, accordingly, would violate the statutory canon to avoid interpreting provisions to render the words superfluous. It is a long-held view 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."<sup>87</sup>

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78. *Sunbeam*, 686 F.3d at 377 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984); *Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 407 (7th Cir. 1995)).

79. *Id.* at 375-78.

80. *Id.* at 378.

81. *Id.*

82. *Id.*

83. Intellectual Property Bankruptcy Protection Act §§ 101(35A), 365(n).

84. 11 U.S.C. § 365(g).

85. *Sunbeam*, 686 F.3d at 377.

86. *Id.*

87. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co. v. Hoffman*, 101 U.S.

The court in *Sunbeam* even notes that “[t]he Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.”<sup>88</sup> If a court interprets Section 365(g) to mean that a licensee’s rights continue after rejection even though Section 365(n) restates this very premise, it would clearly be in violation of the statutory interpretation canon to avoid surplusage.

Collier on Bankruptcy states that the Bankruptcy Code allows for certain “unique situations,” such as Sections 365(h) and 365(i), which deal with property and land sales, respectively, as well as Section 365(n)—all of which “represent *special cases* in which the other party to the contract may be permitted, after rejection, to opt to retain most or all of its rights under the contract.”<sup>89</sup> Because these situations are unique, this suggests that other rejections in bankruptcy that are not specially treated, do not allow the non-debtor to retain all the rights. Collier also makes clear that “rejection deprives the non-debtor party of a specific performance remedy that it might *otherwise have under applicable nonbankruptcy law* for breach of the contract or lease.”<sup>90</sup> In addition, the Fourth Circuit in *Lubrizol* stated,

Even though §365(g) treats rejection as a breach, the legislative history of §365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party . . . . Allowing specific performance would obviously undercut the core purpose of rejection under § 365(a) [allows a bankruptcy trustee to assume or reject an executory contract with court approval], and that consequence cannot therefore be read into congressional intent.<sup>91</sup>

This demonstrates that rejection is not the same in bankruptcy as outside it as the *Sunbeam* court determined.<sup>92</sup>

Even the court in *Sunbeam* analogized the trustee’s rejection of the trademark agreement with CAM to a bankrupt lessor who rejects a tenant’s lease.<sup>93</sup> In that situation, the tenant’s right to remain in possession is still preserved.<sup>94</sup> However, this is because property leases are one of the special cases, under Section 365(h),

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112, 115 (1879)); *see also* *Babbitt v. Sweet Home Chapter, Cmty. for Great Oregon*, 515 U.S. 687, 698 (1995).

88. *Sunbeam*, 686 F.3d at 376 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012)).

89. 1 COLLIER ON BANKRUPTCY ¶ 365.10 (16th ed. 2012) (emphasis added).

90. *Id.* (citing *Nickels Midway Pier, LLC v. Wild Waves, LLC*, 341 B.R. 486 (Bankr. D.N.J. 2006)).

91. *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985) (citing H. REP. NO. 95-595, at 349 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6305).

92. *Sunbeam*, 686 F.3d at 377.

93. *Id.*

94. *Id.*

that the Bankruptcy Code explicitly provides for to allow non-debtors to retain their rights under the contract.<sup>95</sup> Section 365(h) states, “(i) if the rejection by the trustee amounts to such a breach . . . then the lessee under such lease may treat such lease as terminated by the rejection; or (ii) if the term of such lease has commenced, the lessee may retain its rights under such lease.”<sup>96</sup> Just as Section 365(n) specifically lays out protection for licensees rights for certain forms of intellectual property, so too does Section 365(h) lay out protection for property lessees.

The court in *Lubrizol* reasoned that the legislative history of Section 365(g) showed that Congress intended the provision to provide only a remedy of damages for the non-debtor in the event of breach by a debtor in bankruptcy.<sup>97</sup> This reasoning makes the most sense when examining why Section 365(n) was enacted in the first place—to protect licensees of intellectual property from losing their ability to use the license upon the licensor’s rejection.<sup>98</sup> If Section 365(g) already provided for this, then Congress need not have acted at all and courts around the country would not be so confused about how to dispose of these cases.

### B. Trademark Characteristics

Trademarks are fundamentally different from other types of intellectual property. Unlike patents and copyrights, trademarks are not created to foster the development of new creations; rather, they provide the public with assurance of a products quality and to discourage unfair competition.<sup>99</sup> Trademarks function “(1) as an indicator of the origin of the services which the mark represents; (2) as a guarantee of the quality of the services; or (3) as a medium for advertisement.”<sup>100</sup> Because of a trademark’s distinctive characteristics, this form of intellectual property presents unique problems in bankruptcy.

*I. Protection of the Quality of the Trademark.*—Another flaw in the Seventh Circuit’s decision in *Sunbeam*<sup>101</sup> is the issue of whether the licensor will exercise quality control after rejection. Licensing a trademark requires that a licensor

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95. 11 U.S.C. § 365(h) (2006).

96. *Id.*

97. *Lubrizol*, 756 F.2d at 1048 (citing H. REP. NO. 95-595, at 349); *see also In re HQ Global Holdings, Inc.*, 290 B.R. 507, 512 (Bankr. D. Del. 2003) (citing *Raima UK Ltd. v. Centura Software Corp.*, 281 B.R. 660, 673 (Bankr. N.D. Cal. 2002) (“In the event of rejection of an executory contract, the holder of such contract is left with a claim for rejection damages unless section 365 provides additional protection.”)).

98. 133 CONG. REC. S11653 (daily ed. Aug. 5, 1987) (statement of Rep. DeConcini).

99. *The Intersection of Intellectual Property and Bankruptcy Law*, 78 PAT. TRADEMARK & COPYRIGHT J. (BNA) 201, 207 (June 12, 2009).

100. *Reddy Commc’ns, Inc. v. Env’tl. Action Found.*, 477 F. Supp. 936, 944 (D.D.C. 1979) (citing 3 R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 66.3 at 36 (3d ed. 1967)).

101. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 377 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

employ quality control measures over the use of the trademark.<sup>102</sup> When deciding to exclude trademarks from the protection afforded by Section 365(n) of the Bankruptcy Code, Congress stated, “[t]rademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products of services sold by the licensee.”<sup>103</sup>

In *Sunbeam*, the Seventh Circuit stated, “After rejecting a contract, a debtor is not subject to an order of specific performance.”<sup>104</sup> However, if this reasoning is followed, this raises a serious problem because if the debtor does not have to perform his part of the contract, he no longer has to provide quality control over the trademark.<sup>105</sup> Sunbeam’s petition for writ of certiorari to the Supreme Court reflected this concern — “a licensee can subsequently affix the trademark to products without fear of liability, thus weakening the inherent value of the trademark and harming consumers who rely on the trademark.”<sup>106</sup> If the licensor no longer provides control of the trademark, then others may consider the mark abandoned because the public has no assurance of the quality of the product that they have come to expect.<sup>107</sup> This can cause a problem referred to as “naked licensing.”<sup>108</sup>

Naked licensing occurs “when a trademark owner fails to exercise reasonable control over the use of a mark by a licensee” so that “the presence of the mark on the licensee’s goods or services misrepresents their connection with the trademark owner since the mark no longer identifies goods or services that are under the control of the owner of the mark” and the mark can no longer provide “a meaningful assurance of quality.”<sup>109</sup>

“The intent of this [Lanham] Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce . . . to protect persons engaged in such commerce against unfair

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102. DONALD S. CHISUM ET AL., UNDERSTANDING INTELLECTUAL PROPERTY 522 (2d ed. 1992) (citing *Dawn Donut Co. v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1946)).

103. *In re Exide Techs.*, 607 F.3d 957, 967 (3d Cir. 2010) (quoting S. REP. NO. 100-505, at 5).

104. *Sunbeam*, 686 F.3d at 377 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984); *Midway Motor Lodge of Elk Grove v. Innkeepers’ Telemanagement & Equip. Corp.*, 54 F.3d 406, 407 (7th Cir. 1995)); see also *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985) (internal citation omitted).

105. See CHISUM ET AL., *supra* note 102.

106. Brief for Petitioner at 13, *Sunbeam*, 686 F.3d 372, *petition for cert. filed* (U.S. Oct. 5, 2012) (No. 12-431).

107. *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509 (9th Cir. 2010) (citing *Barcamerica Int’l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 595-96 (9th Cir. 2002)).

108. CHISUM ET AL., *supra* note 102.

109. *Id.* (quoting *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 764 (6th Cir. 2005) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 33 cmt. b (1995))).

competition.”<sup>110</sup> One purpose of trademarks is to protect consumers from being misled about the quality of the product based on its trademark.<sup>111</sup> However, because the court cannot order the licensor to perform his part of the contract after rejection,<sup>112</sup> licensees are free to use the trademark uncontrolled.

In addition to quality control issues, the licensor no longer has a duty to defend against possible trademark infringements.<sup>113</sup> This creates a scenario ripe with the possibility that the public will be deceived about the source and quality of the products it purchases.

2. *Effects of Trademark License Rejection.*—The effect of having a patent license stripped away upon a licensor’s rejection in bankruptcy can be much more debilitating to a business than the elimination of a licensee’s ability to use a trademark. For example, if a business manufactures tires and has a *trademark* license that is rejected in bankruptcy, that business is not precluded from continuing to manufacture the tires; it just will not be able to place that trademark on the product. On the other hand, if the business has a *patent* license that is rejected by the licensor in bankruptcy, that business may potentially lose everything, including the money spent on tooling the factory as well as the ability to sell the product. This can be completely devastating for the company and may result in the company’s reluctance to enter into a patent licensing agreement in the first place—particularly if the licensor is struggling financially.

When examining *Lubrizol’s* effect on patent licenses, the court in *In re Qimonda AG Bankruptcy Litigation* emphasized, “[B]ecause many businesses rely on intellectual property rights as a vital resource for survival, many businesses were faced with financial ruin due to the precedent which the *Lubrizol* case established.”<sup>114</sup> As stated, this is certainly true for patents, but does not hold true for trademarks. In the case of trademarks, the licensee need only rename the product, but may continue to manufacture and sell the product. This would not result in “financial ruin” to the licensee, and the trademark licensee could sue the licensor for contractual damages for any losses incurred from the rejection of the trademark.<sup>115</sup>

Sunbeam discussed this difference between trademarks and patents in its reply brief to its certiorari writ to the Supreme Court.<sup>116</sup> “To be sure, licensees

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110. 15 U.S.C. § 1127 (2006).

111. CHISUMETAL., *supra* note 102 (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995)).

112. 1 COLLIER, *supra* note 89 (citing *Nickels Midway Pier, LLC v. Wild Waves, LLC*, 341 B.R. 486 (Bankr. D.N.J. 2006) (regarding 11 U.S.C. § 365(g)); *id.* § 365(n)(1)(B) (2006) (precluding the right to specific performance).

113. *Id.*; 11 U.S.C. § 365(n)(1)(B) (2012) (precluding the right to specific performance).

114. *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 567 (E.D. Va. 2010) (citing David M. Jenkins, Comment, *Licenses, Trademarks, and Bankruptcy, Oh My: Trademark Licensing and the Perils of Licensor Bankruptcy*, 25 J. MARSHALL L. REV. 143, 151-52 (1991)).

115. 11 U.S.C. § 365(n).

116. Reply Brief for Petitioner at 1, *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 372 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

can and do make substantial investments to practice a licensor's patent rights. But unlike changes required to practice patent rights, affixing a trademark is neither expensive nor difficult and can easily be discontinued after rejection."<sup>117</sup>

When introducing the Intellectual Property Bankruptcy Act to the Senate, Representative DeConcini stressed this variance in severity between the effects of rejection of trademarks versus the effects of rejection of other types of intellectual property. He stated,

Licenses that involve patents, copyrights, and trade secrets are different from others because in this type of license, there is only one source—the company that owns the intellectual property. There is no alternative for the licensee. Thus losing the license may have enormous consequences, since there is nowhere else the company can go to get the technology or information it needs. We must make sure the 'executory' contract does not signal the execution of many businesses relying on intellectual property licenses for their livelihood.<sup>118</sup>

The difference between trademarks and other forms of intellectual property, particularly patents, further bolsters the idea that trademarks should be treated separately than those forms of intellectual property protected under Section 365(n) of the Bankruptcy Code.

3. *Reorganization*.—The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'<sup>119</sup> The problem with allowing licensees to continue to use the trademark after the debtor rejects the contract in bankruptcy is that this may interfere with the goal of bankruptcy—the debtor's ability to reorganize the business and become successful.<sup>120</sup> In *NLRB v. Bildisco & Bildisco*, the Supreme Court reasoned, "[T]he authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization."<sup>121</sup>

The failure to reorganize successfully is exactly what occurred in *Exide*.<sup>122</sup> In that case, *Exide* granted several licenses, including a trademark license, to EnerSys for use in the industrial battery business.<sup>123</sup> As a strategic matter, *Exide* later wanted to unify its image and return to the industrial battery business by taking back its trademark.<sup>124</sup> After filing for bankruptcy, *Exide* attempted to

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117. *Id.*

118. 133 CONG. REC. S11653 (statement of Rep. DeConcini).

119. *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)).

120. *In re Exide Techs.*, 607 F.3d 957, 962 (3d Cir. 2010) (quoting *Nicholas v. United States*, 384 U.S. 678, 687 (1966)) ("The policy behind Chapter 11 of the Bankruptcy Code is the 'ultimate rehabilitation of the debtor.'").

121. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

122. *In re Exide*, 607 F.3d at 961.

123. *Id.* at 960.

124. *Id.* at 961.

reject the contract with EnerSys.<sup>125</sup> As discussed *supra*, the court ruled that EnerSys could continue to use the trademark.<sup>126</sup>

This created an absurd result. Exide was forced to compete in the industrial battery market against its own name. It is not likely that Congress fully considered the possibility that a company who has worked hard creating its brand and earning customers who recognize the quality of its products through its trademark would then be forced to compete against itself in the marketplace. Courts have followed the principle that when an interpretation of statutory language produces an absurd result, the court should construe the statute in a way that avoids this absurdity.<sup>127</sup>

However, the trademark agreement in this case was exclusive and royalty-free and accordingly, found not to be executory.<sup>128</sup> This makes the court's ruling that the licensee could continue to use the mark more palatable; a licensee that has been granted perpetual and exclusive use of a mark should not have its business stripped away after a licensor decides to reject the agreement in bankruptcy. However, the same result could occur for non-exclusive license agreements. A business that has worked hard to make a name for itself should be allowed to exercise some control over its own trademark—at least to the extent of not having to directly compete in the same market with a company that is continuing to use its mark even after rejection in bankruptcy. This seems an unjust result and impedes the company's right to have a “fresh start.”

Another problem that interferes with a business's ability to reorganize is the potential limitations a bankruptcy trustee has to sell the trademark assets for the benefit of creditors and the business. Under the reasoning set forth by the Seventh Circuit in *Sunbeam*,<sup>129</sup> a potential buyer may be reluctant to purchase the trademark because of the bankrupt licensor's previous trademark license agreement with another party. This agreement would prove too burdensome for a new purchaser who wants unencumbered rights to the trademark. “The Seventh Circuit's opinion . . . fundamentally undermines the ability of bankruptcy trustees to ‘maximize the proceeds of collection and to distribute those proceeds as expeditiously as possible’ as required by Section 704(a)(1)” of the Bankruptcy Code.<sup>130</sup>

4. *Congressional Intent of the Intellectual Property Bankruptcy Protection Act.*—Through Congress' enactment of Section 365(n) of the Bankruptcy Code, it intended “to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of

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125. *Id.*

126. *Id.* at 964.

127. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892).

128. *In re Exide*, 607 F.3d at 964.

129. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 375-78 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

130. Petition for Writ of Certiorari at 13, *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372 (2012) (No. 12-431), 2012 WL 4831638 (quoting *In re C. Keffas & Son Florist, Inc.*, 240 B.R. 466, 474-75 (Bankr. E.D.N.Y. 1999)).

the license pursuant to Section 365 in the event of the licensor's bankruptcy."<sup>131</sup> Congress emphasized that Section 365(n)

does not address the rejection of executor trademark, trade name, or service mark licenses by debtor-licensors. While such rejection is of concern because of the interpretation of section 365 by the *Lubrizol* court and others . . . such contracts raise issues [such as quality control] beyond the scope of this legislation . . . Since these matters could not be addressed without more extensive study, it was determined to postpone action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts.<sup>132</sup>

The Act's co-sponsor, Representative DeConcini, stressed that an exception was made to omit trademark licenses from protection under the bill because of the obligation of the licensor to provide continued quality assurance.<sup>133</sup> He emphasized that "if the trustee or debtor-in-possession is unable or unwilling to comply with that quality assurance program, the trademark owner's rights in the trademark are damaged at best or lost."<sup>134</sup>

Unlike the Third Circuit, the bankruptcy court in *Exide* used this congressional history in its analysis and held that *Exide* could reject the trademark license in bankruptcy. It properly reasoned that

Congress certainly could have included trademarks within the scope of § 365(n)[,] but saw fit not to protect them. Therefore, the holding in [*Lubrizol v. Richmond Metal Finishers*, as well as the holdings in the other pre and post § 365(n) trademark rejection cases . . .], still retain vitality insofar as they relate to trademark licenses. As a result, a trademark license is terminated upon rejections and the licensee is left only with a claim for damages.<sup>135</sup>

Congress made clear that trademarks were intentionally excluded from the protection afforded by Section 365(n).<sup>136</sup> Since 1988, Congress has not addressed the issue of trademark licenses in bankruptcy. As stated, this explicitly leaves courts to apply equitable principles in these cases.<sup>137</sup> Courts should take note of this Congressional intent and structure their judgments accordingly.

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131. *In re Exide*, 607 F.3d at 961 (quoting S. REP. NO. 100-505, at 1).

132. *Id.* at 966-67 (quoting S. REP. NO. 100-505, at 5).

133. 133 CONG. REC. S11653 (statement of Rep. DeConcini).

134. *Id.*

135. *In re Exide*, 607 F.3d at 966 (quoting *In re Exide Techs.*, 340 B.R. 222, 250 (Bankr. D. Del. 2006)).

136. *Id.* at 966-67 (quoting S. REP. NO. 100-505, at 5).

137. *Id.*



## V. SUPREME COURT

*A. Importance of Making the Docket*

On October 5, 2012, Sunbeam filed a petition for certiorari to the United States Supreme Court.<sup>138</sup> Given courts' confusion on whether to apply Sections 365(n) or (g) of the Bankruptcy Code to trademarks or, in the absence of an applicable Bankruptcy Code provision, to apply equitable principles to trademark cases, the Supreme Court should have addressed the issue. Unfortunately, while in the process of writing this Note, the Supreme Court denied Sunbeam's petition.<sup>139</sup> If the Supreme Court would have weighed in on this issue, its decision would have provided clarity and consistency among circuits and given trademark licensors and licensees assurance of their future if bankruptcy occurs.

In addition, the Supreme Court's decision would have provided much needed comfort to purchasers in bankruptcy that they are receiving the rights to trademarks for which they bargained.<sup>140</sup> Under *Lubrizol*, a trademark purchaser in bankruptcy would receive exclusive rights to the trademark, but under the Seventh Circuit's decision in *Sunbeam*, "purchasers like [Sunbeam] must share the trademark rights with a prior licensee where no privity of contract exists between the purchaser of the mark and the licensee, thus freeing the licensee to use the trademark in any way it sees fit without a policing of the mark."<sup>141</sup> Particularly in today's unpredictable economic climate, a definitive ruling from the Court could soothe concerns from businesses that are contemplating entering into trademark license agreements with other companies with less than stellar future outlooks.

*B. Potential Outcome of a Future Supreme Court Decision*

Looking at past Supreme Court decisions, the Court's reasoning in *NLRB v. Bildisco & Bildisco* proves informative about the possible outcome of a future Supreme Court decision on this issue.<sup>142</sup> In that case, Bildisco filed for Chapter 11 bankruptcy and subsequently rejected its collective bargaining agreement.<sup>143</sup> The National Labor Relations Board (NLRB) filed suit against Bildisco claiming that Bildisco's rejection of the collective bargaining agreement, before the bankruptcy court's approval, constituted unfair labor practice.<sup>144</sup> Bildisco argued that Section 365(a) of the Bankruptcy Code outlined special considerations for railroad contracts but not for contracts covered by the NLRB.<sup>145</sup> Because of

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138. Brief for Petitioner, *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

139. *Sunbeam*, 133 S. Ct. 790.

140. Brief for Petitioner at 13, *Sunbeam*, 686 F.3d 372.

141. *Id.*

142. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984).

143. *Id.* at 517-18.

144. *Id.* at 518-19.

145. Brief for Respondent at 24, *Bildisco*, 465 U.S. 513 (Nos. 82-818; 82-852).

Congress' silence on agreements contracts included under the NLRB, it intended those contracts to be treated as normal contracts.<sup>146</sup>

The Court agreed with *Bildisco* and drew a negative inference that because Congress did not provide for an exception for the NLRB, an exception was not within the intent of Congress.<sup>147</sup>

Section 1167 . . . expressly exempts collective-bargaining agreements subject to the Railway Labor Act, but grants no similar exemption to agreements subject to the NLRA. Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; *its failure to do so in this instance indicates that Congress intended that § 365(a) apply* to all collective-bargaining agreements covered by the NLRA.<sup>148</sup>

Likewise, courts around the country have applied the reasoning in *Lubrizol* by negative inference to analyze trademark agreements in bankruptcy because of Congress' omission of trademarks in the Intellectual Property Bankruptcy Act.<sup>149</sup> For example, the court in *Raima UK Ltd. v. Centura Software Corp.* held that the licensee did not have any rights to the trademark after the licensor rejected the agreement in bankruptcy "because § 365(n) plainly excludes trademarks."<sup>150</sup> Similarly, the court in *In re HQ Global Holdings, Inc.* stated that "since the Bankruptcy Code does not include trademarks in its protected class of intellectual property, *Lubrizol* controls and the Franchisees' right to use the trademarks stops on rejection."<sup>151</sup> If the Supreme Court once again used negative inference, it would conclude that trademark licensees rights are not retained after the licensor's rejection in bankruptcy.<sup>152</sup>

Alternatively, if the Court used a textualist approach (trademarks are not included in the definition of "intellectual property" and therefore cannot be protected under Section 365(n)), the reasoning in *Lubrizol* would win again.<sup>153</sup> Former Vanderbilt Law School professor and current Dean of the University of Southern California School of Law, Robert Rasmussen, estimated that between 1988 and 1993, the Supreme Court heard twenty-four bankruptcy cases and

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146. *Bildisco*, 465 U.S. 513.

147. *Id.* at 522-23.

148. *Id.* (emphasis added).

149. *In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 512-13 (Bankr. D. Del. 2003); *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 562 (Bankr. D.R.I. 1990).

150. *Raima UK Ltd. v. Centura Software Corp.*, 281 B.R. 660, 674 (Bankr. N.D. Cal. 2002).

151. *In re HQ Global Holdings*, 290 B.R. at 513 (internal citations omitted).

152. See *Bildisco*, 465 U.S. at 522; *In re Exide Techs.*, 607 F.3d 957, 966 (3d Cir. 2010) (Judge Ambro's concession that the Supreme Court used negative inference in cases involving § 365(a)).

153. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (discussion of textualism and the Supreme Court).

decided nineteen to twenty of those using a textualist approach.<sup>154</sup> He opines that the Court does not strive to define a distinct bankruptcy policy, but tends to choose primarily bankruptcy issues in which the circuit courts are split.<sup>155</sup> “In the context of the [Bankruptcy] Code, the cases reveal that the Supreme Court is content to leave the bulk of the interpretative work to the lower courts.”<sup>156</sup> This reasoning bolsters the idea that if the Supreme Court grants certiorari in a future case similar to *Sunbeam*, it will likely use a textualist approach again to determine the fate of trademark license rejections in bankruptcy.

If the Court decides to take up the issue in the future, regardless whether the Supreme Court draws a negative inference to the reasoning in *Lubrizol* or employs a textualist approach, the use of either method would overrule the Seventh Circuit’s holding in *Sunbeam*.<sup>157</sup>

## VI. EQUITABLE SOLUTIONS

### A. Bankruptcy Court’s Broad Powers Under Section 105

If there is a gap in the Bankruptcy Code, then equitable principles should apply.<sup>158</sup> Section 105(a) of the Bankruptcy Code provides that

[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.<sup>159</sup>

Courts have interpreted this section to give bankruptcy courts the authority to exercise equitable principles when necessary.<sup>160</sup>

Additionally, the Supreme Court emphasized in *United States v. Energy Resources Co.* that Section 105(a) is “consistent with the traditional

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154. Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court’s Bankruptcy Cases*, 71 WASH. U. L. Q. 535, 553 (1993).

155. *Id.* at 572-73.

156. *Id.* at 538.

157. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 378 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

158. *See* 1 COLLIER, *supra* note 89 (discussing the two interpretations of 11 U.S.C. § 105; one that the provision allows courts to use equity to fill the gaps in the bankruptcy code and the other that the section should be more narrowly read).

159. 11 U.S.C. § 105(a).

160. *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) (applying equity to a creditor’s right to foreclose on a mortgage); *Beaty v. Selinger*, 306 F.3d 914, 922 (9th Cir. 2002) (internal citations omitted) (“a bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be ‘inconsistent’ with the Bankruptcy Code”).

understanding that bankruptcy courts, *as courts of equity, have broad authority* to modify creditor-debtor relationships.”<sup>161</sup> In that case, Energy Resources filed for reorganization through Chapter 11 bankruptcy and included a plan that disclosed that it would pay its tax debt over a number of years and that payments would be applied to trust fund tax debts.<sup>162</sup> The bankruptcy court approved this plan and the IRS appealed this order.<sup>163</sup> Because the Bankruptcy Code did not explicitly allow bankruptcy courts to do this, the Supreme Court looked to Section 1123(b)(5), which grants courts the authority to “modify the rights of holders of secured claims,”<sup>164</sup> and to Section 105(a) and held that bankruptcy courts could use “their broad power” to decide these issues.<sup>165</sup>

The Supreme Court in *Energy Resources* “signaled its desire to leave the crafting of substantive bankruptcy law to the lower courts.”<sup>166</sup> Given Congress’ omission of trademarks in the definition of “intellectual property,” bankruptcy courts should exercise their “broad powers” under Section 105(a) and use their equitable powers to resolve these cases.

Likewise, in *Celotex Corp. v. Edwards*, the Supreme Court cited the powers available to bankruptcy courts in Section 105,<sup>167</sup> and held that the bankruptcy court had jurisdiction to issue an injunction preventing the Edwards, who had received personal injury awards against bankrupt Celotex, from collecting the judgment from the non-bankrupt surety.<sup>168</sup> “Given the broad mandate to bankruptcy courts generally to reorganize debtors, to afford a fresh start to debtors and to distribute funds equitably to creditors, an expansive construction [of Section 105] is justified. This is confirmed by the Supreme Court’s decision in *Celotex*.”<sup>169</sup>

### B. Using Equity for Trademark Cases

In addition to the broad powers afforded to bankruptcy courts by Section 105 of the Bankruptcy Code,<sup>170</sup> Congress also stated when it enacted the Intellectual Property Bankruptcy Protection Act, that until it could more fully evaluate the implications of protecting trademarks, bankruptcy courts should use equity when making decisions concerning trademark licenses.<sup>171</sup> Likewise, Judge Ambro, in

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161. *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) (internal citations omitted) (emphasis added); *see also* Rasmussen, *supra* note 154 (discussing the Supreme Court’s desire to leave substantive bankruptcy law decisions to the lower courts).

162. *Energy Res.*, 495 U.S. at 584-85.

163. *Id.* at 585.

164. 11 U.S.C. § 1123(b)(3) (2006).

165. *Energy Res.*, 495 U.S. at 550-51.

166. Rasmussen, *supra* note 154.

167. *Celotex Corp. v. Edwards*, 514 U.S. 300, 310-11 (1995).

168. *Id.* at 301-02.

169. 1 COLLIER, *supra* note 89.

170. 11 U.S.C. § 105(a).

171. *In re Matusalem*, 158 B.R. 514, 516 (Bankr. S.D. Fla. 1993) (quoting S. REP. NO. 100-

his concurrence in *Exide*, espoused using equitable principles in cases involving trademark licensees' rights in bankruptcy in lieu of applying the reasoning set forth in *Lubrizol*.<sup>172</sup>

The court in *Sunbeam* reasoned, “The limited definition in § 101(35A) means that § 365(n) does not affect trademarks one way or the other.”<sup>173</sup> However, the court went on to reject the notion that equity could be applied because doing so “supercede[s] the Code’s provisions.”<sup>174</sup> The court’s reasoning seems disjunctive—if Section 365(n) does not apply one way or the other to trademarks, as the court declares<sup>175</sup> then equitable principles should apply.

The important aspects of what makes trademarks different from other forms of intellectual property—such as the need for quality control over the mark to preserve the public’s faith in the product—can be preserved if courts do not impute Section 365(n) as including trademarks. If trademark licenses are not provided for under the Bankruptcy Code, then courts could be free to fashion equitable solutions in situations that warrant such decisions in accordance with their broad powers under Section 105 of the Bankruptcy Code.<sup>176</sup>

#### CONCLUSION

The Seventh Circuit Court’s holding in *Sunbeam* that trademark licensee rights should be maintained after the licensor rejects the agreement in bankruptcy, has too many failings for other circuit courts to follow suit.<sup>177</sup> The court in *Sunbeam* dismissed the fact that trademarks are not included under the Bankruptcy Code’s definition of “intellectual property,”<sup>178</sup> and merely explained, “an omission is just an omission.”<sup>179</sup> However, this was not “just an omission” but rather a well-thought-out exclusion by Congress to allow time to research how best to treat trademarks, given their inherent uniqueness and challenges.<sup>180</sup> Well over twenty years have passed since Congress passed the Intellectual Property Bankruptcy Protection Act, and it still has not added trademarks to the definition.<sup>181</sup>

Moreover, the Seventh Circuit’s interpretation of Section 365(g) of the

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505, at 5).

172. *In re Exide Techs.*, 607 F.3d 957, 967 (3d Cir. 2010).

173. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 375 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012).

174. *Id.* at 375-76 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012)).

175. *Id.* at 375.

176. 11 U.S.C. § 105(a).

177. *Sunbeam*, 686 F.3d at 375-78; *see also In re Exide*, 607 F.3d at 964-65.

178. 11 U.S.C. § 101(35A).

179. *Sunbeam*, 686 F.3d at 375.

180. *In re Exide*, 607 F.3d at 966-67 (quoting S. REP. NO. 100-505, at 5).

181. Intellectual Property Bankruptcy Protection Act 11 U.S.C. §§ 101(35A), 365(n).

Bankruptcy Code means the licensee's rights continue after rejection.<sup>182</sup> This flawed reasoning renders Section 365(n),<sup>183</sup> which allows the same result, mere surplusage. Despite the court's reasoning, which essentially renders these two sections identical for intellectual property license purposes, Congress intended Section 365(g) to only provide for a damages remedy, as the Fourth Circuit Court in *Lubrizol* clearly explained.<sup>184</sup>

The Seventh Circuit's decision in *Sunbeam* also fails to delve into why trademarks are so different than other forms of intellectual property and, as a result, should be treated differently in bankruptcy. The licensor has duties to the licensee to provide quality control and to defend against infringement.<sup>185</sup> In addition, the effects of having a trademark license rejected are less damaging to licensees than having a patent or copyright license stripped away.<sup>186</sup>

The court's decision also inhibits the licensor's ability to reorganize successfully. At best, a decision like the one in *Sunbeam* means that a licensor's trademark assets are reduced, and at worst, means that the licensor is forced to compete against its own name in the marketplace.

The Supreme Court's failure to grant certiorari means that courts around the country lack much needed guidance on this controversial issue and will have to rely on existing case law and bankruptcy principles to determine these types of cases.<sup>187</sup> Hopefully in the near future the Supreme Court will decide to address this important issue, but in the meantime, instead of applying the Seventh Circuit's flawed reasoning,<sup>188</sup> courts should use equitable principles to resolve these cases, as espoused by the Supreme Court,<sup>189</sup> Congress,<sup>190</sup> and Section 105 of the Bankruptcy Code.<sup>191</sup>

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182. *Sunbeam*, 686 F.3d at 377 ("rejection of an executory contract . . . constitutes a breach of such contract").

183. 11 U.S.C. § 365(n).

184. *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985) (citing H. REP. NO. 95-595, at 349).

185. See CHISUM ET AL., *supra* note 102.

186. See, e.g., *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 567 (E.D. Va. 2010) (internal citations omitted).

187. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 133 S. Ct. 790 (2012).

188. *Sunbeam Prods., Inc. v. Chi. Am. Mfg.*, 686 F.3d 372, 375 (7th Cir.), *cert. denied*, 133 S. Ct. 790.

189. *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990).

190. *In re Exide Techs.*, 607 F.3d 957, 966-67 (3d Cir. 2010) (quoting S. REP. NO. 100-505, at 5).

191. 11 U.S.C. § 105(a).

# ARTIFICIALLY “NATURAL”: CLASS ACTION LAWSUITS ATTACK MISLEADING “NATURAL” CLAIMS IN FDA’S ABSENCE

SHEA THOMPSON\*

## INTRODUCTION

Any consumer perusing their local grocery store aisle is bombarded with hundreds of food advertisements and labels totting various health claims in big, bold letters: “low-fat,” “50 percent less sodium,” “low-carb,” “no artificial sweeteners,” and, most recently, “all-natural.”<sup>1</sup> While the government regulates some of these advertisements and labels, several of these labels have little or no significant meaning, and many are poorly regulated, if at all.<sup>2</sup> Consequently, consumers are left with the dilemma of determining which labels to believe and, unfortunately, often select products based on misleading health claims.<sup>3</sup>

With health risks and obesity at an all-time high in America, “natural” eating has emerged as a new consumer trend.<sup>4</sup> In the past decade, natural foods have transformed from a small “niche market” into a \$22.3 billion industry<sup>5</sup>, and “all-natural” was the second most frequently used claim on new U.S. food products in 2008.<sup>6</sup> According to market research publisher, Packaged Facts, U.S. retail sales of natural and organic foods rose nearly \$39 billion in 2010, an increase of nine percent over the previous year and sixty-three percent higher than five years earlier.<sup>7</sup> Moreover, the number of U.S. households purchasing natural products also continues to grow, up thirteen percent in 2012, with ninety-seven percent of

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1. *Food Marketing and Labeling: Lesson Plan*, JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE 12-13, [http://www.jhsph.edu/research/centers-and-institutes/teaching-the-food-system/curriculum/\\_pdf/Marketing\\_and\\_Labeling\\_Lesson.pdf](http://www.jhsph.edu/research/centers-and-institutes/teaching-the-food-system/curriculum/_pdf/Marketing_and_Labeling_Lesson.pdf), archived at <http://perma.cc/9S35-HUD6> (last visited July 31, 2014).

2. *Id.* at 12.

3. *Id.*

4. FOOD MKTG. INST., <http://www.fmi.org/docs/facts-figures/nutrition.pdf?sfvrsn=2>, archived at <http://perma.cc/ZKM-93VF> (last visited July 31, 2014).

5. Lilly O’Donnell, *What Does a “Natural” Label Really Mean?*, FOOD POLITIC: JOURNAL OF FOOD NEWS AND CULTURE (Mar. 8, 2013, 8:38 AM), <http://www.foodpolitic.com/what-does-a-natural-label-really-mean/>, archived at <http://perma.cc/4ZYP-S5NJ>.

6. Sarah Hills, *Kosher Leads Top Ten Claims for New Products*, FOOD NAVIGATOR-USA (Dec. 11, 2008), <http://www.foodnavigator-usa.com/Suppliers2/Kosher-leads-top-ten-claims-for-new-products>, archived at <http://perma.cc/UTX3-Q823>.

7. *“All Natural” Class Action Litigation: An Overview of the Regulatory Regime and Developing Case Law*, FOLEY & LARDNER LLP (Apr. 11, 2012), <http://www.foley.com/files/Event/e58140ec-216e-4f48-8a0b-deedd7c4eb92/Presentation/EventAttachment/c57c721a-611e-4af0-9c36-d274d7ce913d/4-11LitPresentation.pdf>, archived at <http://perma.cc/4LNG-LNHA>.

the U.S. households now purchasing natural grocery products.<sup>8</sup>

Consumers are becoming more concerned with what they are putting into their bodies and are actively buying products labeled “natural.”<sup>9</sup> However, if one were to ask ten different people what “natural” on a food label means, one would likely hear ten different answers.<sup>10</sup> On the other hand, almost everyone will probably believe “natural” food is healthier.<sup>11</sup> Recent polls indicate many consumers believe “natural” means “almost organic,” or that a natural product is even better than organic.<sup>12</sup> People are usually surprised to discover that for most foods, “natural” on the label can be nutritionally insignificant.<sup>13</sup> Specifically, the FDA tightly regulates nutrient claims such as “low-fat,” “low-sodium,” or “high-fiber.”<sup>14</sup> Furthermore, to use terms such as “high” or “good” on a label, the food item must meet a certain percentage of the recommended daily allowance (RDA) of the specific nutrient.<sup>15</sup> However, for the word “natural,” the same stringent rules do not apply.<sup>16</sup>

Currently, the Food and Drug Administration (FDA) does not have a legal definition for the term “natural” when used by food companies to advertise products.<sup>17</sup> In 1991, the FDA announced that it was considering defining the term “natural” and even solicited formal comments on the term.<sup>18</sup> However, the agency ultimately declined to adopt a formal rule “because of resource limitations and other agency priorities.”<sup>19</sup> Although no binding legal standard exists, the FDA has developed an informal policy regarding the term “natural” without committing to a legal definition.<sup>20</sup> This policy considers “‘natural’ to mean that nothing artificial or synthetic (including colors regardless of source) is included

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8. *SPINS Year End Overview: How Did Natural Products Perform?*, SPINS, <http://www.spins.com/wp-content/uploads/2013/07/SPINS-Year-End-Review-Strength-of-Natural-Products1.pdf>, archived at <http://perma.cc/UH8K-RUMR> (last visited July 31, 2014).

9. FOOD MKTG. INST., *supra* note 4, at 2.

10. Ronnie Cummins, *Whole Fraud: Exposing the Myth of So-Called Natural Foods*, ORGANIC CONSUMERS ASS’N (Feb. 9, 2012), [http://www.organicconsumers.org/articles/article\\_24844.cfm](http://www.organicconsumers.org/articles/article_24844.cfm), archived at <http://perma.cc/4EN-2U99>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Guidance for Industry: A Food Labeling Guide*, FOOD AND DRUG ADMIN. (Oct. 2009), <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labeling/nutrition/ucm064908.htm>, archived at <http://perma.cc/SAZ9-B8RW>.

15. *Id.*

16. *What Is the Meaning of ‘Natural’ on the Label of Food?*, FOOD AND DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>, archived at <http://perma.cc/Q8AH-JQKA> (last visited July 31, 2014).

17. *Id.*

18. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991) (to be codified at 21 CFR 5 and 101).

19. *Id.*

20. *What Is the Meaning of ‘Natural’ on the Label of Food?*, *supra* note 16.



in, or has been added to, the product that would not normally be expected to be there.”<sup>21</sup>

Due to the FDA’s reluctance to define the term “natural,” class action lawsuits, instead of FDA standards, are forcing food companies to confront whether their use of the term is false and misleading to consumers.<sup>22</sup> The Center for Science in the Public Interest (CSPI)<sup>23</sup> is leading many of these attacks on the use of the term “natural” and is filing nearly all its cases under California’s stronger consumer protection laws.<sup>24</sup> If these California lawsuits are successful, they could reverberate nationwide, including implications for food advertisements and increased pressure on the FDA.

This Note explores the FDA’s reluctance to promulgate an official definition of “natural” and argues that class action lawsuits are, currently, the best way to address the lack of a “natural” definition and to protect consumers against misleading “natural” claims. Part I explores the history behind the FDA’s reluctance to define “natural” with an emphasis on its informal policy and that policy’s implications on class action lawsuits. Part II looks at the current docket of “natural” class action lawsuits in California, under California’s strong consumer protection laws, as well as other states’ “natural” lawsuits. Part III discusses the issue of federal preemption. Part IV advocates that class action lawsuits are currently, in the absence of an FDA rule, the best way to address the lack of a “natural” definition and to protect consumers against misleading “natural” claims. Finally, Part V recommends that when courts employ the FDA’s current “natural” policy in rulings, they should interpret the policy to prohibit both high fructose corn syrup (HFCS) and genetically modified organisms (GMOs) from being marketed as “natural.”

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21. *Id.*

22. *See* Janney et al. v. Gen. Mills, No. 12-cv-03919 (N.D. Cal. filed July 26, 2012) (asserting deceptive advertising claims under California’s Unfair Competition Law and False Advertising Law for the use of “natural” on products containing high fructose corn syrup); *see also* Sandys v. Naked Juice Co., No. 11-cv-08007 (C.D. Cal. filed Sept. 27, 2011) (asserting false advertising claims under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act for the use of “natural” on fruit juice containing GMOs).

23. CSPI is a public interest group founded by three scientists which carved out a niche as the organized voice of the American public on nutrition, food safety, health and other issues during a boom of consumer and environmental protection awareness in the early 1970s. CSPI is currently one of the nation’s top consumer advocates, “fighting for government policies and corporate practices that promote healthy diets, prevent deceptive marketing practices, and ensure that science is used to promote the public welfare.” *About Us*, CTR. FOR PUB. INTEREST AND SCI., <http://www.cspinet.org/about/index.html>, archived at <http://perma.cc/A6EY-SCZU> (last visited July 31, 2014).

24. *Litigation Project: Current Docket*, CTR. FOR PUB. INTEREST AND SCI., <http://www.cspinet.org/litigation/current.html>, archived at <http://perma.cc/M6VU-LKNB> (last visited July 31, 2014).

## I. HISTORY BEHIND THE FDA'S LACK OF A "NATURAL" DEFINITION

Congress began to regulate food and beverage labels more than 100 years ago when, in 1906, it passed legislation known as the "Wiley Act," or the Pure Food and Drug Act.<sup>25</sup> The Pure Food and Drug Act prohibited the misbranding of food sold and distributed through interstate commerce.<sup>26</sup> While the Pure Food and Drug Act was a big step for Congress, there were problems with the legislation because it did not have the dramatic effect Congress intended.<sup>27</sup> Accordingly, Congress replaced the Pure Food and Drug Act in 1938 with the Federal Food, Drug, and Cosmetic Act ("FDCA").<sup>28</sup> The FDCA authorized the FDA to regulate food safety and labeling, giving the FDA considerable latitude in food regulations, definitions, and standards.<sup>29</sup> However, neither the FDCA nor the FDA required strict nutritional labeling requirements for all food and beverage products.<sup>30</sup>

In 1990, due to mounting demand for a national labeling law,<sup>31</sup> Congress passed the Nutrition Labeling and Education Act ("NLEA").<sup>32</sup> The NLEA introduced a number of substantial reforms: (1) it required nutrition labeling for nearly all food products under the authority of the FDA, (2) it changed the requirements for ingredient labels on food packages; (3) it imposed and regulated health claims on packages; (4) it standardized all nutrient content claims; and (5) it standardized serving sizes.<sup>33</sup> The NLEA provided uniformity to all food labels and package advertisements for consumers.<sup>34</sup> Specifically, the NLEA required the FDA to set comprehensive standards for nutrition claims such as "low fat," "light," and "healthy."<sup>35</sup> Since the introduction of the NLEA, the FDA has continued to regulate the majority of terms that appear on food and beverage labels.<sup>36</sup> However, the agency has not set the same comprehensive standards with regard to "natural" labels.<sup>37</sup>

The FDA has the power to promulgate a rule regarding the use of "natural"

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25. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 331 (3d Cir. 2009).

26. *Id.* (citing U.S. FOOD AND DRUG ADMIN., *The Story of the Laws Behind the Labels, Part II* (1981)).

27. *Id.* (citing Wallace F. Janssen, *The Story of the Laws Behind the Labels, Part II*, U.S. FOOD AND DRUG ADMIN. (June 1981), <http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm>, archived at <http://perma.cc/YS83-S7FP>).

28. *Id.* at 331.

29. *Id.*

30. *Id.*

31. *Id.*

32. 21 U.S.C. § 343 (2006).

33. *The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995).

34. *Id.*

35. *Id.* at 606 n.14.

36. *Id.* at 606 n.9.

37. *What Is the Meaning of 'Natural' on the Label of Food?*, *supra* note 16.

labels, but it has repeatedly declined to do so.<sup>38</sup> One policy reason governing this decision is that rulemaking is not a short or simple procedure.<sup>39</sup> The rulemaking process in administrative law requires legislative rules to go through a notice and comment process prior to their promulgation.<sup>40</sup> The notice and comment requirement allows some public participation prior to a declaration of a new rule as well as insures “agencies’ policy decisions are both informed and responsive.”<sup>41</sup> After the agency considers this public feedback and makes changes where appropriate, it then publishes a final rule in the *Federal Register* with a specific date upon which the rule becomes effective and enforceable.<sup>42</sup> In promulgating a final rule, the agency must describe and respond to the public comments it received.<sup>43</sup> This process can take many years to complete due to all the formal requirements.<sup>44</sup>

If an agency is not prepared or does not want to go through the rulemaking process, it can issue informal policy or guidance. Guidance, unlike an official rule, is the “administrative [pronouncement] of general applicability which [is] not made pursuant to delegated authority and do[es] not have the force of law, i.e., [is] not [a] legislative [rule]. [Its] purpose is to guide or advise the public.”<sup>45</sup> Guidance can usually be pronounced without the public proceedings required to promulgate an administrative rule.<sup>46</sup> Therefore, an agency may opt to issue guidance on a subject because promulgating a rule may be too time or resource intensive.<sup>47</sup> However, if the agency opts to issue guidance instead of going through an official rulemaking process, the agency will not be able to enforce such guidance because it does not carry the same force of law as a legal rule.<sup>48</sup>

The FDA has never completed the official rulemaking process required to issue a binding legal definition of “natural.”<sup>49</sup> In 1991, the FDA announced that it was considering defining “natural,” and specifically stated “if the term ‘natural’ is adequately defined, the ambiguity surrounding use of this term that results in misleading claims could be abated.”<sup>50</sup> The FDA solicited comments with regard to defining “natural” and determined the use of the term “is of considerable interest to consumers and industry”; however, the agency ultimately declined to

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38. *Id.*

39. CHARLES H. KOCH, JR., 1 ADMIN. L. & PRAC. § 4:10 (3d ed. 2012).

40. *Id.*

41. *Id.*

42. *Id.* § 4:46.

43. *Id.* § 4:45.

44. *Id.*

45. *Id.* § 1:20.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 340-41 (3d Cir. 2009).

50. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).

adopt a formal definition.<sup>51</sup> The FDA declined to define “natural,” in part because there were still “many facets of this issue that the agency will have to carefully consider if it undertakes a rulemaking to define the term ‘natural.’”<sup>52</sup> The FDA also cited resource limitation and other agency priorities as further reasons for its reluctance to promulgate a legal definition.<sup>53</sup> Although the FDA declined to adopt a formal legal definition of “natural,” it has provided an informal policy as guidance for corporations and consumers alike:

[T]he agency *has considered* ‘natural’ to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there. For example, the addition of beet juice to lemonade to make it pink would preclude the product being called “natural.”<sup>54</sup>

Because the FDA has declined to adopt a legal definition of “natural” but has provided informal policy, some courts have been reluctant to rule on “natural” class action lawsuits.<sup>55</sup>

## II. CURRENT DOCKET OF “NATURAL” CLASS ACTION LAWSUITS

During the past decade, food and beverage companies advertising their products as “All Natural” have increasingly been targets of litigation from competing companies, consumer groups, and consumers in the form of class action lawsuits.<sup>56</sup> The majority of these lawsuits are punitive class action lawsuits brought by plaintiff lawyers, representing the class members.<sup>57</sup> Most of these lawsuits are being filed in California due to the strong consumer protection laws afforded to its residents.<sup>58</sup> These lawsuits usually allege deceptive business practices under California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and sometimes its Consumers Legal Remedies Act (CLRA).<sup>59</sup>

### A. Unfair Competition Law (UCL)

California’s Unfair Competition Law (UCL), the state’s model of the Federal

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51. *Id.*

52. *Id.*

53. *Id.*

54. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991).

55. Dawn Goulet, *Confusion in Court over “All Natural” Claims*, AM. BAR ASSOC. (Apr. 30, 2012), <http://apps.americanbar.org/litigation/committees/classactions/articles/spring2012-0412-all-natural-labels-mean-marketing.html>, archived at <http://perma.cc/F98G-HNNR>.

56. Erik Benny, Essay, “Natural” Modifications: The FDA’s Need to Promulgate an Official Definition of “Natural” That Includes Genetically Modified Organisms, 80 GEO. WASH. L. REV. 1504, 1512 (2012).

57. Goulet, *supra* note 55; see also discussion *infra* Part II.E.

58. See *supra* note 22 and accompanying text.

59. *Id.*

Trade Commission Act of 1914, defines unfair competition to include any “unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the [False Advertising Law].”<sup>60</sup> Hence, anything in violation of the FAL would also be in direct violation of the UCL.<sup>61</sup> The UCL, which can be enforced by elected officials or private parties, gives California residents very broad protection against any fraudulent business practices.<sup>62</sup> An “act or practice” under the UCL can range from repeated or habitual business practices to single, isolated acts.<sup>63</sup>

Violations under the UCL can take three different forms: unlawful, unfair, and/or fraudulent.<sup>64</sup> An “unlawful” violation under the UCL is any business practice that violates any other state or federal law, which may seem redundant.<sup>65</sup> However, many of these underlying laws may not allow private rights of action.<sup>66</sup> Therefore, the UCL essentially provides California residents a universal private right of action to any “unlawful” business practice, whether the underlying law allows for private enforcement or not.<sup>67</sup> An “unfair” business practice violation, if between competitors, is one that “threatens an incipient violation of antitrust law, or violates the policy or spirit of one of those laws . . . , or otherwise significantly threatens or harms competition.”<sup>68</sup> Courts have not yet clearly defined what amounts to “unfair” business practices as they relate to consumer rights of action.<sup>69</sup> However, courts have allowed causes of action for business practices that offend public policy or where the harm outweighs the business utility.<sup>70</sup> Finally, the standard for a “fraudulent” business practice under the UCL is whether a member of the public is likely to be deceived by the business practice.<sup>71</sup> The “fraudulent” business practice prong of the UCL is the prong that overlaps with coverage under the FAL.<sup>72</sup>

### *B. False Advertising Law (FAL)*

The main difference between the UCL and FAL fraudulent business practice standard is that the UCL, unlike the FAL, does not require that the company knew

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60. CAL. BUS. & PROF. CODE § 17200 (West 2012).

61. *Id.*

62. *Id.* at § 17204.

63. *Klein v. Earth Elements, Inc.*, 69 Cal. Rptr. 2d 623, 625 n.3 (Ct. App. 1997).

64. CAL. BUS. & PROF. CODE § 17200 (West 2012).

65. Trenton H. Norris, *Consumer Litigation & FDA-Regulated Products: The Unique State of California*, 61 FOOD & DRUG L.J. 547, 553 (2006).

66. *Id.*

67. *Id.*

68. *Cel-Tech Comm’n, Inc. v. L.A. Cellular Tel. Co.*, 83 Cal. Rptr. 2d 548, 565 (1999).

69. Norris, *supra* note 65, at 554.

70. *Id.*

71. *Comm. on Children’s Television v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983).

72. CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2012).

or should have known that the advertisement was false or misleading.<sup>73</sup> Therefore, the FAL has a stricter standard than the UCL under California law.<sup>74</sup> The FAL makes it unlawful for companies “to make or disseminate . . . any statement, . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”<sup>75</sup> Therefore, in order to have a successful claim under the FAL, a plaintiff would need to prove that a company made a claim that was false or misleading and the company knew of or should have known the claim would be misleading to consumers.<sup>76</sup> Not only is the FAL expansive in coverage, but California courts have also interpreted it liberally.<sup>77</sup>

### C. Consumers Legal Remedies Act (CLRA)

The CLRA is very similar to both the UCL and the FAL, and plaintiffs often allege violations of all three laws for the same business practices.<sup>78</sup> The CLRA is specifically designed to protect consumers against “unfair methods of competition.”<sup>79</sup> While serving many of the same end goals as both the UCL and the FAL, the CLRA differs in that instead of providing broad coverage to residents, the CLRA specifically outlines twenty-five practices that are deemed “unfair methods of competition.”<sup>80</sup> Among the twenty-five unlawful practices are “representing that goods . . . have . . . characteristics, ingredients, uses, benefits, or quantities which they do not have” or that the goods “are of a particular standard, quality, or grade . . . if they are of another.”<sup>81</sup> The CLRA is limited to consumer plaintiffs and to those plaintiffs who have suffered actual damage.<sup>82</sup> Despite these restrictions, the CLRA offers broader remedies than do the UCL and the FAL, including compensatory and punitive damages.<sup>83</sup> Accordingly, California has become a very attractive venue for these “natural” class action lawsuits due to strong consumer protection laws, liberal court systems, and expansive remedies.<sup>84</sup>

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73. Norris, *supra* note 65, at 555.

74. *Id.*

75. CAL. BUS. & PROF. CODE § 17500 (West 2012).

76. Norris, *supra* note 65, at 555.

77. *Id.* at 547.

78. See Complaint, Pappas v. Naked Juice Co. of Glendora, Inc. et al, No La CV 11-08276 JAK (PLAx), 2012 WL 1925598 (C.D. Cal. May 14, 2012) (asserting false advertising claims under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act for the use of “natural” on fruit juice containing GMOs).

79. CAL. CIV. CODE § 1770 (West 2012).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Norris, *supra* note 65, at 547.

*D. The Ninth Circuit’s Controlling Decision on Deceptive Food Labeling*

In 2008, the Ninth Circuit in *Williams v. Gerber Products Co.* addressed deceptive food labeling under California’s consumer protection laws.<sup>85</sup> The class action was filed by consumers who were parents of small children and alleged eight causes of action, including claims under the UCL, FAL, and CLRA, against Gerber for deceptive packaging of its Fruit Juice Snacks.<sup>86</sup> Class members challenged five aspects of Gerber’s packaging: (1) “the use of the words ‘Fruit Juice’ juxtaposed alongside images of fruits such as oranges, peaches, strawberries, and cherries” when the Fruit Snacks contained no fruit juice from any of the fruits pictured;<sup>87</sup> (2) “a statement on the side panel of the packaging describing the product as made ‘with real fruit juice and other all natural ingredients’”;<sup>88</sup> (3) a statement on the side panel of the package that stated the Snacks were “one of a variety of nutritious Gerber Graduates foods and juices”;<sup>89</sup> (4) “Gerber’s decision to label the product a ‘snack’ instead of a ‘candy,’ ‘sweet,’ or a ‘treat’”;<sup>90</sup> and (5) “that the phrase ‘naturally flavored’ did not comply with applicable type size requirements.”<sup>91</sup> The district court granted Gerber’s motion to dismiss, finding that the statements would not deceive a “reasonable consumer.”<sup>92</sup>

The Ninth Circuit disagreed with the district court, finding that the class members sufficiently “stated a claim and could plausibly prove that a reasonable consumer would be deceived by the Snacks packaging.”<sup>93</sup> The Ninth Circuit reversed the district court’s grant of Gerber’s motion to dismiss, emphasizing that “California courts . . . have recognized that whether a business practice is deceptive [under the UCL] will usually be a question of fact not suitable for decision on demurrer.”<sup>94</sup> Specifically, the court noted, “the statement that Fruit Juice Snacks w[ere] made with ‘fruit juice and other all natural ingredients’ could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false.”<sup>95</sup> The Ninth Circuit specifically addressed the district court’s ruling in stating, “[w]e disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient

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85. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

86. *Id.*

87. *Id.* at 936.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 937.

93. *Id.* at 940.

94. *Id.* at 938-39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 61 Cal. Rptr. 3d 221, 236 (Ct. App. 2007)).

95. *Id.* at 939.

list in small print on the side of the box.”<sup>96</sup>

According to the Center for Science in the Public Interest’s website, after the reversal from the Ninth Circuit, the case is still pending in federal district court.<sup>97</sup> No final ruling has been reached, but even prior to the Ninth Circuit’s decision, Gerber had modified its packaging to remove some of the allegedly misleading representations.<sup>98</sup> Specifically, Gerber removed the word “nutritious” from the side panel, shortened “made with real fruit juice and other all natural ingredients” to “made with real fruit juice,” and changed the name of the product from “Fruit Juice Snacks” to “Fruit Juice Treats.”<sup>99</sup>

#### *E. Pending California “Natural” Class Action Lawsuits*

Like the complaint in *Williams*, most “natural” class action lawsuits filed in California allege causes of action under the UCL, FAL, and CLRA, claiming defendants are able to charge a premium for their products because the “all natural” designation falsely leads consumers to believe the products do not contain “artificial” or “unnatural” substances.<sup>100</sup> These complaints “generally fall into four categories: products containing HCFS [high fructose corn syrup], products containing genetically modified organisms (GMOs), products containing artificial preservatives, and products processed with chemicals or containing other unnatural ingredients.”<sup>101</sup>

*Astiana v. Ben & Jerry’s Homemade, Inc.*,<sup>102</sup> a class action lawsuit in the Northern District of California, alleged that defendants misrepresented ice cream by advertising that it was “all natural” when, in fact, the ice cream was made with “Dutch” or “alkalized” cocoa that “is processed with potassium carbonate, a man-made ingredient that is ‘synthetic,’ not ‘natural.’”<sup>103</sup> Plaintiffs filed the false advertising claims in December 2010 on behalf of a nationwide class and a California sub-class.<sup>104</sup> Each member “allege[d] a claim of fraud; three claims under the [UCL]; a claim of false advertising under the [FAL]; and a claim for restitution based on a theory of unjust enrichment.”<sup>105</sup> Defendants promptly filed a motion to dismiss the case for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>106</sup> The district court denied the motion because

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96. *Id.* at 940.

97. *Litigation Project: Current Docket*, CTR. FOR SCI. IN THE PUB. INT., <http://www.cspinet.org/litigation/current.html>, archived at <http://perma.cc/T9ES-N5S3> (last visited July 31, 2014).

98. *Williams*, 552 F.3d at 936 n.2.

99. *Id.*

100. *See supra* note 22 and accompanying text.

101. Goulet, *supra* note 55.

102. *Astiana v. Ben & Jerry’s Homemade, Inc.*, No C 10-4387 PJH, 2011 WL 2111796 (N.D. Cal. May 26, 2011).

103. *Id.* at \*1.

104. *Id.* at \*2.

105. *Id.*

106. *Id.* at \*1.



plaintiffs (1) alleged a plausible legal theory, (2) had standing under Article III, (3) sufficiently pleaded the injury with particularity, and (4) had claims that were not preempted by federal law.<sup>107</sup>

After the district court refused to grant defendant’s motion, Ben & Jerry’s decided to settle with the plaintiffs.<sup>108</sup> However, presiding Judge Hamilton rejected the settlement on September 12, 2012, because she found the proposed settlement legally unconscionable.<sup>109</sup> The proposal had set up a \$7.5 million fund for the plaintiffs, limiting individual consumer damages from two to twenty dollars.<sup>110</sup> “Under the *cy pres* doctrine, the court would distribute any amount remaining after plaintiffs had asserted their claims to ‘not-for-profit charities related to food or nutrition in the United States.’”<sup>111</sup> The class action sought \$1.8 million in attorney’s fees.<sup>112</sup> Both parties filed a timely motion with the judge insisting they had new information regarding the proposed settlement and requesting a status conference.<sup>113</sup> However, in January 2014, more than a year after the proposed settlement, Judge Hamilton denied a request to certify a class of consumers who purchased Ben & Jerry’s ice cream, effectively rendering a devastating blow to the plaintiff’s lawyers as the case will likely not proceed without class certification.<sup>114</sup>

Although Ben & Jerry’s effectively defeated the class action against it over a prolonged three-year litigation period, it is not the first company to fall prey to California’s consumer protection laws.<sup>115</sup> In 2011, a handful of class actions against Kashi Co. and Kellogg Co. were filed and consolidated in the Southern District of California.<sup>116</sup> The complaint alleged that Kashi and Kellogg deceived consumers “by promoting their products as ‘all natural’ or containing ‘nothing artificial,’ when, in reality, the products contained a wide range of substances like ascorbic acid, calcium pantothenate, calcium phosphates, potassium carbonate, and/or xanthium gum.”<sup>117</sup> Similarly, “on September 21, 2011, a class action was filed in the Northern District of California against Bear Naked, Inc., alleging that the company’s products labeled ‘100% Pure & Natural’ actually contain

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107. *Id.* at \*13-15.

108. Cory L. Andrews, *Update: Judge Rejects Settlement in Ben & Jerry’s “Natural” Class Action*, FORBES (Sept. 28, 2012, 3:57 PM), <http://www.forbes.com/sites/wlf/2012/09/28/update-judge-rejects-settlement-in-ben-jerrys-natural-class-action/>, archived at <http://perma.cc/6WKB-LXAG>.

109. *Id.*

110. *Id.*; Goulet, *supra* note 55.

111. *Id.*

112. *Id.*

113. *Id.*

114. Josh Long, *Ben & Jerry’s Creams Plaintiff in ‘All-Natural’ Lawsuit*, FOOD PRODUCT DESIGN (Jan. 15, 2014), <http://www.foodproductdesign.com/news/2014/01/ben-jerry-s-creams-plaintiff-in-all-natural-lawsu.aspx>.

115. Goulet, *supra* note 55.

116. *Id.*

117. *Id.*

ingredients recognized as synthetic by federal regulators, including potassium carbonate, glycerin, and lecithin.”<sup>118</sup> In 2012, General Mills became the next company hit with the wave of “natural” lawsuits when a class action lawsuit was filed against Nature Valley for advertising its products as “all natural.”<sup>119</sup> The claim alleged that “Nature Valley goes to great length to market its granola bars and ‘thins’ as ‘natural,’ even though they contain industrially produced artificial ingredients such as high-fructose corn syrup, high-maltose corn syrup, and maltodextrin.”<sup>120</sup>

Each of these class action lawsuits asserts causes of action under the California Legal Remedies Act, the Unfair Competition Law, and the False Advertising Law, with most cases combating HFCS or artificial sweeteners as being mislabeled as “natural.”<sup>121</sup> However, with the heightened awareness of the GMO-labeling issue under California’s recently unsuccessful Prop 37,<sup>122</sup> some attorneys believe that the new trend in these California “natural” lawsuits will be combating GMO ingredients.<sup>123</sup> In fact, just two days after voters in California defeated Prop 37, supporters of Prop 37 including Food Democracy Now, Green America, Institute for Responsible Technology, and Nature’s Path launched a coalition to help consumers identify GMO ingredients called “GMO Inside.”<sup>124</sup> In the press release announcing the coalition, the CEO of Green America declared,

Corporations may have misled voters in California about GMOs, but they can’t change the fact that over ninety percent of Americans support the labeling of foods with genetically engineered ingredients . . . [GMO Inside’s] campaign will show corporations that people will not complacently serve as lab rats for the testing of genetically engineered

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118. *Id.*

119. *Litigation Project: Current Docket*, *supra* note 97; see Complaint, Janney et al. v. Gen. Mills, 944 F. Supp. 2d 806 (N.D. Cal 2013) (No. 12-cv-3919 PJH), 2012 WL 3691752 [hereinafter Janney Complaint].

120. *Litigation Project: Current Docket*, *supra* note 97.

121. See Janney Complaint, *supra* note 119 (asserting deceptive advertising claims under California’s Unfair Competition Law and False Advertising Law for the use of “natural” on products containing high fructose corn syrup); Goulet, *supra* note 55.

122. Prop 37, had it been successful, would have required mandatory labeling of most foods containing GMOs in the state of California. Mark Bittman, *Buying the Vote on G.M.O.’s*, THE NEW YORK TIMES (Oct. 23, 2012, 9:00 pm), <http://opinionator.blogs.nytimes.com/2012/10/23/buying-the-vote-on-g-m-o-s/>, archived at <http://perma.cc/5HTB-RBBL>.

123. Elaine Watson, *PepsiCo back in the firing line over all-natural claims as new class action targets Frito-Lay*, FOOD NAVIGATOR USA (Sep. 24, 2012), <http://www.foodnavigator-usa.com/Regulation/PepsiCo-back-in-the-firing-line-over-all-natural-claims-as-new-class-action-targets-Frito-Lay>, archived at <http://perma.cc/3BCZ-WKUG>.

124. GO INSIDE, *Groups Launch National Initiative To Help All Americans Take Action On Genetically Engineered Foods*, GMOINSIDE.ORG (Nov. 8, 2012), <http://gmoinside.org/launch-press/>, archived at <http://perma.cc/L458-6934>.

foods.<sup>125</sup>

It seems only a matter of time before food companies will see a rise in California’s GMO related “natural” class action lawsuits.

#### F. Closed California “Natural” Class Action Lawsuits

While most “natural” class action lawsuits are still pending with more being filed all the time, there are some cases which have been dismissed. In February 2012, a class action was filed against South Beach Beverage Co. and PepsiCo in the Central District of California alleging the “all natural” marketing of SoBe beverages is false and misleading.<sup>126</sup> Specifically, the class actions alleged the beverages do not contain juice from any fruits described in their names and “contain substances created by chemical processing, including ascorbic acid, cyanocobalamin, calcium pantothenate, niacinamide, and pyridoxine hydrochloride.”<sup>127</sup>

On May 18, 2012, U.S. District Judge John F. Walter granted Sobe’s motion to dismiss with prejudice, which appears to be the first instance of dismissal with prejudice for an “all natural” claim under California’s consumer protection laws.<sup>128</sup>

Judge Walter justified the dismissal in saying, “no reasonable consumer would read the ‘all natural’ language as modifying the ‘with vitamins’ language and believe that the added vitamins are suppose to be ‘all natural vitamins.’”<sup>129</sup> He further explained that “to the extent there is any ambiguity, it is clarified by the detailed information contained in the ingredient list, which explains the exact contents of Lifewater.”<sup>130</sup> Interestingly, Judge Walter relied on the same legal reasoning from the Ninth Circuit’s holding in *Williams v. Gerber* to reach a completely opposite decision than in *Williams*, which had very similar facts to the complaint against SoBe.<sup>131</sup>

#### G. Other State’s “Natural” Class Action Lawsuits

While most plaintiffs’ lawyers actively seek to file in California court because of its strong consumer protection laws,<sup>132</sup> recent case filings may indicate

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125. *Id.*

126. Goulet, *supra* note 55.

127. *Id.*

128. *Hairston v. S. Beach Beverage Co.*, No. CV 12 -1429-JFW (Dtbx), 2012 WL 1893818 (C.D. Cal. May 18, 2012).

129. *Id.*

130. *Id.*

131. *See id.* “As the Ninth Circuit held in *Williams v. Gerber*, ‘reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.’ . . . In this case, the ingredient list is consistent with the front label statement of ‘all natural with vitamins.’” *Id.*

132. Melissa A. Jones, *UCL Class Actions in California Expand Beyond “All Natural”*

that the “all natural” fight will take place in more than just one state.<sup>133</sup> In September and October of 2011, eight class-action lawsuits were filed in federal courts in California, Florida, New Jersey, New York, and Illinois against the makers of SkinnyGirl Margarita beverages, asserting claims for consumer fraud, false advertising, and breach of express warranty.<sup>134</sup> Specifically, the class actions alleged SkinnyGirl Margarita has been packaged, marketed, and advertised as being “all natural” and containing “no preservatives,” when, in fact, the product contains a synthetic preservative found in many diet sodas.<sup>135</sup> In January 2012, a class action lawsuit was filed against Frito-Lay and PepsiCo in the Eastern District of New York, alleging Tostitos and SunChips products were not “made with all natural ingredients” because the corn and oils used to make them were made from genetically modified plants.<sup>136</sup> The class action asserted causes of action for violations of New York’s consumer-fraud and false-advertising laws and breach of express warranty.<sup>137</sup> PepsiCo and Frito-Lay are also being hit in Florida with a similar lawsuit against the use of the term “all natural” on Frito-Lay’s Bean Dip.<sup>138</sup> The complaint is one of the first that has been filed expressly against the use of GMO ingredients under “all natural” labeling.<sup>139</sup> The complaint alleges a cause of action under the Florida Unfair and Deceptive Practices Trade Act and asserted that Frito-Lay Bean Dips “contain soy, among other ingredients, which are known to be derived from GMOs.”<sup>140</sup> The express purpose of the Florida statute, as explained in the complaint, is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.”<sup>141</sup>

On November 6, 2012, Pepperidge Farm, Inc., which is owned by Campbell Soup Co., became the most recent target of another GMO punitive class action suit filed in Colorado.<sup>142</sup> The complaint alleges that Pepperidge Farm “mistakenly or misleadingly represented that its Cheddar Goldfish crackers . . . are ‘Natural’ when in fact, they are not, because they contain Genetically

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*Claims*, FOOD LIABILITY LAW BLOG (Mar. 21, 2012), <http://www.foodliabilitylaw.com/articles/litigation-2/consumer-fraud-class-claims/>, archived at <http://perma.cc/NT5S-D7B8>.

133. See Goulet, *supra* note 55 (asserting deceptive advertising under New York General Business Law sections for the use of “natural” on products containing GMOs).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Complaint at 1, *Altman v. Frito-Lay N. Am., Inc.*, No. 12-cv-61803, 2012 WL 4043960 (S.D. Fla. Sept. 13, 2012).

139. *Id.*

140. *Id.* at 14.

141. *Id.* at 31.

142. Complaint at 1, *Bolerjack v. Pepperidge Farm, Inc.*, No 12-cv-02918 (U.S.D.C. Col. Filed Nov. 6, 2012).

Modified Organisms . . . in the form of soy and/or soy derivatives.”<sup>143</sup> The complaint alleges its cause of action under Colorado’s Consumer Protection Act, which prohibits deceptive trade practices.<sup>144</sup> Deceptive trade practices, under the statute, include when a company makes a false representation as to the “characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property.”<sup>145</sup>

It appears that other states are beginning to host similar “natural” class action lawsuits as those that began in California.<sup>146</sup> However, while complaints may have begun being filed in other states, the question remains whether other court systems will be as liberal minded throughout the court proceedings as those in California.<sup>147</sup> Ultimately, no court has yet issued a final ruling in any of these “natural” class action lawsuits, mainly because the cases have been dismissed in the pleading stage or, if the plaintiffs succeed past the pleadings stage, companies have been eager to reach a settlement before having their day in court.<sup>148</sup> Although there has not been a big-judgment against any of the “deceptive” companies, these lawsuits have already begun to exact some changes.<sup>149</sup> Beginning in 2009, for instance, Snapple began replacing high fructose corn syrup with sugar in all of its products labeled as “All Natural.”<sup>150</sup> Similarly, even before a settlement was reached in litigation against it, Ben and Jerry’s agreed to phase out the phrase “all natural” from any of its ice creams or yogurts containing processed contents.<sup>151</sup>

### III. FDA PREEMPTION

Some courts have been reluctant to rule in these “natural” class action lawsuits for fear of preemption by the FDA. For example, in 2010, the New Jersey District Court certified to the FDA for an administrative determination on whether high fructose corn syrup (HFCS) qualifies as a “natural” ingredient.<sup>152</sup>

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143. *Id.*

144. *Id.* at 6.

145. *Id.* at 10.

146. *See supra* note 132 and accompanying text; *see also* Bolerjack v. Pepperidge Farm, Inc., No 12-cv-02918 (U.S.D.C. Col. Filed Nov. 6, 2012) (asserting deceptive advertising under Colorado’s Consumer Protection Act for the use of “natural” on products containing GMOs).

147. *See Jones, supra* note 132 (noting that California’s consumer-friendly laws are attracting more class action lawsuits to be filed in California).

148. Andrews, *supra* note 108.

149. *Id.*; *see also* Jane Black, *Ben & Jerry to Curb Use of ‘All Natural’ on Labels*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092704053.html>, *archived at* <http://perma.cc/5CR-SZKF> (last visited July 31, 2014).

150. Robin Hilmantel, *Why Snapple and Pepsi Are Going HFCS-Free*, QSR, <http://www2.qsrmagazine.com/articles/exclusives/0309/sugar-1.phtml>, *archived at* <http://perma.cc/A69C-MJB4> (last visited July 31, 2014).

151. Black, *supra* note 149.

152. Goulet, *supra* note 55.

However, in September 2010, the FDA declined to provide the requested guidance.<sup>153</sup> Instead, the FDA responded to this request in a letter making three main points: (1) Resolving the issue whether HFCS is “natural” would require opening a rulemaking process which would likely take two or three years to complete; (2) Consumers currently receive some “protection in the absence of a definition of natural” because the FDA requires all ingredients be declared on the food’s label and thus here, consumers will know from the label if a product contains HFCS; and (3) The most relevant statement of the Agency’s views is the informal policy or guidance the FDA maintains on the use of “natural.”<sup>154</sup> The FDA has made it clear that it does not intend to provide the guidance courts have requested to handle these “natural” lawsuits. Accordingly, the question remained whether the FDA’s informal policy, without having undergone any official rulemaking process, was enough to preempt the state statutes in these “natural” lawsuits.<sup>155</sup>

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>156</sup> Under the Supremacy Clause, federal law may preempt state law in three circumstances: express preemption, field preemption, and implied conflict preemption.<sup>157</sup> Express preemption occurs when a federal statute or regulation contains specific language explaining when a state or local law is preempted.<sup>158</sup> Field preemption occurs when “state law occupies a ‘field reserved for federal regulation,’ leaving no room for state regulation.”<sup>159</sup> Field preemption can also be considered when “an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”<sup>160</sup> Implied conflict preemption exists when it is “impossible for a private party to comply with both state and federal requirements.”<sup>161</sup> However, many federal statutes, like the FDCA, simply prohibit state or local laws that are “inconsistent” with the federal statute or regulation.<sup>162</sup> In *Holk v. Snapple Beverage Corp.*, the Third Circuit did not address express preemption because it had been waived at the District Court; however, it did address both field and implied conflict preemption in determining the FDA’s informal policy does not hold the weight of federal law.<sup>163</sup>

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153. *Id.*

154. *Id.*

155. *See, e.g.,* *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009).

156. U.S. CONST. art. VI., cl. 2.

157. *Holk*, 575 F.3d at 335.

158. *Id.* at 336.

159. *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 111 (2000)).

160. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

161. *Id.* at 79.

162. *See, e.g.,* FEDERAL FOOD, DRUG, AND COSMETIC ACT, 21 U.S.C. § 343-1 (2006).

163. *Holk*, 575 F.3d at 338-42.

A. *Holk v. Snapple Beverage Corp.*

With the FDA remaining silent on any guidance to courts concerning the use of “natural” labels, the Third Circuit, in *Holk v. Snapple Beverages*, tackled the preemption issue and determined that the FDA’s informal policy did not preempt any state law claims concerning the term “natural”.<sup>164</sup> In coming to its conclusion in *Holk*, the Third Circuit looked first at the FDA’s reluctance to preempt state law in the past.<sup>165</sup> Specifically, the FDA stated that it “does not use its authority to preempt state requirements unless there is a genuine need to stop the proliferation of inconsistent requirements between the FDA and the States.”<sup>166</sup> Moreover, in response to comments for the FDA to preempt state law labeling regulations, the agency explained preemption was a complex issue and states should be allowed to require additional information for their consumers.<sup>167</sup>

The *Holk* court also pointed to the Supreme Court precedent.<sup>168</sup> “[T]he mere existence of a federal regulatory scheme,” even a particularly detailed one, “does not by itself imply pre-emption of state remedies.”<sup>169</sup> Simply because a federal agency has decided to step into a field, it does not necessarily mean its regulations will be exclusive.<sup>170</sup> The *Holk* court also noted that the Supreme Court has declined to allow preemptive effect in “less formal measures lacking the ‘fairness and deliberation’ which would suggest Congress intended the agency’s action to be a binding and exclusive application of federal law.”<sup>171</sup> Moreover, the Supreme Court has previously stated “[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to ‘stand by both concepts and to tolerate whatever tension there [is] between them.’”<sup>172</sup>

The Third Circuit, in *Holk*, cited that the FDA has stated it does not intend to occupy the field of food and beverage labeling,<sup>173</sup> and it does not use its authority to preempt state requirements unless there is a genuine need to stop the proliferation of inconsistent requirements between the FDA and the states.<sup>174</sup>

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164. *Id.* at 342.

165. *Id.*

166. *Id.* at 338 (quoting Food Labeling; Declaration of Sulfiting Agents, 51 Fed. Reg. 25,012, 25,016 (July 9, 1986)).

167. *Id.* at 338-39 (quoting Food Labeling; Mandatory Status of Nutrition Labeling and Nutrient Content Revision, 55 Fed. Reg. at 29,509; Food Labeling; Serving Sizes, 55 Fed. Reg. at 29, 528).

168. *Id.* at 339 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990)).

169. *Id.* (citing *English*, 496 U.S. at 87).

170. *Id.* (citing *English*, 496 U.S. at 87).

171. *Id.* at 340 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

172. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

173. *Holk*, 575 F.3d at 338.

174. *Id.*

Therefore, *Holk* determined that field preemption did not exist.<sup>175</sup>

Implied conflict preemption exists when it is “impossible for a private party to comply with both state and federal requirements.”<sup>176</sup> In these “natural” lawsuits, there have not been inconsistent requirements because the FDA has not expressly required anything. Furthermore, no court has actually ruled on any state law issue in “natural” cases. Therefore, there is no way to know whether there would be inconsistent requirements.

In addressing implied field preemption, the Third Circuit ultimately determined the FDA’s informal policy did not have preemptive effect for four main reasons: (1) the FDA did not commence a formal process or receive public input; (2) the FDA admitted it was not officially defining the term; (3) the FDA’s enforcement letters to food and beverage manufacturers telling them to remove “natural” labels were inadequate to determine that the policy held the weight of federal law; and (4) the FDA reissued the preexisting “natural” policy after soliciting public comments, proving that the agency did not take any of the comments they received into account.<sup>177</sup>

#### *B. Going Forward: Following Holk*

Due to the FDA’s lack of an official definition of “natural,” companies are free to use the term at their own risk. However, after the Third Circuit found no preemption problem in class action lawsuits attacking the deceptive use of “natural,” the risk for companies has grown exponentially.<sup>178</sup> Now that there is an official decision addressing the lack of preemptive effect of the FDA’s informal policy, a flood of class action lawsuits attacking companies on their deceptive use of “natural” has commenced.<sup>179</sup> As preemption should not be a barrier for current and future class action lawsuits and the FDA presently wants nothing to do with defining “natural,” courts should begin ruling on these cases in an effort to protect consumers against deceptive and misleading advertisements.

#### IV. CLASS ACTION LAWSUITS ARE CURRENTLY, ABSENT AN FDA RULE, THE BEST SOLUTION TO PROTECT CONSUMERS AGAINST MISLEADING “NATURAL” CLAIMS

Consumers are willing to pay more for natural foods due to a perceived higher quality and health and safety benefits associated with products labeled as “natural.”<sup>180</sup> By marketing their products as “natural” while they contain unnatural ingredients, companies are seeking to capitalize on consumers’

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175. *Id.* at 339.

176. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

177. *Holk*, 575 F.3d at 342.

178. *Id.*

179. *See supra* note 22 and accompanying text.

180. Complaint at 4, *McKendrick v. Gen. Mills*, No. 12-3919 (N.D. Cal. filed Jul. 26, 2012).



preference for all-natural foods.<sup>181</sup> These unnatural ingredients can, in many instances, be very harmful or increase health risks if consumed frequently.<sup>182</sup> Accordingly, the Center for Science in the Public Interest (CSPI) has found that large amounts of high fructose corn syrup (HFCS) promote “tooth decay, as well as increase triglyceride (fat) levels in blood, thereby increasing the risk of heart disease.<sup>183</sup> Also, recent studies show that consuming twenty-five percent of calories from fructose or HFCS leads to more visceral (deep belly) fat or liver fat.”<sup>184</sup> These effects of HFCS may then directly increase the risk of diabetes or heart disease.<sup>185</sup> While beliefs about the safety concerns relating to GMOs vary, the American Academy of Environmental Medicine cites evidence, primarily from animal studies, of possible health risks of GM food consumption including infertility, organ damage, gastrointestinal and immune system disorders, and accelerated aging.<sup>186</sup>

Consequently, consumers seeking “natural” products are doing so to avoid these harmful effects on the body.<sup>187</sup> As the Ninth Circuit noted in *Williams v. Gerber*, “[w]e do not think that the FDA requires an ingredients list so that manufacturers can mislead consumers and then rely on the ingredients list to correct those misinterpretations.”<sup>188</sup> Therefore, “natural” products should be just that, instead of “natural” on the front of the box with a small-printed ingredients list on the back suggesting otherwise.

The “natural” and organic industry is still growing with no indication of decline in the near future.<sup>189</sup> Therefore, misbranding products as “natural” is a problem that has most likely not yet reached its apex. It is clear that the FDA has no intention of making a ruling on the definition of “natural” in the near future.<sup>190</sup> For almost twenty years, the FDA has recognized that the term “natural” causes confusion in the industry, and most importantly to consumers.<sup>191</sup> Yet, the agency has still evaded tackling a working definition for the term.<sup>192</sup> If the FDA has

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181. *Id.*

182. *Chemical Cuisine: Learn about Food Additives*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/reports/chemcuisine.htm#hfc>, archived at <http://perma.cc/RC6W-E3TU> (last visited July 31, 2014).

183. *Id.*

184. *Id.*

185. *Id.*

186. Elisa Zied, R.D., *Calif. to Vote on Labeling GMO Foods, but You May Already Eat Them*, NBCNEWS (Nov. 2, 2012), [http://vitals.nbcnews.com/\\_news/2012/11/02/14836665-calif-to-vote-on-labeling-gmo-foods-but-you-may-already-eat-them?lite](http://vitals.nbcnews.com/_news/2012/11/02/14836665-calif-to-vote-on-labeling-gmo-foods-but-you-may-already-eat-them?lite), archived at <http://perma.cc/S7G3-8GG8>.

187. Complaint at 4, *McKendrick v. Gen. Mills*, No. 12-3919 (N.D. Cal. filed Jul. 26, 2012).

188. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 940 (9th Cir. 2008).

189. FOOD MKTG. INST., *supra* note 4.

190. *See* Goulet, *supra* note 55 (noting that the FDA has continuously declined to adopt a formal “natural” definition despite consumer confusion over the term).

191. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009).

192. *Id.*

recognized a problem for twenty years but has still yet to fix the issue there is nothing to suggest that a binding rule is in the near future. Therefore, courts should stop trying to defer questions concerning the term “natural” to the FDA and begin ruling on these class action lawsuits.

As a 2012 Loyola Consumer Law Review article noted, the “natural” dilemma is not the first misleading advertising claim to find its way into the court system by way of class action lawsuits.<sup>193</sup> The history of tobacco litigation has revealed that the tobacco industry was willing to ignore dangers, act solely in the interest of profit, and completely disregard public health before the historic tobacco litigation cases began.<sup>194</sup> Just as the tobacco industry marketed “light cigarettes” as safer than “regular” brands, companies are advertising ice cream as “all natural” and containing “no preservatives.”<sup>195</sup>

Once laws required tobacco companies to disclaim health risks on their cigarette packaging, the tobacco industry tried another advertising tactic by introducing the “low tar” cigarette.<sup>196</sup> The main goal was to dissuade smokers from actually quitting by suggesting that if they smoked light or “low tar” cigarettes they would be able to avoid the documented health consequences associated with smoking.<sup>197</sup> Unfortunately, the low-tar and light cigarette brands were far less safe than advertised.<sup>198</sup> The problem was that

the smoker inhaling from a low-tar or filtered cigarette would simply compensate by drawing more heavily on the cigarette in order to achieve the same level of nicotine delivery. The tobacco companies were not only aware of this fact, but also relied on it in order to sustain cigarette sales. This was achieved by altering nicotine levels in their products to maintain consumer dependence.<sup>199</sup>

Similarly, companies advertising their products as “all natural” and containing “no preservatives” know their product is not natural, but they are relying on these advertisements to sustain their sales.<sup>200</sup> There are many “natural” labeled foods on the market today that are horrible, by most health standards, just like “light” cigarettes.<sup>201</sup> However, most consumers believe that if companies are allowed to make a claim regarding their product, it must be true because of all the

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193. Franklin Smith, *Where Have We Seen This Before: Comparing the “Natural” Caloric-sweetened Beverage Trend to the Claims of “Light” Cigarettes*, 24 LOY. CONSUMER L. REV. 389, 401 (2012).

194. *Id.*

195. *Id.*; *Astiana v. Ben & Jerry’s Homemade, Inc.*, No C 10-4387 PJH, 2011 WL 2111796, at \*1 (N.D. Cal. May 26, 2011)

196. Smith, *supra* note 193.

197. *Id.*

198. *Id.*

199. *Id.* at 401-402.

200. Goulet, *supra* note 55.

201. *Astiana*, 2011 WL 2111796 at \*1; Smith, *supra* note 193.

consumer protection laws against false advertising.<sup>202</sup> Unfortunately, because “natural” has no legal definition, which is unbeknownst to the average consumer, companies are free to use the term at their own risk.<sup>203</sup> As noted by the Ninth Circuit in *Williams*, labels should not be used to manipulate the consumer, but instead instruct the consumer on what they will be eating should they purchase the product.<sup>204</sup>

The notion that consumers have enough information to make their own choices and focus only on health when purchasing food is unrealistic, especially when the food industry is using deceptive advertisements and labels.<sup>205</sup> Companies argue that consumers should know that ice cream is not a healthy food choice, and the food industry should not be blamed for consumers’ unintelligent choices.<sup>206</sup> However, it should not be the consumer’s job to decipher which advertisements are true and which ones are not.<sup>207</sup>

Class action lawsuits are currently, in the absence of an FDA rule, the best solution to define “natural” and protect consumers against misleading “natural” claims. The FDA has failed to protect consumers against deceptive “natural” claims for nearly twenty years.<sup>208</sup> There is no sign that this trend will change in the near future.<sup>209</sup> First, at the very best, if the FDA were to begin its rulemaking process now, that process would take at least two to three years to complete.<sup>210</sup> At worst, the FDA may never define the term. There needs to be some kind of regulation of the term in the absence of FDA provisions, considering that an FDA provision would not be in place for some time due to the formal requirements of the rulemaking process.<sup>211</sup> Therefore, similar to the long-protracted tobacco litigation that preceded it, at least one avenue in the battle against “natural” claims should be fought in the courtroom.<sup>212</sup> Furthermore, although none of these cases has yet to go to trial, “natural” class action lawsuits have already succeeded in exacting change. Many defendant companies have removed misleading “natural” packaging and advertising statements from their products.<sup>213</sup>

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202. See, e.g., CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2012).

203. *What Is the Meaning of ‘Natural’ on the Label of Food?*, *supra* note 16.

204. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir.2008).

205. *Id.*

206. See *Astiana*, 2011 WL 2111796 at \*2 (asserting that most consumers know the ice cream is not a healthy dietary choice).

207. *Williams*, 552 F.3d at 939.

208. *Guidance for Industry: A Food Labeling Guide*, FOOD & DRUG ADMIN. (Jan. 2013), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Labeling/Nutrition/ucm2006828.htm>, archived at <http://perma.cc/Q8QM-WPXT>.

209. See Goulet, *supra* note 55 (noting that the FDA has continuously declined to adopt a formal “natural” definition despite consumer confusion over the term).

210. CHARLES H. KOCH, JR., 1 ADMIN. L. & PRAC. § 4:45 (3d ed. 2012).

211. *Id.*

212. Smith, *supra* note 193, at 406-07.

213. Andrews, *supra* note 108; Hilmantel, *supra* note 150.

V. WHEN RULING ON THESE “NATURAL” CLASS ACTION LAWSUITS, COURTS SHOULD INTERPRET THE FDA’S INFORMAL “NATURAL” DEFINITION TO EXCLUDE HFCS AND GMOS

When ruling on these “natural” cases, courts should apply the FDA’s current informal policy and, when doing so, should interpret it to exclude HFCS and GMOs because neither are “natural” ingredients. Many scholarly articles have been written about how the FDA needs to promulgate a definition of “natural” because it should not be left to the courts.<sup>214</sup> These articles claim that allowing this problem to be solved in the courtroom will lead to inconsistent judgments and confusion.<sup>215</sup> They also argue that the courts do not have the expertise necessary to rule on a “natural” definition.<sup>216</sup> However, by employing the FDA’s current informal policy, most of these proposed issues dissipate with regards to the run-of-the-mill “natural” lawsuit, which usually allege the company’s use of preservatives or chemically processed ingredients while still labeling the product as “natural.”<sup>217</sup> Nevertheless, courts would have to interpret the FDA’s broad informal policy with regards to two major trends in “natural” litigation: (1) whether HFCS is “natural”; and (2) whether the use of GMO’s in a product should prohibit that product from being labeled “natural” without also identifying that the product contains GMOs.

The FDA’s policy considers “‘natural’ to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there.”<sup>218</sup> Nearly all of the current class action cases rely on the FDA’s informal policy in concluding that businesses were misleading or deceptive in their labeling. Some of these cases deal with the more difficult questions of whether HFCS or GMOs should be labeled “natural.”<sup>219</sup> However, many complaints simply allege the use of “artificial preservatives” as not complying with the “natural” label on the product, which appears to be in direct violation of the FDA’s policy prohibiting anything

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214. See Benny, *supra* note 56, at 1514 (asserting the FDA should promulgate a “natural” definition which allows GMOs to be considered “natural”); see also April L. Farris, *The “Natural” Aversion: The FDA’s Reluctance to Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 FOOD & DRUG L.J. 403, 404 (2010) (asserting that the FDA needs to promulgate a “natural” definition because allowing class action lawsuits will lead to inconsistent results).

215. Benny, *supra* note 56, at 1514.

216. *Id.*

217. See *Astiana v. Ben & Jerry’s Homemade, Inc.*, 2011 WL 2111796, at \*1 (N.D. Cal. May 26, 2011) (“assert[ing] that the alkalized cocoa used in Ben & Jerry’s and Breyers’ ice cream is processed with potassium carbonate, a man-made ingredient that is ‘synthetic,’ not ‘natural’”).

218. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2397 (Jan. 6, 1993).

219. See *supra* note 22 and accompanying text.

“artificial” from being labeled “natural.”<sup>220</sup> Therefore, in ruling on the “natural” cases involving products containing artificial preservatives and the like, courts should have little inconsistency in applying the FDA’s policy.<sup>221</sup> The only inconsistencies would be regarding the strength of state consumer protection laws.<sup>222</sup> However, even this is seemingly becoming less inconsistent because class action lawsuits on “natural” claims are now being filed in other states beside California.<sup>223</sup>

By employing the FDA’s informal policy, courts will have to interpret the broad definition in regards to both HFCS and GMOs.<sup>224</sup> When doing so, courts should determine that neither HFCS nor GMOs meet the “natural” standard provided by the FDA. While these decisions may, at first, lead to inconsistent conclusions, similar to what happened with the preemption issue that was finally addressed in *Holk*, inconsistencies are what persuade appellate courts to take cases and eventually resolve the issue.<sup>225</sup> Ultimately, because the FDA refuses to address the “natural” issue, similar to its refusal to address the preemption issue, some inconsistent decisions that lead to an appellate court taking the issue are preferable to silence on the matter.<sup>226</sup>

#### A. HFCS Should Not Be Considered “Natural”

In its first response to a letter requesting guidance on whether HFCS was “natural,” the FDA responded by stating the typical process used to produce HFCS “would not be consistent with our . . . policy regarding the use of the term ‘natural.’”<sup>227</sup> However, after a Corn Refiners Association (CRA) member appealed to the FDA describing a different HFCS production process, the FDA promptly reneged its statement and reverted back to its stance that HFCS fit under the “natural” definition.<sup>228</sup> Over the past several years, the FDA has not expressly

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220. See *Astiana*, 2011 WL 2111796 at \*1 (“assert[ing] that the alkalized cocoa used in Ben & Jerry’s and Breyers’ ice cream is processed with potassium carbonate, a man-made ingredient that is ‘synthetic,’ not ‘natural’”).

221. See generally Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2,302, 2,397 (Jan. 6, 1993).

222. See generally CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 2012); COLO. REV. STAT. § 6-1-105 (West 2012).

223. See *supra* Part II(G).

224. See generally Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2,302, 2,397 (Jan. 6, 1993).

225. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009).

226. *Id.*

227. Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and the Battle over Restricting High Fructose Corn Syrup from Food and Beverages Labeled ‘Natural,’* 5 J. FOOD L. & POL’Y 145, 172 (2009).

228. *Id.*

stated that HFCS is “unnatural” or “natural.”<sup>229</sup>

This indecision has caused more confusion in the marketplace, and ultimately led to what is now referred to as “The Sugar Wars.”<sup>230</sup> With the recent increased negative advertising concerning HFCS, the CRA asked the FDA to allow them to call HFCS “corn sugar” on product labels, but they were rejected.<sup>231</sup> The CRA also commenced a string of commercials with consumers questioning the harmful effects of HFCS with the commercials advertising HFCS as no different than regular sugar, announcing: “sugar is sugar.”<sup>232</sup> In early 2012, following the launch of these commercials, the sugar industry promptly filed suit alleging misrepresentation and false advertising against the CRA.<sup>233</sup> In September 2012, a group of U.S. food companies subsequently sued the sugar industry claiming promoters of “natural” sugar are unfairly criticizing high fructose corn syrup.<sup>234</sup> An attorney for the sugar industry summarized the ongoing debate in stating, “[t]he bottom line is it (high fructose corn syrup) is not a natural product . . . [i]t is something that is synthesized . . . [i]t is not the same thing as real sugar.”<sup>235</sup>

The modern HFCS production method starts with the pure fructose found in corn, but after the production process, the industry standard HFCS is converted to only a forty-two percent fructose mixture.<sup>236</sup> The production process uses “synthetic fixing agents” and “artificial agents”; however, the CRA argues that these “agents” either never actually come in contact with the HFCS or are “washed away” before the end of the process.<sup>237</sup> This argument, however, should hold zero weight when looking toward the FDA’s current policy because both “synthetic” and “artificial” ingredients are used in creating the product, which appears to be in direct conflict with the FDA’s policy.<sup>238</sup> Regardless of whether the synthetic, artificial ingredients are present in the end product, the idea that HFCS is debatably “natural” based on the current production process is in itself misleading and deceptive.<sup>239</sup> Therefore, in employing the FDA’s current “natural” policy, courts should interpret it to prohibit HFCS from being labeled “natural.”

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229. *Id.*

230. Carey Gilliam, *Food Companies Sue Sugar Industry, Say High Fructose Corn Syrup Being ‘Unfairly Maligned,’* HUFFINGTON POST (Sept. 5, 2012, 5:15 PM), [http://www.huffingtonpost.com/2012/09/06/sugar-vs-corn-syrup\\_n\\_1859311.html](http://www.huffingtonpost.com/2012/09/06/sugar-vs-corn-syrup_n_1859311.html), archived at <http://perma.cc/M7PH-HSAW>.

231. *Id.*

232. *Id.* See also Robyn O’Brien, “*Sugar Is Sugar*” Claims the Corn Refiners Association. *But Is It?*, HUFFINGTON POST (Sept. 15, 2010, 9:10 AM), [http://www.huffingtonpost.com/robyn-o/sugar-is-sugar-claims-the\\_b\\_717537.html](http://www.huffingtonpost.com/robyn-o/sugar-is-sugar-claims-the_b_717537.html), archived at <http://perma.cc/E492-C4LC>.

233. *Id.*

234. *Id.*

235. *Id.*

236. Schlosser, *supra* note 227, at 178.

237. *Id.*

238. *Id.*

239. *Id.*

*B. GMOs Should Not Be Considered Natural*

In the wake of Proposition 37’s rejection in California, GMOs will likely be the next wave in the “natural” class action lawsuits.<sup>240</sup> Some complaints have already been filed, alleging that products containing GMOs should not be labeled “natural.”<sup>241</sup> Just as HFCS should not be considered “natural,” products containing GMOs, should, likewise, be prohibited from being marketed as “natural.”

First and foremost, a chemical company, not an agricultural or food group, initially introduced GMOs to the world.<sup>242</sup> First introduced in the mid-1990s, GM crops are those in which the genetic material of an organism is transferred from one organism to another to introduce a new trait into the organism.<sup>243</sup> The resulting crops, GMOs, are then super-resistant to herbicides, which are extremely toxic and kill most everything except for the specified crop.<sup>244</sup> Specifically, one of the chemicals sprayed on newly engineered corn, is 2,4-D, which is one of the components in Agent Orange.<sup>245</sup>

Some scholars argue that GMOs should fall within the FDA’s current “natural” policy.<sup>246</sup> As stated previously, the FDA’s current policy considers “natural,” as meaning that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be in the food.<sup>247</sup> When analyzing GMOs, it would appear that the very purpose of creating GMOs is to produce a product containing herbicide-resistance “that would not normally be expected to be in the food.”<sup>248</sup> Therefore, it is hard to understand why companies using these ingredients should be permitted to label their products as “natural” and then argue that they are compliant with the FDA’s “natural” policy.<sup>249</sup> Recently, Prop 37 was defeated in California, and with it the requirement that companies label products containing

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240. Zied, *supra* note 186.

241. *See supra* note 78 and accompanying text.

242. *See supra* note 78 and accompanying text; Zied, *supra* note 186; *see also* James Chapman, *History of Genetically Modified Food*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-419985/History-genetically-modified-food.html> (last visited July 31, 2014).

243. *Id.*

244. *Id.*

245. Mark Bittman, *Buying the Vote on G.M.O.’s*, N.Y. TIMES, Oct. 23, 2012, <http://opinionator.blogs.nytimes.com/2012/10/23/buying-the-vote-on-g-m-o-s/>, *archived at* <http://perma.cc/9A7N-QCJT>.

246. *See* Benny, *supra* note 56, at 1514 (asserting the FDA should promulgate a “natural” definition which allows GMOs to be considered “natural”).

247. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2397 (Jan. 6, 1993).

248. *Id.* at 2407; Bittman, *supra* note 245.

249. *See supra* note 78 and accompanying text.

GMOs as such.<sup>250</sup> However, simply because companies are not currently required to identify the presence of GMOs in their product, it does not follow that they should also be allowed to advertise their products as “natural.”

#### CONCLUSION

With obesity rates continuing to grow in the United States and health risks at an all-time high, Americans are beginning to look at health and nutrition claim on the brands they have grown to love. Unfortunately, due to the FDA’s reluctance to promulgate a legal definition of the term “natural,” many consumers believe they are making a “smart” choice, when really that choice is simply misinformed. Consumers need to be protected from these deceptive “natural” claims, and without a rule from the FDA, class action lawsuits are currently the best way to accomplish this. Therefore, courts need to rule on these cases using the FDA’s current informal policy. When doing so, courts should interpret the FDA’s policy to prohibit both HFCS and GMOs from being labeled “natural” to ensure that the proliferation of deceptive “natural” claims does not continue.

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250. Amy Westervelt, *With California Prop Defeated, GMO Labeling Proponents Look to Farm Bill*, FORBES (Nov. 13, 2012, 11:05 AM) <http://www.forbes.com/sites/amywestervelt/2012/11/13/with-california-prop-defeated-gmo-labeling-proponents-look-to-farm-bill/>, archived at <http://perma.cc/W7XD-YDEH>.